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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

MINNESOTA STATE LIBRARY.

No. 189.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED, PETITIONER,

vs.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 13, 1906.
CERTIORARI AND RETURN FILED FEBRUARY 2, 1907.

(20,484.)

(20,484.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 519.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED, PETITIONER,

vs.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1757.

EVA A. INGERSOLL, *as Administratrix of the Estate of Robert G. Ingersoll, deceased,*

v.

JOSEPH A. CORAM ET AL.

BILL OF COMPLAINT.

[FILED JUNE 15, 1903.]

To the Honorable Judges of the Circuit Court of the United States for the District of Massachusetts:

Eva A. Ingersoll, of Dobbs Ferry, county of Westchester, State of New York, as administratrix of the estate of Robert G. Ingersoll, deceased, late of said place, brings this her bill of complaint against Joseph A. Coram, of the city of Lowell, Mass.; Charles H. Palmer, as trustee, of the city of Boston, Mass.; Andrew J. Davis, as trustee, of the city of Butte, Montana; John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, of the city of Butte, Montana; Henry A. Root, of the city of Butte, State of Montana; Elizabeth S. Ladd, otherwise known as Lizzie S. Ladd, of the city of Springfield, Mass.; and her husband, Charles H. Ladd, of the city of Springfield, Mass.; Mary Louise Dunbar, otherwise known as M. Louise Dunbar, of the city of Springfield, Mass., and Herbert P. Cummings, of the town of Ware, Mass., as executor of the last will and testament of Sarah Maria Cummings, deceased.

And thereupon your orator complains and says that your orator, Eva A. Ingersoll, is a resident of Dobbs Ferry, county of Westchester, State of New York, and a citizen of said State of New

York, over the age of twenty-one years, and is the duly appointed, qualified and acting administratrix of the estate of Robert G. Ingersoll, deceased, late of [illegible] county of Westchester, State of New York [illegible] last-mentioned place, and a citizen [illegible] time of his death, as hereinafter more [illegible] said defendant Joseph A. Coram is a resident of the city of Lowell, State of Massachusetts, and a citizen of the State of Massachusetts; that said Charles H. Palmer is a citizen of the State of Massachusetts and a resident of Boston, in the State of Massachusetts, and is made party hereto in his capacity as trustee in the behalf hereinafter more fully alleged; that defendants Elizabeth S. Ladd, otherwise known and called Lizzie S. Ladd, and her husband, Charles H. Ladd, and Mary Louise Dunbar, otherwise known and called M. Louise Dunbar, are each and all of them residents of Springfield, Mass., and citizens of the State of Massachusetts; that said defendant Herbert P. Cummings, of the town of Ware, Mass., is a citizen of the State of Massachusetts, and is the duly appointed, qualified and acting executor of the last will and testament of Sarah Maria Cummings, deceased, who died at the town of Ware, Mass., being a citizen and resident of the State of Massachusetts at the time of her decease, and as such executor said Herbert P. Cummings is made party defendant hereto; that said defendant John H. Leyson is a resident of the city of Butte, State of Montana, and is a citizen of the State of Montana, and the duly appointed, qualified and acting administrator of the estate of Andrew J. Davis, deceased, as hereinafter more fully alleged, and as such administrator is made party defendant hereto; that said defendant Henry A. Root is a resident of the city of Butte, State of Montana, and a citizen of the State of Montana; that said defendant Andrew J. Davis, Jr., is a resident of the city of Butte, State of Montana, and a citizen of the State of Montana, and is made party defendant hereto in his capacity as joint trustee with said defendant Charles H. Palmer in the behalf hereinafter more fully alleged; and that each and all of said defendants are over the age of twenty-one years.

That your orator Eva A. Ingersoll is the duly appointed, qualified and acting administratrix of the estate of Robert G. Ingersoll,

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deceased, by appointment of, and issuance of letters of administration to, her by the proper court in the State of New York, and in the State of Massachusetts, as hereinafter more fully set forth.

That your orator, as legal representative of Robert G. Ingersoll, deceased, has a valid, lawful and existing claim and lien upon, and interest in, certain funds and other property in the custody of said John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, situate in Boston, Massachusetts, to secure certain indebtedness owing and due from said defendants Joseph A. Coram and Henry A. Root to your orator, as the administratrix and legal representative of said Robert G. Ingersoll, deceased, which indebtedness accrued and is now owing, and said lien accrued and is now existing and adhering to said funds and effects, by virtue of the facts hereinafter stated, to enforce payment of which indebtedness by subjecting said funds and effects thereto, your orator brings this action.

And thereupon your orator further complains and says:

I. That, on or about March 11, 1890, said Andrew J. Davis, then a citizen and resident of the city of Butte, county of Silver Bow, State of Montana, died at said place, leaving an estate consisting of real and personal property situate in the State of Montana and in the Commonwealth of Massachusetts, and elsewhere in the United States, of great value, to wit, of the value of from two to five million dollars, and leaving him surviving brothers, sisters, nephews and nieces, who were his next of kin, and, in case said decedent died intestate, were his heirs at law and as such entitled to succeed to said estate by inheritance under the provisions of the laws of the State of Montana, in shares of one eleventh (1/11) each, there being eleven heirs at law of said decedent, *per stirpes*, among whom were Henry A. Root and Ellen Cornue, otherwise known and mentioned as Ellen S. Cornue, children and heirs of Anna C. Root, a deceased sister of said Andrew J. Davis, who were each entitled to one twenty-second, or together were entitled to one eleventh of said estate of Andrew J. Davis, deceased, as an intestate; Sarah Maria Cummings, otherwise known as and called Maria Cummings, a sister of said Andrew J. Davis, who was entitled to one eleventh of his estate in case he died intestate; Elizabeth S. Ladd, otherwise known as and called Lizzie S. Ladd, child and heir of Sophronia

Firman, a deceased [illegible] Andrew G. Davis, who was entitled to [illegible] estate in case he died intestate; and Mary [illegible] otherwise known and mentioned as [illegible] daughter and heir of Roxana Dunbar, a deceased [illegible] said Andrew J. Davis, who was entitled to one [illegible] of his estate in case he died intestate; and said [illegible] heirs of Andrew J. Davis, deceased, last-above named, were altogether entitled to inherit and succeed to three and a half elevenths or three hundred and fifty eleven hundredths of all and singular the property of said estate of Andrew J. Davis, deceased, both real and personal, in case he died intestate.

2. That shortly after his death, to wit, in July, 1890, John A. Davis, a surviving brother of said Andrew, residing at the city of Butte, county of Silver Bow, State of Montana, propounded for admission to probate and record, in and by the District Court of the Second Judicial District of the State of Montana, within and for said county of Silver Bow, the Court having original domiciliary jurisdiction of the estate of Andrew J. Davis, deceased, a certain writing, dated in the year 1866, purporting and alleged to be the last will and testament of said Andrew J. Davis, deceased, accompanied by a petition of said proponent, setting forth proper and sufficient averments as provided by the laws of the State of Montana, if established and found by said Court to be true, to entitle said writing to admission to probate as the last will and testament of said Andrew J. Davis, deceased, among which averments there were allegations to the effect that said Andrew J. Davis died at the time and place as aforesaid, being a citizen and resident of said county of Silver Bow, State of Montana, at the time of his decease, and leaving a large estate situate in said county of Silver Bow, State of Montana, within the jurisdiction of said District Court, and elsewhere, and leaving next of kin and heirs at law, each and all of whom, and their residences, were mentioned in said petition, among whom were mentioned said proponent of said alleged will as one of the brothers of said Andrew J. Davis, deceased, and said five heirs first above named; and it was also alleged in said petition that said Andrew J. Davis left his last will and testament, which was by said proponent thereby offered for admission to probate, and a copy of said alleged

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will was attached to said petition; and in said petition said proponent prayed that said writing be by the judgment of said court, after proper notice to the heirs of said decedent and hearing of said petition, admitted to probate in and by said District Court of the State of Montana, as the last will and testament of said Andrew J. Davis, deceased.

3. That by the terms, devises and bequests set forth in said writing, so propounded as the last will and testament of Andrew J. Davis, deceased, all and singular the estate which he left, except three minor bequests of maintenance to three persons, some of whom had departed this life since 1886, was devised and bequeathed to said John A. Davis, the proponent of said alleged will; and neither of the said five heirs first above mentioned were named or in any manner mentioned or given or bequeathed or devised anything by the terms of said alleged will, and if said writing had been established and admitted to probate in and by said District Court in the State of Montana, as the last will and testament of said Andrew J. Davis, deceased, without a defeasance of said will title by decree of said District Court in the State of Montana, or by a proper instrument of writing duly executed by said John A. Davis, the legatee and devisee of said estate under the terms of said will, or his heirs and legal representatives, assigning and granting to said Henry A. Root, Ellen S. Corbin, Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar, portions of said estate, their and each and all of their claims, rights and interests in and to said estate to which they were entitled as next of kin and heirs at law of said Andrew J. Davis, deceased, as are intestate, would have been cut off and defeated by said will, and in that event neither of said five heirs last above mentioned would have got any part of said estate by virtue of their kinship to said decedent.

And the said John A. Davis and his heirs, successors and legal representatives prosecuted for a long period of time said petition and proceedings in said District Court of the State of Montana to establish and cause said writing so propounded to be admitted to probate made by said Court as the last will and testament of Andrew J. Davis, deceased.

4. That for the purpose of opposing the admission of said alleged

will to probate and securing and getting said shares of said estate t
which said Henry A. Root, Ellen S. Cornue, Sarah Maria Cum
mings, Elizabeth S. Ladd and Mary Louise Dunbar were entitled a
next of kin and heirs at law of Andrew J. Davis, deceased, as a
intestate, they associated themselves together to act conjoiatly i
contesting the validity of said will in opposition to the admissio
thereof to probate, in said District Court in the State of Montana
and for that purpose and as their cause of action, in due time in sai
year 1890, as provided by the laws of the State of Montana, afte
notice of the propounding of said will for admission to probate a
aforesaid, contests of the validity of said will, and objections to th
admission thereof to probate were instituted in said District Cou
in the State of Montana, according to the laws of said State, i
the name of said Henry A. Root and Sarah Maria Cummings
respectively, for and on behalf of themselves and on behalf o
each and all of said five heirs associated together as aforesaid i
contesting and opposing the admission of said will to probate
on grounds set forth in said contests and objections, to th
effect that said Andrew J. Davis died intestate, that said allege
will was not the will of said decedent, that it was never signed b
said Andrew J. Davis, nor by the witnesses, or either of them, whos
names appeared written thereon, and that neither of said pretende
witnesses signed said pretended will in the presence of said Andre
J. Davis, or at all, and that said pretended will was fraudulen
spurious and void, and on the further ground that long after th
time when said pretended will purports upon its face to have bee
made said Andrew J. Davis made another will in the State o
Montana, whereby he expressly revoked all former wills, and th
terms of which latter will were inconsistent with said alleged wi
dated in the year 1866, and that for said reasons and on said ground
said alleged will so offered for probate was not entitled to admission t
probate as the last will and testament of Andrew J. Davis, deceased

That said contests and objections to the admission of said allege
will to probate were pending and were prosecuted in said Distri
Court of the State of Montana from the time of the institution there
as aforesaid until the same were finally determined as hereinafter s
forth.

5. That each and all of said five heirs last above-mentioned associated in said contests were interested to the extent of their respective claims, rights, shares and interests in and to said estate of Andrew J. Davis, deceased, as his heirs at law, in opposing and preventing the admission of said alleged will to probate in said District Court of the State of Montana, by the prosecution of said contests, until said shares claimed by said five heirs were effectually granted and secured to them by the proponent of said will or by decree of said District Court having jurisdiction of said contests and estate, so that said five heirs associated in said contests would get the shares of said estate to which they were entitled as next of kin and heirs at law of Andrew J. Davis, deceased, and that to aid in the prosecution of said objections and contests, and in procuring attorneys and counsellors at law to prosecute the same, and for that purpose and in consideration of the undertaking by said Henry A. Root, stipulated in a writing executed by and between him and his four associate heirs, a copy of which writing is hereto annexed marked "Exhibit A", to procure counsel and such other things as were necessary for opposing said will and obtaining for said heirs associated with him in said contests "their respective rights and shares in said estate", four of said heirs, namely, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and Mary Louise Dunbar, about the time of the institution of said contests, by a certain instrument of writing by them duly made, executed and delivered, assigned, transferred and set over to said Henry A. Root and Gideon Wells, as trustees, in trust, an entire one-third part of the interests of each of them, the said Cummings, Cornue, Ladd and Dunbar respectively, in and to said estate of Andrew J. Davis, deceased, to which they were or should become entitled, out of the avails of which interests so assigned to said Root and Wells to aid in paying for the services and expenses of attorneys and counselors at law employed and acting in the prosecution of said objections to and contests of the validity of said alleged last will and testament of Andrew J. Davis, deceased, in opposition to the admission thereof to probate, and that any of said interests so assigned not used or expended for said purpose should belong to and be the property of said Henry A. Root. And by the terms, tenor and effect of said writing, assigning

part of their said shares and interests in and to said estate to said Root and Wells, as aforesaid, the said Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and Mary Louise Dunbar, severally constituted, appointed and empowered said Henry A. Root by irrevocable commission and authority to represent them, the said Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and Mary Louise Dunbar in the prosecution of said objections to and contests of the validity of said alleged will in opposition to the admission thereof to probate, and to demand, sue for, collect, receive, compound and receipt for each and all of said shares and interests of, in and to, said estate, to which said four heirs last above-named were entitled as next of kin and heirs at law of Andrew J. Davis, deceased.

That a copy of said instrument of writing last above-mentioned is hereto annexed marked "Exhibit A", and the same is hereby referred to, and made a part hereof by reference to the same effect as if set forth at large herein.

That after the execution and delivery of said last mentioned instrument of writing, the said Gideon Wells, therein named as joint trustee with said Henry A. Root, departed this life, and as your orator is informed and believes, and on her information and belief avers, no successor of said Gideon Wells has ever been named or appointed or authorized to act as joint trustee in the behalf mentioned in said instrument, and that said Henry A. Root during the times herein mentioned acted and is still acting as sole representative of his said four associates, in reference to said will contests, and other matters in relation to their interests in said estate herein mentioned.

6. That during the times herein mentioned one Joseph A. Coram acquired and still has, owns and holds all the remaining interests and shares claimed and finally acquired by said Elizabeth S. Ladd and Mary Louise Dunbar in and to said estate of Andrew J. Davis, deceased, and as your orator is informed and believes, the said Joseph A. Coram also acquired and now has some interest in the shares, parts and parcels of said estate acquired by said Henry A. Root, Ellen S. Cornue and Sarah Maria Cummings, or some of them, through said contests and proceedings herein mentioned, the extent

of which interests so acquired by said Joseph A. Coram in and to the shares of said three last mentioned heirs is to your orator at this time unknown; which claims, rights and interests of said Joseph A. Coram in said estate were dependent upon the prosecution of said objections to, and contests of, the validity of said alleged last will and testament of Andrew J. Davis, deceased, in opposition to the admission thereof to probate instituted in the names of Henry A. Root and Sarah Maria Cummings, as aforesaid, until said shares of said estate to which said five heirs were entitled as heirs at law of Andrew J. Davis, deceased, were secured to them, by grant and assignment from the proponent of said alleged will, or by decree of said District Court of the State of Montana, having jurisdiction of said estate and contests, in the determination of said contests.

7. That after said objections to, and contests of, the validity of said alleged will were instituted and pending in said District Court of the State of Montana, and before any trial of either of said contests came on, or was had, the said Henry A. Root and Joseph A. Coram engaged and employed Robert G. Ingersoll, late of Dobbs Ferry, State of New York, an attorney and counsellor at law, to act as attorney and counsel in the prosecution of said contests in opposition to the admission of said alleged will to probate, for and on behalf of said five heirs associated in said contests, and Joseph A. Coram.

That said Robert G. Ingersoll accepted said employment, and in pursuance and fulfilment thereof rendered valuable services and counsel to and in behalf of said Henry A. Root, Ellen S. Cormue, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar and Joseph A. Coram in the prosecution of said objections and contests.

8. That during the rendition of said services and counsel by said Robert G. Ingersoll in the prosecution of said objections to and contests of the validity of said alleged will in opposition to the admission thereof to probate in said District Court of the State of Montana, and in consideration of said services rendered and to be rendered by said Robert G. Ingersoll, the said Henry A. Root and Joseph A. Coram made, signed and delivered to said Robert G. Ingersoll, an agreement and promise in writing, dated Aug. 17,

1891, whereby and by the terms and conditions of which, the
Root and Coram promised and agreed to and with the said R
G. Ingersoll, to the effect that for and in consideration of the se
rendered and to be rendered by said Robert G. Ingersoll i
prosecution of said objections and contests, in the event tha
alleged will should be defeated as to said Henry A. Root, Ell
Cornue, Maria Cummings, Elizabeth S. Ladd and M. L
Dunbar, and they succeeded in getting the shares of said est
Andrew J. Davis, deceased, to which said five heirs were en
as next of kin and heirs at law of Andrew J. Davis, deceased,
intestate, then said Robert G. Ingersoll should have and be pa
said Root and Coram one hundred thousand dollars, as comp
tion for the services of said Robert G. Ingersoll rendered and
rendered in the prosecution of said contests, in opposition t
admission of said will to probate, and said Root and Coram fu
promised and agreed in and by the terms of said last-ment
writing that in any event the expenses and disbursements o
Robert G. Ingersoll in and about the prosecution of said co
should be paid by said Root and Coram; but it was provided in
promise and agreement as to said Joseph A. Coram to the effec
there should be no personal obligation against him to pay said R
G. Ingersoll said stipulated fee for the prosecution of said conte
the event said Henry A. Root, Ellen S. Cornue, Maria Cumm
Lizzie S. Ladd and M. Louise Dunbar, represented by said Hen
Root in said contests were unsuccessful and failed to secure s
of said estate of Andrew J. Davis, deceased, and that said C
should not be obligated to pay said stipulated fee except o
funds and property secured from said estate by said five heirs
ciated in the prosecution of said contests, but that he shou
obligated for the payment of said fee so promised to said Robe
Ingersoll, out of the funds and other property secured from
estate of Andrew J. Davis, deceased, by said five heirs associat
the prosecution of said contests in case they were successf
securing the shares of said estate to which said five contesting
were entitled as heirs at law of said Andrew J. Davis, decease
an intestate.

That said Joseph A. Coram is mentioned in, and subscribe

name to, said promise in writing so made and delivered to said Robert G. Ingersoll, by the use of the initial letters "J. A." to represent his first or Christian name "Joseph A."

That a copy of said promise in writing so made and delivered by said Henry A. Root and Joseph A. Coram to said Robert G. Ingersoll is hereto annexed, marked "Exhibit B", to which reference is hereby made as a part of this complaint, to the same effect as if set forth at large herein.

9. That said Robert G. Ingersoll duly and fully performed and rendered services, in the prosecution of said contests, mentioned in said writing, both before and after said writing was made and delivered, for which it was promised and agreed as aforesaid he should be paid said fee of one hundred thousand dollars as compensation therefor.

10. That said objections to, and contests of, the validity of said will instituted in said District Court of the State of Montana, in the name of said Henry A. Root in opposition to the admission of said will to probate, was tried in the year 1894 in and by said court sitting with a jury of twelve jurors regularly empanelled pursuant to the laws of the State of Montana, which trial was of long duration, occupying about seven consecutive weeks, at which trial said Robert G. Ingersoll constantly attended and by leave of said Court took an active part in said trial, and rendered great and valuable services in the prosecution of said objections to, and contests of, the validity of said alleged will in opposition to the admission thereof to probate, for and on behalf of said Henry A. Root, Ellen S. Cornue, Elizabeth S. Ladd, Sarah Maria Cummings, Mary Louise Dunbar and Joseph A. Coram, each and all of whom were interested to the extent of their said claims and rights in and to said estate of Andrew J. Davis, deceased, in opposing and preventing the admission of said will to probate by and through the prosecution of said contests, until their said shares of said estate were secured to them; that said jury empanelled and sitting in said trial to whom was submitted by said Court the question of fact as to the due execution and validity of said alleged will, and other questions of fact involved in said trial, and whose sole province it was under the laws of the State of Montana, to determine said facts, refused to

return a verdict establishing or in favor of the validity of said alleged will, and as a result of said trial, said proponent was defeated and failed in his effort to establish or cause said writing to be admitted to probate as the last will and testament of said Andrew J. Davis, deceased, seven of said jurors being opposed to finding said alleged will valid.

11. That thereafter said Robert G. Ingersoll continued without remission to make preparation for another trial of said contests in opposition to the admission of said will to probate, and to counsel advise and aid said contestants in relation thereto; and that on or about April 28, 1893, while the said contests were pending in said court, and while the same were being prosecuted by said Robert G. Ingersoll for and on behalf of said five contesting heirs and Joseph A. Coram in opposition to the admission of said will to probate, and while another trial of said contests was being arranged for and insisted upon, by said contestants represented by said Robert G. Ingersoll, and by reason and in consideration of the prosecution of said contests, and the force, effect and stress thereof, as against the proponent of said alleged will in preventing the admission thereof to probate, and in consideration of the determination of said controversy and litigation and for no other consideration or reason, the legal representative, heirs, and successors in interest of said John A. Davis the proponent of said alleged will, who had departed this life prior to the date last aforesaid, were constrained to yield and did yield consent to the making and entry of an order and decree by said District Court in the State of Montana, in said proceedings for the admission of said will to probate and said contests thereof, granting, awarding and decreeing to said five heirs associated in said contests and represented by said Robert G. Ingersoll in the prosecution thereof as aforesaid, certain parts, parcels, shares and interest of, in and to, the entire estate of said Andrew J. Davis, deceased both real and personal, greatly exceeding the shares, parts and parcels of said estate to which said five heirs for whom said Robert G. Ingersoll prosecuted said contests were entitled to have or receive of said estate as heirs at law of said Andrew J. Davis, deceased, an intestate: and accordingly, in order to provide for the success

determination of said contests and litigation in favor of said five contesting heirs and Joseph A. Coram by a decree of said District Court in the State of Montana to be entered therein, providing for the division and distribution of parts and parcels of said estate to said contending parties, an agreement and stipulation was made, by the terms and conditions of which, the heirs, successors in interest and John E. Davis, the duly appointed, qualified and acting administrator of the estate of John A. Davis, the deceased proponent of said will, stipulated and agreed to the effect that said five contesting heirs for whom said Robert G. Ingersoll was prosecuting said contests should have and there should be distributed to them directly two and a half elevenths (2 1-2/11) of said estate of Andrew J. Davis, deceased, both real and personal, in kind, to be allotted and decreed to said five contesting heirs directly, by said decree to be entered determining said contests, and that said five contesting heirs should also have another one eleventh (1/11) of said estate, both real and personal, in kind, to be allotted and decreed by said decree determining said contests and distributed and delivered to Charles H. Palmer and Andrew J. Davis, Jr., as trustees in trust for the sole use and benefit of said five contesting heirs; and that all the residue and remainder of said estate of Andrew J. Davis, deceased, except two elevenths (2/11) thereof in kind, reserved for the heirs, successors in interest and legal representatives of John A. Davis, the deceased proponent of said will, should be by said decree to be entered determining said contests allotted and decreed to said Charles H. Palmer and Andrew J. Davis, Jr., as trustee in trust for the use and benefit of, and to be divided equally between said five contesting heirs on the one part, and the heirs, successors in interest and legal representatives of said John A. Davis, the deceased proponent of said will, on the other part; and it was further provided, agreed and stipulated in and by the terms of said last-mentioned agreement to the effect that in case said will should be admitted to probate said agreement should operate as a defeasance of the title to said estate of said will vested in said John A. Davis, his heirs, successors in interest and legal representatives, to the extent of the shares, parts and parcels of said estate which was so provided and stipulated should go to said five contesting heirs and

to said Charles H. Palmer and Andrew J. Davis, Jr., tru
trust for the uses therein stipulated and provided, the sai
ment was set forth in writing and so executed and acknowle
it would in law have such effect and operation; and it was
stipulated and agreed by the terms of said last-mentioned ag
to the effect that in case said will were admitted to prob
order and decree of said District Court of the State of M
admitting the same to probate, should provide, order, adju
decree, that said estate should be distributed directly to said
in parts, parcels and portions as in said agreement stipula
provided; and it was further provided, stipulated and agree
terms, tenor and effect of said last-mentioned agreement
taking effect thereof was dependent upon the entry of a d
said District Court in the State of Montana to be made and
determining said contests, and providing for the division an
bution of said estate according to the agreement of said p
said contests, and prescribing the shares, parts, parcels and
of said estate which each person, or group of persons, cl
share or interest therein should have after each and all cont
litigation brought in said District Court of the State of Mo
secure an interest in said estate were finally disposed
determined.

That each and all of said five heirs associated together in
tests acquiesced in said agreement and stipulation provide
determination of said contests in their favor as therein st
and said Joseph A. Coram also concurred and acquiesced th

That said Charles H. Palmer and Andrew J. Davis, J
tioned as trustees, in said agreement, accepted said trust the
vided, and title to certain interests in and to the property
estate of Andrew J. Davis, deceased, both real and perso
wheresoever situate, was accordingly by the decree determi
contests allotted and decreed to them, in trust for the use an
of said Henry A. Root, Ellen S. Cornue, Sarah Maria Cu
Elizabeth S. Ladd and Mary Louise Dunbar, part of wh
trustees still have and hold title to under said trust, as he
more particularly set forth, which interests so held by said
in trust for said five heirs or said Coram or any assignee o

thereof are subject to the indebtedness and lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, as hereinbelow more fully shown.

12. That thereafter, on or about March 27, 1895, said legal representative of said John A. Davis, proponent of said will and the said contestants thereof by their respective attorneys in said proceeding for the admission of said will to probate and contests thereof, obtained and caused an order and decree of said District Court in the State of Montana to be entered of record therein in the matter of said contests in opposition to the admission of said will to probate, in which decree said will was referred to as admitted to probate, but subject to the terms, provisions and conditions of said decree, whereby it was adjudged, ordered and decreed by said District Court of the State of Montana, among other things, that twenty-five forty fourths of said estate should be distributed and delivered, on distribution thereof, to said five contesting heirs for whom said Robert G. Ingersoll rendered said services in the prosecution of said contests.

13. And your orator further says that other contests of said will were, during the times herein mentioned, instituted in said District Court in the State of Montana, by other heirs-at-law of said Andrew J. Davis, deceased, for the purpose of securing shares of said estate, and said other contests were pending in said District Court until finally disposed of as hereinafter set forth.

That after the making and delivery of said agreement between the proponents of said alleged will, and said five heirs associated together in said contests thereof as aforesaid, each and all parties to said last-mentioned agreement acting together made adjustments, arrangements and stipulations with each and all other heirs of said Andrew J. Davis, deceased, who had interposed in said District Court in the State of Montana, contests and litigation for the purpose of securing a share of said estate, by which it was stipulated and agreed that there should be allotted, by decree of said District Court of the State of Montana, in determining said litigation and contests in respect to said alleged will and estate, to said other contesting heirs, severally or in groups, a certain fractional part of the shares or interests of, in and to said estate to which they were

entitled as heirs at law of Andrew J. Davis, deceased, wh
fractional portions were allotted to said other heirs as set forth a
provided in the decree finally made and entered of record, in and
said District Court of the State of Montana, in determining s
contests and litigation as hereinafter shown, the last of which stip
lations with said other heirs claiming shares of said estate w
made on or about Aug. 6, 1897.

14. That thereupon said District Court in the State of Monta
having jurisdiction of the estate of John A. Davis, the deceased p
ponent of said alleged will, by its order duly made and entered
record on or about Aug. 24, 1897, sanctioned and approved
action of said John E. Davis, as administrator of the estate of Jo
A. Davis, deceased, in consenting and entering into each and all
said arrangements, stipulations and agreements concerning the en
of a decree or decrees of said District Court of the State of Monta
determining said litigation in regard to said alleged will and c
tests thereof, and providing for the parcelling and distribution
said estate, according to a decree of said District Court then a
there duly made and entered of record.

15. That said District Court of the State of Montana, thereup
on or about the same day, Aug. 24, 1897, duly made and entered
record its decree in said proceedings therein pending for the adm
sion to probate and contests of said will, wherein said John
Davis was proponent, and said Henry A. Root and Sarah Ma
Cummings were contestants, in which contests said John E. Da
as administrator of the estate of John A. Davis, deceased, had be
substituted for said John A. Davis, the deceased proponent of s
will, whereby and by the terms and provisions of said dec
determining said contest and litigation, it was ordered, adjudged a
decreed among other things, that upon distribution of said estate
Andrew J. Davis deceased, there shall be distributed to said He
A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizab
S. Ladd and her husband Charles H. Ladd, Ellen S. Cornue
her husband Joshua G. Cornue, and that they shall have two h
dred and fifty eleven-hundredths (250/1100) of all and singular
funds and other property of said estate of Andrew J. Dav
deceased, in kind, both real and personal, by distribution thereof,

them directly; and that four hundred thirty-one eleven-hundredths (431/1100) of all and singular the funds and other property of said estate of Andrew J. Davis, deceased, in kind, both real and personal, shall, on the distribution of the property of said estate, be distributed and delivered to said Charles H. Palmer and Andrew J. Davis, Jr., trustees in trust for the use and benefit of said five contesting heirs associated in said will contests, prosecuted by said Robert G. Ingersoll, and the heirs and legal representatives of said John A. Davis, the deceased proponent of said will, according to the terms and stipulations of said agreement between them made on or about April 28, 1895, hereinabove mentioned in paragraph number 11 of this bill of complaint, according to the terms and conditions of that agreement, of which (431/1100) four hundred thirty-one eleven-hundredths of the property of said estate, both real and personal, so allotted and decreed to said trustees, said group of five heirs, for whom Robert G. Ingersoll prosecuted said will contests, namely, Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and Mary Louise Dunbar, are entitled by the terms and stipulations of said agreement last above-mentioned to two hundred sixty-five and a half eleven-hundredths (265 1-2/1100) for their sole use and benefit as beneficiaries of said trust; and the said two hundred and fifty eleven-hundredths (250/1100) of said estate allotted and awarded by said decree directly to said five contesting heirs, for whom said Robert G. Ingersoll prosecuted said contests, together with said two hundred sixty-five and a half eleven-hundredths (265 1-2/1100) of said estate allotted and decreed as aforesaid to said Charles H. Palmer and Andrew J. Davis, Jr., trustees for the use and benefit of said five contesting heirs, amounts to five hundred fifteen and a half eleven-hundredths (515 1-2/1100) of all and singular the property of said estate of Andrew J. Davis, deceased, both real and personal, which said five contesting heirs and Joseph A. Coram, as assignee and grantee of some of their interests, acquired and got absolute title to through the prosecution of said contests by said Robert G. Ingersoll, as their attorney and counsel, and the said decree determining said contests; whereby and by reason of the prosecution of said contests and proceedings and decree determining the same, said will was defeated in so far

as it could affect the rights, shares or interests in and to said estate, of said five heirs mentioned in said agreement and promise made and delivered by said Root and Coram to said Robert G. Ingersoll, forasmuch as they were entitled to only three hundred and fifty eleven-hundredths (350/1100) of said estate as such heirs at law of said Andrew J. Davis, deceased, and got absolute right and title to five hundred and fifteen and a half eleven-hundredths (515 1-2/1100) thereof, through the prosecution of said contests and decree determining the same, prior to the distribution of any part of said estate; and your orator further says that in the determination of said contests as aforesaid, there was no compromise concession or relinquishment by either of said five heirs represented by said Robert G. Ingersoll in the prosecution of said contests, of any part or item of the shares, rights or interest to which they, or either of them, were entitled of, in and to said estate, as heirs at law of Andrew J. Davis, deceased.

And your orator further says, that said five heirs and Coram, for whom said Robert G. Ingersoll rendered said services in the prosecution of said will contests and in securing and getting said portions, parts and parcels of said estate for them, have participated in, and have had and received, and had the use and benefit of, five hundred fifteen and a half eleven hundredths (515 1-2/1100) of each and all distributions heretofore made of funds and other property of said estate of Andrew J. Davis, deceased, both real and personal.

That a copy of said decree determining said will contests and providing for the division of said estate and allotting and decreeing said portions, parts and parcels thereof to said five heirs directly and for their use and benefit to said trustees as aforesaid, is hereto annexed marked "Exhibit C", and hereby referred to as part of this bill of complaint to the same effect as it set forth at large herein.

And your orator further says that said Henry A. Root and Joseph A. Coram and their associates in said will contests agreed to, sanctioned, approved and acquiesced in, each and all of said stipulations, arrangements and proceedings whereby said contests were successfully determined in their favor as aforesaid, and whereby said five heirs for whom said Robert G. Ingersoll rendered said services in the prosecution of said will contests mentioned in said agreement

and promise made and delivered to and with him, by said Root and Coram, got their shares and largely more than their shares of said estate of Andrew J. Davis, deceased, to which they were entitled as his heirs at law, and the said Henry A. Root and Joseph A. Coram and their associates in said contests now have absolute right and title thereto, and right to ask, demand, take, receive and receipt therefor and have the use and benefit thereof.

That said Robert G. Ingersoll not only rendered services and counsel in the prosecution of said contests for and on behalf of said five heirs mentioned in said agreement and promise made to and with him as aforesaid, in fulfillment thereof on his part, but he also advised and counseled and aided in consummating and effectuating said arrangements and proceedings by which said decree determining said contests in favor of said five heirs, represented by him, was obtained, whereby said five heirs were awarded, decreed and became vested with title to and got five hundred fifteen and a half eleven-hundredths (515 1-2/1100) of all and singular the funds and other property, both real and personal, of said estate of Andrew J. Davis, deceased, as aforesaid.

16. And your orator further says, that on or about the twenty-sixth day of August, A. D. 1897, said District Court in the State of Montana, by its order duly made and entered of record, ordered and directed John H. Leyson, administrator of said estate of Andrew J. Davis, deceased, to distribute out of the funds of said estate in his custody in the State of Montana, and deliver to said five heirs for whom said Robert G. Ingersoll prosecuted said contests, directly, the sum of one hundred fifty-two thousand two hundred and seventy-two and 73/100 dollars ($152,272.73) and at the same time and by the same order last aforesaid, said John H. Leyson as administrator of the estate of Andrew J. Davis, deceased, was ordered and directed to distribute out of the funds of said estate in his custody in the State of Montana, and deliver to said trustees Charles H. Palmer and Andrew J. Davis, Jr., the sum of two hundred sixty-two thousand five hundred eighteen and 18/100 dollars ($262,518.18) in trust for the use and benefit of the parties to said agreement of April 28, 1893, of which sum last mentioned said five heirs and Joseph A. Coram, for whom said Robert G. Ingersoll prosecuted said contests

were entitled to have and receive one hundred sixty-one thousand seven hundred thirteen and 39/100 dollars ($161,713.39), as beneficiaries in said trust; which two last above-mentioned sums of money so ordered distributed to said five heirs associated in said contests and for their use and benefit to said trustees, aggregate three hundred thirteen thousand and nine hundred eighty-six and 12/100 dollars ($313,986.12); which sums were distributed and paid over to said five heirs and Coram, for whom said Robert G. Ingersoll prosecuted said contests, and for their use and benefit to said trustees, in accordance with said decree determining said contests. And the said District Court in the State of Montana, in the proceedings and order of distribution last above-mentioned, ascertained, fixed, adjudged and determined the value of annuities mentioned in said will to be sums which aggregate altogether not exceeding fifteen thousand dollars, and all said annuities were paid and fully settled and discharged by the expenditure of not exceeding said last-mentioned sum out of the funds of said estate.

And your orator further says that all real estate belonging to said estate of Andrew J. Davis, deceased, at the time of his death, situate in the State of Montana, of value exceeding a million dollars, was on the eighth day of February, A. D. 1898, by order of said District Court of the State of Montana, duly made and entered of record on that date, distributed and delivered to the persons, and in the undivided shares and interests as mentioned and provided in said decree of said District Court of the State of Montana, determining said will contests of which a copy is hereto annexed marked "Exhibit C", of, in and to which real estate, the said five heirs and Coram as assignee of some of them, for whom Robert G. Ingersoll prosecuted said will contests, received five hundred fifteen and a half eleven-hundredths (515 1-2/1100) undivided parts, parcels and interest directly and through said Charles H. Palmer and Andrew J. Davis, Jr., trustees, as aforesaid.

17. That said Henry A. Root and Joseph A. Coram and their associates in said will contests prosecuted for them by said Robert G. Ingersoll, have heretofore by deeds of conveyance, made and recorded in the office of the County Clerk and Recorder of Silver Bow County, State of Montana, where said real estate is situate, the

last of which deeds bears date on or about May 10, 1900, conveyed away and devested themselves of all right, title and interest in and to said real estate vested in them by said decree determining said will contests.

18. And your orator further says that pursuant to another order of distribution, duly made and entered of record in and by said District Court in the State of Montana, on or about Dec. 3, 1901, and by orders supplemental thereto, heretofore duly made and entered of record in and by said District Court, five hundred fifteen and a half eleven-hundredths (515 1-2/1100) of one hundred thousand dollars and one hundred shares of the capital stock of the First National Bank of Butte, Montana, of the clear, convertible money value of thirty thousand dollars of said estate of Andrew J. Davis, deceased, has been distributed to said Henry A. Root and Joseph A Coram, as the grantee and assignee of the interests in said estate acquired as aforesaid by said Elizabeth S. Ladd and Mary Louise Dunbar, and to the others of said five heirs for whom said Robert G. Ingersoll prosecuted said will contests, and for the use and benefit to said trustees, according to said decree determining said will contests, which portion of said last-mentioned funds and bank stock so distributed to said Root, Coram and other associates in said will contests, and for their use and benefit to said trustees, amounts in clear money value to $60,921.79, and the same has been heretofore distributed, paid over, and delivered according to the direction of said order, and the same together with said other distributions of money belonging to said estate heretofore made to said Root and Coram and associates for whom said Robert G. Ingersoll prosecuted said will contests, and for their use and benefit to said trustees as aforesaid, amounts in the aggregate to three hundred seventy-four thousand nine hundred seven and 91/100 dollars ($374,907.91), besides the distribution of said real estate to them as aforesaid. That said distributions have practically exhausted the funds and property of said estate in the State of Montana, there being left in the custody of the administrator of said estate only a small amount of funds and effects of small value in the State of Montana, which as your orator is informed and verily believes, will be all consumed in paying costs

and expenses of administration of said estate in that jurisdiction to be hereafter paid.

19. That by virtue of said employment of Robert G. Ingersoll, and said agreement and promise to and with him made and delivered as aforesaid by said Root and Coram, and the services and counsel by him rendered in the prosecution of said will contest in fulfilment of said employment mentioned in said agreement and promise, and by virtue of the happening of said contingent event therein mentioned, viz.: that in case said five heirs got their shares of said estate to which they were entitled as heirs at law of said Andrew J. Davis, deceased, said Robert G. Ingersoll should be paid said stipulated fee, — which event matured by the entry of said decree determining said contests, and by virtue of the facts herein set forth, the said Robert G. Ingersoll became entitled to the payment of said compensation of $100,000, promised for said services as aforesaid, together with interest thereon from Aug. 26, 1897, when title to said shares had not only been acquired by the defeat of said will through said decree determining said contests as aforesaid, but a large amount of funds of said estate, greatly in excess of said amount due said Robert G. Ingersoll was actually distributed and delivered to said five heirs and Coram as the assignee of some of them, and for their use and benefit to said trustees as aforesaid.

And your orator further says, that by virtue of said services rendered by said Robert G. Ingersoll in the prosecution of said cause on behalf of said five heirs and Coram, and the determination thereof in their favor as aforesaid, and said contract and promise to and with said Robert G. Ingersoll, as aforesaid, and the provisions of the laws and statutes of the State of Montana, in force during all the times herein mentioned, an attorney's lien accrued in favor of said Robert G. Ingersoll and his legal representatives, and is existing and in force and effect upon portions, parcels and interest of, in and to the funds and other property of said estate of Andrew J. Davis, deceased, so acquired for said five heirs, as the fruits of the labor and services rendered by said Robert G. Ingersoll, in the prosecution of said contests, "in whosever hands" the same may be, out of which to enforce payment of said compensation owing and due for said services rendered by said Robert G. Ingersoll, as aforesaid.

That the statutes of the State of Montana, existing and in force prior to and during all the time from 1887, known as the "Compiled Statutes of Montana", to July 1, 1895, contained in Section 116, of the Fifth Division thereof the following provisions: —

"All attorneys and counsellors at law shall have a lien upon all moneys in their hands, and upon all judgments they may have obtained for any clients for any fees or balance of fees due or to become due, for any professional services rendered by them in any court or courts of this territory; such lien to be deemed to attach from the commencement of such action or the performance of such services; and shall extend to and include reasonable fees therefor; Provided, that notice of lien claimed upon any judgment shall be filed in the office of the clerk of the court in which the judgment is obtained, or with the probate judge or justice of the peace, rendering judgment, within three days after final judgment shall have been entered, and it is hereby made the duty of the clerk of the court, probate judge or justice of the peace, with whom such notice shall be filed, to endorse on such notice the date of filing, and to file the same with the papers pertaining to the cause. And, in case notice of lien shall not be filed as aforesaid, the lien shall not attach to such judgment."

That on July 1, 1895, said above-mentioned statute was succeeded and superseded by provisions contained in Sections 430 and 1850 of the Code of Civil Procedure of the State of Montana, enacted by the Legislative Assembly of said State, which went into force and effect at the time last mentioned, and are in words and figures as follows:

"SECT. 430. The compensation of an attorney and counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment." (Sect. 430, Code of Civ. Proc.)

"SECT. 1850. The measure and mode of compensation of attorneys and counsellors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." (Sect. 1850, Code Civ. Proc.)

That said latter statute contained in said Code of 1895 was expressly declared by the Legislative Assembly of the State of

Montana in the enactment of said Code to be a continuation of the former statute on the same subject in so far as the provisions of the latter statute were substantially the same as the former, which provision so declaring the relation of said statutes is contained in Section 3454 of said Code of Civil Procedure of the State of Montana, which went into force July 1, 1895, and is as follows:

"The provisions of this Code, so far as they are substantially the same as existing statutes, or the common law, must be construed as continuations thereof and not as new enactments."

And your orator says that the effect of said change in said statutes relating to said attorney's lien, during said proceedings and litigation, whereby said attorney's lien accrued in favor of said Robert G. Ingersoll and his legal representatives upon the shares and interests acquired for said five contesting heirs of, in and to said estate of Andrew J. Davis, deceased, as fruits of the labors of said Robert G. Ingersoll in the prosecution of said will contests, was to eliminate from the statute law of the State of Montana the proviso of said older statute relating to the procedure in respect to notice of such lien claim, while said right of lien was accruing in favor of said Robert G. Ingersoll and his legal representatives, and before it matured.

20. And your orator further says, that said compensation so promised, and to which said Robert G. Ingersoll became entitled for said services, has not been paid, nor has any part thereof been paid, except the sum of $5,000, paid on account thereof out of said first distribution of money of said estate to said five heirs and Coram, and that there is now owing and due from said Henry A. Root and Joseph A. Coram upon said agreement and promise, made and delivered by them to said Robert G. Ingersoll as aforesaid, and wholly unpaid, the sum of ninety-five thousand ($95,000) dollars and interest thereon at the rate of ten per cent. per annum from Aug. 26, 1897, to Feb. 28, 1899, and thereafter at the rate of eight per cent. per annum, as provided by the laws of the State of Montana, and that payment thereof has been demanded from said Root and Coram, by the legal representatives of the estate of Robert G. Ingersoll, deceased, but said Root and Coram have neglected and refused to pay said balance so owing and due upon their said con-

tract and promise; and although requested to make proper or effectual provision to secure the payment thereof out of funds, property and proceeds of said shares of said estate so acquired for said five contesting heirs and Coram through the labors of said Robert G. Ingersoll as their attorney and counsel in the prosecution of said contests as aforesaid, the said Root and Coram have failed, neglected and refused so to do.

21. That on or about the twenty-first day of July, A. D. 1899, at the village of Dobbs Ferry, in the County of Westchester, State of New York, said Robert G. Ingersoll, then a resident and citizen of said place, departed this life intestate, leaving him surviving next of kin and heirs at law, his widow, your orator, Eva A. Ingersoll, and two daughters, namely, Maud Ingersoll and Mrs. Walston H. Brown, each and all of whom are now living.

That thereafter on or about the twenty-first day of August, A. D. 1899, your orator was by order of the Surrogate of said last above-mentioned county duly made and entered of record, appointed administratrix of the estate of Robert G. Ingersoll, deceased, in said State of New York, and thereupon your orator duly qualified as such administratrix according to the order of said Surrogate, and Letters of Administration were duly issued out of, and attested by the seal of, said Surrogate's Court, appointing and commissioning your orator as such administratrix, and your orator ever since has been and now is the duly appointed, qualified and acting administratrix of the estate of Robert G. Ingersoll, deceased, in the State of New York.

That heretofore, to wit, on the *29th* day of *May*, A. D. 1903, your orator was by order of *the Probate Court within and for the county of Suffolk, Commonwealth of Massachusetts*, duly made and entered of record, appointed administratrix of the estate of Robert G. Ingersoll, deceased, in the Commonwealth of Massachusetts, and your orator thereupon duly qualified pursuant to said order of appointment last mentioned, and your orator now is the duly qualified and acting administratrix of the estate of Robert G. Ingersoll, deceased, in the Commonwealth of Massachusetts.

22. And your orator further says, that soon after the death of said Robert G. Ingersoll, and the appointment of your orator as

administratrix of his estate in the State of New York, as aforesaid, your orator undertook and continued for some time by written communications addressed to said Henry A. Root, and by personal interviews which your orator caused to be had with him and with said Joseph A. Coram, through the agency of Clinton P. Farrell, also known and addressed as C. P. Farrell, of New York City, and through John H. Hazelton, of the same place, attorney for your orator as administratrix of the estate of Robert G. Ingersoll, deceased, to obtain payment of said balance owing and due from said Root and Coram on said contract and promise made by them to said Robert G. Ingersoll, for his services rendered in prosecution of said will contests, or to obtain an effectual arrangement by which the same would be secured and paid out of the funds and proceeds of the property of said estate of Andrew J. Davis, deceased, distributed and to be distributed from said estate to and on account of said shares so acquired from said estate for said five heirs and Coram, as aforesaid. That in said interviews and written correspondence both said Root and Coram admitted and acknowledged their said indebtedness on said contract and promise made by them to and with Robert G. Ingersoll, for said services rendered by him in the prosecution of said will contests, and that only said sum of five thousand dollars had been paid thereon as aforesaid, and said Root and Coram professed to be desirous that said indebtedness should be paid; that said Henry A. Root in a letter dated Sept. 2, 1899, written and sent by him from Springfield, Mass., through United States mail, addressed to and received by your orator, stated to your orator that the Davis estate matters were "reaching a conclusion that will bring substantial results to you", meaning thereby to assure your orator that said indebtedness owing and due from said Root and Coram would be paid out of funds and other property acquired from said estate of Andrew J. Davis, deceased, for said five heirs and Coram for whom said Robert G. Ingersoll prosecuted said will contest.

That in reply to a letter dated Sept. 24, 1899, sent by said C. P. Farrell, for and on behalf of your orator, to said Henry A. Root, on the subject of said indebtedness owing by him and said Coram to the estate and legal representative of Robert G. Ingersoll,

deceased, the said Henry A. Root, by letter dated Sept. 26, 1899, stated to said Farrell in part as follows:

"I have yours of the 24th. You may be sure I shall do the very best I can for Mrs. Ingersoll as regards the Davis estate."

That in a letter dated March 3, 1900, sent by said Farrell for and on behalf of your orator to said Henry A. Root, said Farrell stated to him in part as follows:

"As you know, I am very anxious that Mrs. Ingersoll should realize out of the Davis will case; and I am very sorry not to have seen you when you were in New York, so that I might have talked the matter over with you fully. As I understand, Colonel Ingersoll was to have all his expenses paid and to have $100,000 as his fee."

That in reply to said last-mentioned letter said Henry A. Root wrote to said Farrell by letter dated May 7, 1900, in part as follows:

"Since seeing you, I have received your letter of March 3, which was sent to me in Montana, and I hasten to reply to it. With you I am also desirous that Mrs. Ingersoll should realize out of the Davis Estate as much as possible, and to that end I shall myself bend every effort in my power, regardless of any personal interests that I might sacrifice by so doing. I want to wait until I see Mr. Coram in Boston where I am going the first of next week, before writing the letter to Mrs. Ingersoll, which you suggested I should do, and which will cover the whole situation."

That in another letter signed and sent by said Henry A. Root to your orator under date of May 21, 1900, referring to said contract and promise made by himself and said Joseph A. Coram to and with said Robert G. Ingersoll for payment for his services rendered in the prosecution of said will contests, the said Root stated to your orator that the agreement with said Robert G. Ingersoll "was that he was to receive $100,000, from moneys collected from the Davis estate for his services"; and in the same letter, referring to the funds and other property of said estate in Boston, Mass., the said Henry A. Root stated to your orator that, "I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money."

That, in another letter signed and sent by said Henry A. Root to your orator's agent said C. P. Farrell under date of Sept. 25, 1900,

referring to said indebtedness owing by said Henry A. Root and Joseph A. Coram, to the estate and your orator as legal representative of Robert G. Ingersoll, deceased, and to that part of the funds and other property of said estate of Andrew J. Davis, deceased, acquired for said five heirs, and Coram, by said Robert G. Ingersoll through the prosecution of said will contests, remaining in Boston, Mass., the said Henry A. Root stated to said C. P. Farrell in part as follows:

"I have your letter of Sept. 20, and hasten to reply. I see I did not make myself understood to you. You say: 'You stated that if an application was made to the court on Mrs. Ingersoll's behalf at the time of the distribution, there would be no objection raised,' etc.

Now, what I thought I said to you was this: That I would do everything I could at the time of an actual distribution of the Boston money for Mrs. Ingersoll, and all I can do is to say to you in the first place that she may rely upon it that that money, if distributed to our people, will not be distributed until after she has had an opportunity to have a hearing upon the claim of the Colonel for services rendered, and I will at that hearing do all that I can do which will tend to increase the amount to be paid her for such services."

That your orator is informed, advised and verily believes, and on her information and belief says that by reason of said employment of Robert G. Ingersoll and the services rendered by him in the prosecution of said will contests and the successful determination thereof as aforesaid, whereby said shares, parts and parcels of said estate were acquired for said five heirs and Coram as fruits of said labor of Robert G. Ingersoll, and the said promises of payment of said stipulated compensation for said services out of said funds and effects so acquired for said five heirs and Coram situate in Boston, Mass., and said promises to the effect that the same should not be distributed, taken or carried away in default of the payment of said indebtedness owing by said Root and Coram to the estate and legal representative of Robert G. Ingersoll, deceased, but that said funds and effects situate in Boston, Mass., should be and remain subject to said indebtedness and to be resorted to for the payment thereof, an equitable lien exists upon said funds and effects situate in Boston, Mass., in favor of your orator as the administratrix and

legal representative of Robert G. Ingersoll, deceased, besides and in addition to said lien thereon created and existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, by virtue of the statutes of the State of Montana as aforesaid, and that said funds and effects situate in Boston, Mass., to which said Root and Coram became entitled as aforesaid, directly and through said trustees are equitably pledged to secure payment of said indebtedness, owing by said Root and Coram to your orator, as legal representative of Robert G. Ingersoll, deceased.

23. That your orator is informed and believes and on her information and belief further says, that there is in the city of Boston, Commonwealth of Massachusetts, money and convertible stocks and bonds belonging to said estate of Andrew J. Davis, deceased, of the value of four hundred and fifty thousand dollars ($450,000), after paying all expenses of administration thereof, in the custody of said John H. Leyson as administrator of said estate in Massachusetts; of which funds and effects said five heirs and Joseph A. Coram for whom said Robert G. Ingersoll prosecuted said will contests are entitled by virtue of said decree of said District Court in the State of Montana determining said will contests, a copy of which is hereto annexed marked "Exhibit C", to have and receive directly and through said Charles H. Palmer and Andrew J. Davis, Jr., trustees, five hundred fifteen and a half eleven-hundredths (515 1-2/1100) acquired as part of the fruits of the labors of said Robert G. Ingersoll in the prosecution of said will contests. That the said Henry A. Root, Joseph A. Coram and their associates in said will contests have heretofore petitioned the Probate Court in and for Suffolk County, Commonwealth of Massachusetts, and their petition is now pending, praying said Court to order distribution to them of said shares, parts and portions of said funds and effects of the estate of Andrew J. Davis, deceased, situate in Boston, Mass., to which they are entitled directly and through said trustees, as provided by said decree of said District Court in the State of Montana determining said will contests, to wit, five hundred fifteen and a half eleven-hundredths (515 1-2/1100) thereof. That all of said five hundred fifteen and a half eleven-hundredths (515 1-2/1100) of said funds and effects situate in Boston, Mass., except the interest owned

therein by the heirs and legal representatives of said Sarah Maria Cummings, and the interest owned therein by Ellen S. Cornue is subject to said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, to secure payment of said compensation promised, owing and due for his services rendered in acquiring for said five heirs and Coram said portion of said estate through the prosecution of said will contests. That the share and interest of Ellen S. Cornue, who as your orator is informed and believes resides at New Rochelle, State of New York, and is a citizen of the State of New York, in said funds and effects of the estate of Andrew J. Davis, deceased, as one of his heirs at law, was one twenty-second (1/22) or fifty eleven-hundredths (50/1100) thereof, and that by the terms of said instrument, a copy of which is hereto annexed marked "Exhibit A", she assigned, transferred and set over one third of her said interest, to wit: sixteen and two thirds eleven-hundredths thereof to said Henry A. Root as aforesaid, reserving and leaving to said Ellen S. Cornue thirty-three and one third eleven-hundredths (33 1/3/1100) of said funds and effects, which is all the interest she now owns therein, and said Henry A. Root is her attorney in fact by virtue of the terms of said last mentioned instrument, in relation to her said share and interest in said funds and effects; that complainant does not claim any interest in or lien upon said thirty-three and one third eleven-hundredths (33 1-3/1100) of said funds and effects owned by said Ellen S. Cornue. That the share and interest of said Sarah Maria Cummings in said estate, funds and effects of Andrew J. Davis, deceased, as one of his heirs at law, was one eleventh or one hundred eleven-hundredths thereof and that by the terms of said instrument, a copy of which is hereto annexed marked "Exhibit A", she assigned, transferred and conveyed to said Henry A. Root one third of her said interest, to wit: thirty-three and one third eleven-hundredths thereof, reserving and leaving to said Sarah Maria Cummings, sixty-six and two thirds eleven-hundredths thereof, which is all the interest owned by her heirs and legal representatives in said funds and effects of said estate; that complainant does not claim any interest in or lien upon said 66 2-3/1100 of said funds and effects owned by the heirs or legal representatives of said Sarah Maria Cummings, deceased.

That said Sarah Maria Cummings died testate at Ware, County of Hampshire, Commonwealth of Massachusetts on the day of April, A. D. 1901, being a resident and citizen of said last mentioned place at the time of her decease; that in and by her last will and testament she nominated and appointed said Herbert P. Cummings as executor thereof; that thereafter, on the day of May, 1901, said last will and testament of Sarah Maria Cummings was by order of the Probate Court in and for said County of Hampshire duly given, made and entered of record, admitted to probate, and letters testamentary were thereupon, pursuant to the order of said Probate Court, duly made and entered of record, issued and delivered to said Herbert P. Cummings; and he has ever since been and now is the duly appointed, qualified and acting executor of the last will and testament of said Sarah Maria Cummings, deceased.

That all of the shares and interests of, in and to said funds and effects of the estate of Andrew J. Davis, deceased, acquired as aforesaid for said Elizabeth S. Ladd and Mary L. Dunbar, and each of them, have been by them and each of them sold, assigned, and transferred to said Henry A. Root and Joseph A. Coram.

That said Charles H. Ladd, as your orator is informed and believes, is the husband of said Elizabeth S. Ladd, and for that reason is impleaded as defendant herein with his said wife.

24. That your orator is informed and believes, and on her information and belief further says, that notwithstanding the aforesaid and many other acknowledgments and admissions made by said Henry A. Root and Joseph A. Coram, to the effect that said indebtedness is owing and due from them to the estate and legal representatives of Robert G. Ingersoll, deceased, for said services by him rendered in the prosecution of said will contests, and the professions of said Root and Coram of a purpose on their part to aid your orator as legal representative of Robert G. Ingersoll, deceased, to obtain payment of said indebtedness, the said Henry A. Root and Joseph A. Coram have conspired together and with other persons to your orator unknown, with the intent and purpose on their part to wrong, injure and defraud the heirs and legal representatives of said Robert G. Ingersoll, deceased, and if possible defeat the collection of said indebtedness by procuring possession of, and taking and

placing beyond the reach of the heirs and legal representatives of Robert G. Ingersoll, deceased, all of the funds and property acquired for said five heirs and Coram through the prosecution of said will contests, and all funds and property remaining available out of which to enforce payment of said indebtedness owing and due from said Root and Coram to the estate and legal representatives of Robert G. Ingersoll, deceased, and thereby defeat the collection thereof, and that in furtherance of said purpose said Root and Coram have since the dates aforesaid falsely asserted and pretended that they are not indebted to the estate or legal representatives of said Robert G. Ingersoll, deceased; and that in furtherance of, and to consummate the purpose of, said conspiracy and deprive the heirs and legal representatives of said Robert G. Ingersoll, deceased, of the benefit of said lien and of the opportunity or means of enforcing payment of said indebtedness out of said funds and effects belonging to the estate of Andrew J. Davis, deceased, subject to said lien, situate in Boston, Mass., and to defeat the enforcement of payment of said indebtedness and defraud the heirs and legal representatives of Robert G. Ingersoll, deceased, and in violation of said promise not to cause the portion of said funds and effects acquired for said Root and Coram and their associates in said will contests, situate in Boston, Mass., to be distributed until an opportunity is given to assert said claim existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, upon said funds and effects, the said Root and Coram have planned and arranged and are now actively undertaking and attempting to obtain an immediate distribution and delivery to them of all said funds and effects of the estate of Andrew J. Davis, deceased, subject to distribution to them, situate in this Commonwealth, or to cause the immediate removal thereof to the State of Montana, and to cause the same to be there immediately distributed and delivered to them, and to put the same beyond the reach of the heirs and legal representatives of said Robert G. Ingersoll, deceased. And your orator has reason to believe and verily believes that in case said funds and effects subject to distribution to said Root and Coram and their said associates in said will contests, on which said lien exists in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, are removed

out of this Commonwealth or distributed and delivered to said Root and Coram before the heirs and legal representatives of Robert G. Ingersoll, deceased, have said opportunity promised them as aforesaid to insert and enforce by legal action their said claim and lien thereon, the same will be placed beyond their reach and they will be deprived of remedy to enforce payment of said indebtedness and defrauded and utterly defeated of their rights in the premises, to their great and irreparable injury. That said Henry A. Root and Joseph A. Coram have heretofore obtained the distribution and delivery to them and to persons holding claims and liens thereon, all the remaining funds and effects of said estate of Andrew J. Davis, deceased, situate in the State of Montana, to which they are entitled directly and through said trustees as provided by said decree determining said will contests; that all funds and effects of said estate remaining in the custody of the administrator thereof, situate in the State of Montana, will be required and used, as your orator is informed and believes, to pay taxes, costs and expenses of the administration of said estate in the State of Montana.

That upon diligent inquiry, your orator is informed and verily believes that neither said Henry A. Root nor Joseph A. Coram have known or tangible property other than said shares and interests in said estate of Andrew J. Davis, deceased, and that upon inquiry as to tangible holdings of property by said Root and Coram or either of them, your petitioner is informed and verily believes that a judgment could not be enforced against either of them, except out of said interests they are entitled to receive from said estate of Andrew J. Davis, deceased, acquired by said labors of Robert G. Ingersoll, as aforesaid, now situate in this Commonwealth.

That your orator is informed and believes, and on her information and belief further says, that each and all liens and claims asserted to the said John H. Leyson, as administrator of said estate of Andrew J. Davis, deceased, upon the shares thereof acquired for said five heirs and Coram, through the prosecution of said will contests and said decree determining the same, except said claim and lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, have been acknowledged and confessed by said Henry A. Root and Joseph A. Coram and with their acquiescence and sanction

paid and discharged out of funds of said estate of Andrew J. Davis, deceased, acquired as aforesaid for, and heretofore ordered by said District Court in the State of Montana, to be distributed to said five heirs and Joseph A. Coram, among which claims and liens so confessed and acknowledged by said Root and Coram and paid, were certain attorneys' liens claimed by attorneys resident in the State of Montana, who were employed by said Root and Coram to assist in the prosecution of said will contests on behalf of said five heirs and Coram, and whose lien on funds and property acquired for said five heirs and Coram through said contests, accrued by virtue of said statutes of the State of Montana, and for services as attorneys in the same contests prosecuted by said Robert G. Ingersoll, and successfully determined in favor of said five heirs and Coram, as aforesaid; that there are no other claims on said shares of said estate acquired for said five heirs and Coram, pending in the State of Montana; nor is there any funds or property in the custody of said administrator of the estate of Andrew J. Davis, deceased, in the State of Montana, upon which said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, could be asserted or enforced; that each and all claims allowed or asserted against the estate of Andrew J. Davis, deceased, in the State of Montana, have been fully paid and discharged, except certain costs and expenses of administration of small amount, to pay which there are funds of said estate reserved in the custody of the administrator thereof in the State of Montana; that the administration and distribution of said estate in the State of Montana is practically finished, except to close up a a few matters of little consequence, and there are no unsettled debts of said estate of Andrew J. Davis, deceased, or other matters pertaining to said estate in Montana which for any reason occasion or require the transfer of said funds and effects thereof situate in Massachusetts, to the State of Montana.

25. That your orator has not been guilty of laches in respect to asserting and making effort to enforce payment of said indebtedness owing by said Henry A. Root and Joseph A. Coram to the estate and legal representatives of Robert G. Ingersoll, deceased; that in July, A. D. 1901, while the petition of said Henry A. Root, Joseph A. Coram and their associates in said will contests for dis-

tribution and delivery to them of said parts and parcels of said hundred thousand dollars and bank stock as aforesaid was pending before said District Court in the State of Montana, your orator caused an action to be brought in said District Court in the State of Montana, in her name as administratrix of the estate of Robert G. Ingersoll, deceased, as plaintiff, against Henry A. Root, Joseph A. Coram and said Leyson as administrator of the estate of Andrew J. Davis, deceased, and said Charles H. Palmer and Andrew J. Davis, Jr., trustees, in the trust as aforesaid, to enforce payment of said claim existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased. But inasmuch as said Root and Coram had professed their desire that said claim existing in favor of your orator as legal representative of Robert G. Ingersoll, deceased, or so much thereof as the remaining funds and property acquired for said five heirs and Coram through the prosecution of said will contests, would suffice to pay, should be paid; and inasmuch as the objection that an administratrix non resident of the State of Montana, is not qualified to prosecute a suit therein, could be, and would by failure of defendants to especially raise such objection by demurrer, be waived, according to the practice and procedure in said State, your orator did not, prior to bringing said action in said District Court of the State of Montana, deem it necessary to incur expense of causing an administrator of the estate of Robert G. Ingersoll, deceased, to be appointed and qualified in the State of Montana, to institute said suit, but caused the same to be brought in her own name as administratrix of the estate of Robert G. Ingersoll, deceased. That after said suit was brought, said Henry A. Root and other defendants appeared and demurred to your orator's complaint therein, on the alleged ground that it did not state facts sufficient to constitute a cause of action, but did not specify or raise the objection thereto; that your orator was not qualified to prosecute said suit, although her said complaint alleged the appointment of your orator as administratrix of said estate of Robert G. Ingersoll, deceased, by the Surrogate's Court of the State of New York, and not otherwise.

That thereafter, when said petition of Henry A. Root and Joseph A. Coram and their associates, for distribution of said hundred thousand dollars and bank stock, came on to be heard, and prior to

the hearing thereof, said John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, sought to file a supplemental and amended answer to said petition for distribution, setting up and showing the fact that said suit had been brought by your orator and was pending in said court, in which your orator, as administratrix and legal representative of the estate of Robert G. Ingersoll, deceased, set up and asserted said claim alleged to be existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, on said funds and effects in the custody of said Leyson as such administrator, and that he had been made party to said suit, the said Henry A. Root and Joseph A. Coram, then and there by their attorneys objected to the showing or consideration of said claim of your orator as the legal representative of Robert G. Ingersoll, deceased, and urged as a reason and the only reason in support of said objection that said suit asserting said claim had not been brought by an administrator of the estate of Robert G. Ingersoll, deceased, appointed in the State of Montana, and notwithstanding said objection had not been raised by any demurrer in said suit, the said District Court in the State of Montana sustained said objection and refused to permit a showing of said claim alleged as existing in favor of your orator as legal representative of Robert G. Ingersoll, deceased, to be made, or consideration thereof to be had, in the hearing or proceedings of said court upon said petition for distribution of said hundred thousand dollars and bank stock.

That thereafter John S. Harris, of the State of Montana, was appointed administrator of the estate of Robert G. Ingersoll, deceased, in said State, and as such administrator was substituted as plaintiff in said suit brought in said District Court of the State of Montana, to assert said claim existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased. That thereafter, on or about Dec. 11, 1902, when said cause came on to be heard in said District Court of the State of Montana, the said Root and Coram by their attorneys made objection to the introduction of any evidence whatever in said cause on the alleged ground that the plaintiff's complaint therein did not state facts sufficient to constitute a cause of action, and said District Court in the State of Montana sustained said objection and refused to permit any evidence what-

over to be introduced in support of the allegations of said complaint, and then and there, on sustaining said objection, without any further proceedings in said action, non-suited said plaintiff and dismissed said complaint on the alleged ground that it did not state facts sufficient to constitute a cause of action, and on no other ground whatsoever; and that by reason of said objection and ruling no evidence whatever was introduced in support of plaintiff's cause set up in said complaint, and no trial thereof has ever been had, nor has said claim, demand and lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, ever been adjudicated in any suit upon any proof in support thereof, nor is the enforcement thereof barred by any statute of limitations.

That your orator has herein averred, and can aver, prove and establish, other and further facts in addition to the facts set forth in said former complaint, which cover and supply each and every insufficiency mentioned in objection to said former complaint brought in said District Court in the State of Montana, and your orator can prove and establish each and all facts set forth in this bill of complaint, and that she is advised and verily believes that the same entitle your orator to the relief herein prayed.

26. That said John H. Leyson is the duly appointed, qualified and acting administrator of the estate of Andrew J. Davis, deceased, situate in the Commonwealth of Massachusetts, by virtue of such appointment and issuance of letters of administration to him by order of the Probate Court in and for the county of Suffolk, Commonwealth of Massachusetts, duly given, made and entered of record on or about the tenth day of March, A. D. 1898; that as such administrator said John H. Leyson has custody of all said funds and effects acquired for said Henry A. Root and his associates in said will contests, and Joseph A. Coram, as assignee of some of them as aforesaid, situate in Boston, county of Suffolk, Commonwealth of Massachusetts, on which said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, rests as aforesaid. That if said funds and effects are distributed and delivered by said Leyson as such administrator and custodian thereof to said Henry A. Root, Joseph A. Coram, and Charles H. Palmer and Andrew J. Davis, trustees, the same will be widely scattered and

dissipated, and would necessitate a multiplicity of actions in an effort to reach or recover the same in satisfaction of said claim and lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, and as your orator verily believes the same would be lost, and your orator and the heirs of Robert G. Ingersoll, deceased, would be thereby wholly deprived of remedy to enforce said claim and lien and defeated of their rights in the premises: that there is no plain, speedy or adequate remedy at law in the premises.

That said Leyson is now commorant in Massachusetts and also has duly appointed Horace G. Allen, a resident of Boston, Mass., as his agent as such administrator upon whom process may be served.

Wherefore your orator prays that said John H. Leyson be restrained and enjoined by order of this Court until the final determination of the rights of your orator in the premises, from distributing or delivering to said Henry A. Root, Joseph A. Coram or Charles H. Palmer and Andrew J. Davis, trustees, or either of them or their or either of their agents, attorneys, representatives or assigns, the said shares, parts or parcels of said funds and effects or any part thereof situate in Boston, Mass., so pledged as aforesaid and upon which said lien rests to secure payment of said indebtedness owing and due from said Root and Coram to the estate and legal representatives of Robert G. Ingersoll, deceased, and from removing the said funds and effects of any part thereof beyond the jurisdiction of this court; and that said John H. Leyson, who has custody of said funds and effects situate within the jurisdiction of this court, and who is already under bond for the safe keeping thereof, or some other suitable person, be by order of this Court appointed receiver of said funds and effects so pledged and subject to said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, to take and hold custody thereof whenever the same is released from administration by said Probate Court for Suffolk County, Massachusetts, and hold custody thereof until the rights of your orator in the premises be determined, and that said shares, parts and parcels of said funds and effects and proceeds thereof so pledged and subject to said lien be by order of

this Court, applied in payment of any judgment recovered in this action in favor of complainant. That in the mean time until the determination of the rights of your orator in the premises, the said Joseph A. Coram, Henry A. Roet, and said Charles H. Palmer and Andrew J. Davis, trustees as aforesaid, and each and all of their attorneys, agents, representatives or assigns be by order of this Court enjoined and restrained from asking, demanding, receiving or receipting for or taking or carrying away or disposing of said shares, parts and parcels of said funds and effects herein above mentioned and described as subject to said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, situate in Boston, Mass.

And your orator further prays that discovery be made of each and all rights, shares and interests in and to the parts, parcels and shares of said estate of Andrew J. Davis, deceased, acquired for said five heirs through the prosecution of said will contests and proceedings and decree determining the same, which has, at any time, been purchased, acquired, owned, held or had and received by said Joseph A. Coram, as well as that to which he is now entitled, and that judgment be rendered against said Joseph A. Coram in favor of your orator as administratrix of the estate of Robert G. Ingersoll, deceased, to the full extent of all interests at any time owned or held in said shares, funds and effects by said Coram, and especially to the extent of two thirds of the shares and interests acquired in said funds and effects for said Elizabeth S. Ladd and Mary L. Dunbar, and by them assigned and transferred to said Coram, and that such judgment be to the full extent of the value of money and property heretofore had and received by said Joseph A. Coram, out of said shares, parts and parcels of said estate of Andrew J. Davis, deceased, acquired for said five heirs through the prosecution of said will contests and decree determining the same, as well as that part thereof, situate in Boston, Mass., to be hereafter distributed; and that such judgment be declared and decreed to be a lien resting upon and adhering to all and singular the rights, shares and interests in said funds and effects, situate within the jurisdiction of this Honorable Court to which said Joseph A. Coram now holds or has held right or title directly and through said trustees under said trust, and that

the same and proceeds derived from the sale thereof, under the decree and order of this Court, be applied to the payment of any judgment rendered in favor of your orator in this action; and that the claims of each and all assigns of said Coram or others claiming any interest in said funds or effects, situate within the jurisdiction of this Court, under or through said Joseph A. Coram, be declared and decreed subject to said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased.

That judgment be rendered against said Henry A. Root, in favor of your orator for recovery of said sum of ninety-five thousand dollars, and interest thereon, at the rate of ten per cent. per annum, from Aug. 26, 1897, until Feb. 28, 1899, and thereafter at the rate of eight per cent. per annum, and that said sum be declared, adjudged and decreed to be a lien resting upon and adhering to all and singular, the shares, parts and parcels of and interest in said funds and effects of the estate of Andrew J. Davis, deceased, acquired for said Henry A. Root, and one-third part thereof acquired for his four associate heirs through said will contests, proceedings and decree determining the same, assigned and conveyed by said four associate heirs to said Henry A. Root to aid in prosecuting said will contests as aforesaid; and that the same and all thereof held by said Root or his assigns or said trustees, or any other person, claiming, or to claim, the same, and the proceeds thereof, situate in Boston, Mass., be applied by order of this Court in payment of said indebtedness owing by said Henry A. Root and Joseph A. Coram for said services of Robert G. Ingersoll rendered in the prosecution of said will contests as aforesaid; and that the claim of each and all assignees or others claiming any interest in said funds or effects, situate within the jurisdiction of this Court, under or through said Henry A. Root, be declared subject to said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased.

That judgment be rendered against said John H. Leyson, and Charles H. Palmer and Andrew J. Davis, Jr., trustees, requiring and compelling them or either of them who may be in possession, or at any time come into possession or control, of said funds and effects in trust, situate in the Commonwealth of Massachusetts, or

any part thereof, subject to said lien existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, as aforesaid, to apply and deliver the same in satisfaction of the judgment and orders of this Honorable Court in this action, after such funds and effects subject to said lien are released from administration by said Probate Court within and for the county of Suffolk, Commonwealth of Massachusetts, and that in default of producing said funds and effects subject to said lien, which may be, or come into, the custody or control of said Leyson or either of said trustees after notice of this action, to be applied in payment of any judgment rendered therein to enforce said lien, then that such custodian of said funds and effects in trust be held personally liable under said judgment to the extent of said funds and effects subject to said lien, which may now be in, or which may come into, the custody of said Leyson or either of said trustees, after notice of the pendency of this suit.

And your orator prays for all such further and other relief as to the Court may seem meet, proper and agreeable to equity and good conscience in the premises, and for costs of this suit.

And forasmuch as your orator can have no adequate relief, except in this court, to the end therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, according to their best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect disclosure and answer make to the premises and each and all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, but not under oath, answers under oath being hereby expressly waived.

May it please your Honors to grant unto your orator not only an order or writ of injunction, and an order appointing a receiver issued out of and under the seal of this court as hereinbefore prayed, but also the process or writ of subpœna of the United States of America, issued out of and under the seal of this Honorable Court, directed to said defendants, Joseph A. Coram, Henry A. Root, Charles H. Palmer and Andrew J. Davis, Jr., trustees, to John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, Elizabeth

S. Ladd and her husband, Charles H. Ladd, Mary Louise Dunl
and to Herbert P. Cummings, as executor of the last will and te
ment of Sarah Maria Cummings, deceased; and that if either
said parties be not found within the jurisdiction of this court or
to voluntarily appear in this suit, that then this Honorable Co
grant and issue an order in accordance with the provisions of S
tion 738, of the Revised Statutes of the United States, direct
such absent defendant or defendants to appear, plead, answer
demur to complainant's bill of complaint herein by a day cert
to be designated in such order, and that upon proof of serv
thereof, in the manner provided by law and the order of this H
orable Court, this action may speedily proceed to the determinat
of the rights of your orator in the premises according to the pr
ciples of equity and good conscience.

EVA A. INGERSOLL,
Administratrix of estate of
ROBERT G. INGERSOLL, *deceased*.

E. N. HARWOOD,
Solicitor and of Counsel for
Complainant, Butte, Montana.

JOHN H. HAZELTON,
Solicitor for Complainant and
of Counsel, 220 Broadway, New York City, N. Y.

HOLLIS R. BAILEY,
Solicitor for Complainant and of Counsel,
53 State Street, Boston, Mass.

UNITED STATES OF AMERICA,
CITY AND COUNTY OF NEW YORK,
STATE OF NEW YORK, ss.

On this twelfth day of June, A. D. 1903, before me personal
appeared Eva A. Ingersoll, who, being by me first duly caution
according to law, deposes and says, that she is the complainant
the above-entitled bill of complaint, that she has read the foregoi
bill of complaint and knows the contents thereof; that the same
true of her own knowledge except as to matters therein stated

information and belief, and as to those matters she believes it to be true.

EVA A. INGERSOLL.

Subscribed and affirmed to before me this twelfth day of June, A. D. 1903.

[SEAL] JOHN H. HAZELTON,
Notary Public within and for the County of New York and State of New York, No. 59.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a Court of Record, do hereby certify that John H. Hazelton, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the thirteenth day of June, 1903.

[SEAL] THOMAS L. HAMILTON, *Clerk.*

EXHIBIT A.

Know all men by these presents, that whereas Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cormue and M. Louise Dunbar claim to be interested in the estate of Andrew J. Davis, late of Butte, Montana, about which controversies have arisen; and whereas Henry A. Root, also a party claiming to be interested in said estate, has rendered services and expended money in the matter of the administration thereon; and whereas there is offered for probate a will purporting to be the will of said Andrew J. Davis, in opposing the allowance of which all the above parties are interested; and,

whereas said Henry A. Root has undertaken to procure evidence, counsel and such other things as are necessary for opposing said will and obtaining for the parties above named their respective rights and shares of said estate, as against all parties other than the brothers and sisters and nephews and nieces of said Andrew J. Davis:

Now, therefore, in consideration as aforesaid, we, the said Sarah *Maria Cummings*, *Elizabeth S. Ladd*, *Ellen* Cornue and *M.* Louise Dunbar hereby severally sell, assign, transfer and set over to Henry A. Root and Gideon Wells one-third part of each of our interests in said estate, in trust, out of the avails thereof, to reimburse said Henry A. Root for all sums by him heretofore or hereafter expended, and liabilities incurred by him on account of the settlement of said estate and opposing the probate of said will, as well as all sums which he may hereafter incur on account thereof, the entire residue of said one third to be paid to said Root as compensation for his time and service in that behalf used and employed. It being understood and agreed that this assignment shall be in full for all of such claims and demands, and that no further liability shall exist against the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar on account thereof. And the said Root shall not be authorized in any way to hold or render either of the above named personally liable or responsible for any of said matters or things.

And the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar severally agree that they will not make any sale, transfer or settlement of their several and respective interests in said estate, or either of them, without the assent thereto of said Henry A. Root and Gideon Wells.

And the said Root on his part agrees to procure counsel, pay their charges, and do all things necessary properly to secure the interests of the parties above named in said estate, as heirs at law and next of kin of said Davis, and agrees that he will not sell, transfer, or in any way dispose of his interest in said estate without the consent of the said Wells thereto.

And we, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar do hereby severally constitute and appoint the said Henry A. Root and Gideon Wells our attorneys

in fact, irrevocable, for us, and each of us, and in our and each of our names, place and stead, jointly to demand, sue for, collect, receive, compound, receipt for and full acquittance give for our and each of our interests in said estate.

In witness whereof we, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Henry A. Root have set our hands and seals to this and one other instrument of like tenor, this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and ninety.

SARAH MARIA CUMMINGS. [SEAL]
ELIZABETH S. LADD. [SEAL]
M. LOUISE DUNBAR. [SEAL]
ELLEN CORNUE. [SEAL]
HENRY A. ROOT. [SEAL]

EXHIBIT B.

BUTTE CITY, MONT., August 17, 1891.

R. G. INGERSOLL, Esq.,
Butte City, Montana.

Sir, We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

HENRY A. ROOT,
J. A. CORAM.

EXHIBIT C.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

IN THE MATTER OF THE ESTATE OF ANDREW J. DAVIS, DECEASED.

Upon the contest of Henry A. Root, Sarah Maria Cummings against the probate of the will of the said deceased, wherein John A. Davis is proponent and Henry A. Root *et al.*, contestants; and the contest of Harriet Shefliekl and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith to revoke the probate of said will.

Be it remembered, that on the twenty-fourth day of August, 1897, the petition in the above-entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the court has been heretofore made on the twenty-fourth day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contest now pending are represented by attorney present in court.

It is ordered that the contests heretofore instituted in this court by Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, be and the same are hereby dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this court, heretofore made on the twenty-seventh day of March, 1895, should be so modified and changed as to entirely conform to said

mpromise agreements and the order of this court confirming the aking, executing and delivering the same, it is ordered, adjudged nd decreed it be so modified and changed accordingly and in accordnce with the provisions hereinafter stated, and that the administator of the estate of said Andrew J. Davis, deceased, with the will nnexed, keep, retain and hold in his possession and under his conrol as such administrator all funds, property and effects necessary nd proper to carry out said compromise agreements, said order and ne provisions thereof.

It is hereby ordered, adjudged and decreed, in pursuance of said etition, said compromise agreement and order confirming them, hat the rights of the respective parties in said estate of said Andrew . Davis, deceased, and so held, retained and controlled by said dministrator, and to be distributed by him, be, and the same are, ereby established and declared to be as follows, to wit: that is to ay, subject to the bequests in said will of Andrew J. Davis, leceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts f said estate. The parties to said compromise agreements are ereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:

Two hundred eleven-hundredths (200/1100) thereof in kind to John E. Davis as administrator of the estate of John A. Davis, leceased; two hundred and fifty eleven-hundredths (250/1100) thereof in kind to Henry A. Kent, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty-four eleven-hundredths (44/1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven-hundredths (50/1100) thereof in kind to Calvin P. Davis; fifty eleven-hundredths (50/1100) thereof in kind to Harriet Wood; twenty-five eleven-hundredths (25/1100) thereof in kind to Elizabeth A. Smith; fifty eleven-hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees, appointed in and by the compromise agreement, dated April 23, 1895, are entitled to have and receive as such trustees and for the purpose of such trust four hundred and thirty-one eleven-hundredths (431/1100) of said estate in kind.

It being further ordered, however, that no portion of the real estate owned by said Andrew J. Davis and situated in the State of Iowa shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be effected by this cause and proceeding are, by consent in open court, adopted and made the basis of this order and decree according to the terms and provisions of said contracts and agreements.

Done in open court this twenty-fourth day of August, A. D. 1897.

JOHN LINDSAY, *Judge.*

DEMURRER.

[Filed Aug. 14, 1903.]

The Demurrer of the above-named Defendants, Joseph A. Coram, Henry A. Root, Herbert P. Cummings, *Executor of the Last Will and Testament of* Sarah Maria Cummings, *Deceased, to the Bill of Complaint of the above-named Plaintiff.*

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do severally demur to the said bill and for cause of demurrer show:

1. That the said complainant has not, by her said bill, made such a case as entitles her in a court of equity to any discovery from these defendants respectively, or any of them, or any relief against them, as to the matters contained in said bill, or any such matters, and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of.

And for further and more specific grounds of demurrer these defendants aver as follows, to wit:

(1) It appears by the said bill that the promise of the defendants Henry A. Root and Joseph A. Coram to pay Robert G. Ingersoll, the plaintiff's intestate, for services rendered and to be rendered by the said Robert G. Ingersoll in the contests of Sarah Maria Cummings and Henry A. Root against the probate of the alleged will of Andrew J. Davis, deceased, was a conditional promise and to be performed only in case the said alleged will should be defeated, and the said Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar should get their shares as next of kin and heirs at law of the said Andrew J. Davis, deceased, and that the said condition precedent was never

performed inasmuch as said will was never defeated and the said Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar never did get their shares as next of kin and heirs at law of the said Andrew J. Davis, deceased.

(2) It appears by the said bill that the complainant is estopped from now claiming that the defendants Henry A. Root and Joseph A. Coram were in the lifetime of Robert G. Ingersoll under any legal obligation to pay him anything, or now are under any legal obligation to pay the complainant as his said administratrix anything by reason of the promise set forth and relied upon in the said bill and made under date of Aug. 17, A. D. 1891, inasmuch as it appears that in the year 1901 the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, began an action in the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, against Henry A. Root, Joseph A. Coram, John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, and Charles H. Palmer and Andrew J. Davis, Jr., as trustees, all defendants in the present action, to enforce payment of the identical claim for the enforcement of which the present action is brought; and that subsequently John S. Harris, who had been duly appointed administrator of the estate of Robert G. Ingersoll, deceased, in the State of Montana, was substituted in the place of the complainant as plaintiff in said action; that at the trial of said action the complaint was dismissed because it did not state facts sufficient to constitute a cause of action.

(3) It appears by the said bill that Robert G. Ingersoll, the complainant's intestate, in his lifetime was never entitled to an attorney's lien under Section 430 of the code of Civil Procedure of the State of Montana, which is set forth in the bill and relied upon by the complainant in this action as the basis for such attorney's lien, inasmuch as the services set forth in the bill and claimed to have been performed by him were performed not in "an action", but in a "special proceeding", and that section gives no lien to an attorney for the party to a special proceeding, but confines an attorney's lien to the attorney who appears for a party to an action and gives such attorney a lien only "upon his client's cause of action or counter claim".

(4) The said bill fails to show that Robert G. Ingersoll, the complainant's intestate, was ever admitted to practice as an attorney at law in the State of Montana, or ever "appeared as attorney" for Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, or for either of them in the special proceeding in the State of Montana, to probate the alleged will of Andrew J. Davis, deceased, but, on the contrary, it appears that the objections filed by Sarah Maria Cummings and Henry A. Root to the probate of said alleged will were filed before the said Robert G. Ingersoll rendered any services, and such services as he rendered were rendered after such objections to the probate of said alleged will had been filed by other attorneys, and that the services performed by the said Robert G. Ingersoll were performed by him, not as attorney, but as counsel, and that, therefore, he was not entitled, nor is the complainant, as his administratrix, now entitled, to an attorney's lien under the said Section 430 of the code of Civil Procedure of the State of Montana.

(5) It appears from said bill that all the services stated in the bill to have been rendered by Robert G. Ingersoll, the complainant's intestate, were rendered in a special proceeding had in the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, to probate the alleged will of Andrew J. Davis, deceased, and, therefore, any attorney's lien to which the said Robert G. Ingersoll in his lifetime was, or the complainant as his administratrix now is entitled, was and is limited to the decree or judgment in that special proceeding and to the proceeds of that decree or judgment, and that the property on which the complainant now seeks to establish an attorney's lien never was the proceeds of said decree or judgment, but was at the time of the death of Andrew J. Davis, deceased, and at the time said decree or judgment in said proceedings in the said court of the State of Montana was so entered, and ever since has been, in the State of Massachusetts, and could never be disposed of except by decree made by the proper court in said State of Massachusetts.

(6) It does not appear from the face of the bill that the proceeds of the decree or judgment of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver

Bow, made and entered on or about Aug. 24, A. D. 1897, or any part of said proceeds, or that the estate of Andrew J. Davis, deceased, or any part thereof, was ever assigned at law or in equity to Robert G. Ingersoll, deceased, or since his death to his legal representative to secure the payment of the claim sued upon, or any part thereof, or that any lien legal or equitable upon the proceeds of said decree or judgment or upon any part thereof, or upon the estate of said Andrew J. Davis, deceased, or upon any part of said estate, was ever given to the said Robert G. Ingersoll or his legal representative to secure the payment of the claim sued upon or any part thereof.

2. These defendants also demur to the bill of complaint upon the further ground that this court has not jurisdiction of this action, because it appears from the said bill that this action is brought to secure from this court a writ of injunction staying proceedings now pending in the Probate Court, in and for the county of Suffolk and Commonwealth of Massachusetts, to distribute the funds and effects of the estate of Andrew J. Davis, deceased, situate in the State of Massachusetts, among the persons entitled thereto, or to otherwise dispose of said funds and effects, and this court is forbidden by Section 720 of the United States Revised Statutes from granting a writ of injunction to stay proceedings in any court of a State.

FREDERICK N. WIER,
Solicitor and of counsel for defendants HENRY A. ROOT *and* JOSEPH A. CORAM *and* HERBERT P. CUMMINGS, *Executor of the last will of* SARAH MARIA CUMMINGS, *deceased.*

No. 27 Pemberton square,
Rooms 816 to 818 Barristers' Hall,
Boston, Mass.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

FREDERICK N. WIER,
of Counsel for Defendants.

STATE OF MASSACHUSETTS,
COUNTY OF SUFFOLK,
DISTRICT OF MASSACHUSETTS, ss.

Henry A. Root, being duly sworn, deposes and says: I am one of the above defendants. The foregoing demurrer is not interposed for delay.

HENRY A. ROOT.

Sworn to before me this thirteenth day of August, 1903.

GEORGE A. SANDERSON,
Justice of the Peace.

DEMURRER OF JOHN H. LEYSON, ADMINISTRATOR.

[Filed Sept. 28, 1903.]

Demurrer of the above-named Defendant, John H. Leyson, *as Administrator of the Estate of* Andrew J. Davis, *Deceased*.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill and for causes of demurrer shows:

1. That the said complainant has not, by her said bill, made such a case as entitles her in a court of equity to any discovery from the defendants, or any of them, or any relief against them, as to the matters contained in said bill or any such matters, and that any discovery which can be made by the defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of avail to the said complainant for any of the purposes for which a discovery is sought against the defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of.

And for further and more specific grounds of demurrer this defendant avers as follows, to wit:

(1) It appears by the said bill that the promise of the defendants Henry A. Root and Joseph A. Coram to pay Robert G. Ingersoll, the plaintiff's intestate, for services rendered and to be rendered by the said Robert G. Ingersoll in the contests of Sarah Maria Cummings and Henry A. Root against the probate of the alleged will of Andrew J. Davis, deceased, was a conditional promise, and to be performed only in case the said alleged will should be defeated, and the said Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar should get their shares as next of kin and heirs at law of the said Andrew J. Davis, deceased, and that the said conditions precedent were never performed, inasmuch as said will was never defeated and the said Henry A. Root, Ellen S. Cornue, Sarah

Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar never did get their shares as next of kin and heirs at law of the said Andrew J. Davis, deceased, as an intestate.

(2) It appears by the said bill that the complainant is estopped from now claiming that the defendants Henry A. Root and Joseph A. Coram were, in the lifetime of Robert G. Ingersoll, under any legal obligation to pay him anything, or now are under any legal obligation to pay the complainant as his said administratrix anything, by reason of the promise set forth and relied upon in the said bill and made under date of Aug. 17, A. D. 1891, inasmuch as it appears that in the year 1901 the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, began an action in the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, against Henry A. Root, Joseph A. Coram, John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, and Charles H. Palmer and Andrew J. Davis, Jr., as trustees, all defendants in the present action, to enforce payment of the identical claim for the enforcement of which the present action is brought: and that subsequently John S. Harris, who had been duly appointed administrator of the estate of Robert G. Ingersoll, deceased, in the State of Montana, was substituted in the place of the complainant as plaintiff in said action; that at the trial of said action the complaint was dismissed because it did not state facts sufficient to constitute a cause of action.

(3) It appears by the said bill that Robert G. Ingersoll, the complainant's intestate, in his lifetime was never entitled to an attorney's lien under Section 430 of the Code of Civil Procedure of the State of Montana, which is set forth in the bill and relied upon by the complainant in this action as the basis for such attorney's lien, inasmuch as the services set forth in the bill and claimed to have been performed by him were performed not in "an action", but in a "special proceeding", and that section gives no lien to an attorney for the party to a special proceeding, but confines an attorney's lien to the attorney who appears for a party to an action and gives such attorney a lien only "upon his client's cause of action or counter-claim".

(4) The said bill fails to show that Robert G. Ingersoll, the complainant's intestate, was ever admitted to practice as an attorney at law in the State of Montana, or ever "appeared as attorney of record" for Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, or for either of them, in the special proceeding in the State of Montana to probate the alleged will of Andrew J. Davis, deceased, but on the contrary it appears that the objections filed by Sarah Maria Cummings and Henry A. Root to the probate of said alleged will were filed before the said Robert G. Ingersoll rendered any services; and such services as he rendered were rendered after such objections to the probate of said alleged will had been filed by other attorneys, and that the services performed by the said Robert G. Ingersoll were performed by him not as attorney, but as counsel, and that, therefore, he was not entitled, nor is the complainant as his administratrix now entitled, to an attorney's lien under the said Section 430 of the Code of Civil Procedure of the State of Montana.

(5) It appears from said bill that all the services stated in the bill to have been rendered by Robert G. Ingersoll, the complainant's intestate, were rendered in a special proceeding had in the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, to probate the alleged will of Andrew J. Davis, deceased, and therefore any attorney's lien to which the said Robert G. Ingersoll in his lifetime was, or the complainant as his administratrix now is entitled, was and is limited to the decree or judgment in that special proceeding and to the proceeds of that decree or judgment, and that the property on which the complainant now seeks to establish an attorney's lien never was the proceeds of said decree or judgment, but was at the time of the death of Andrew J. Davis, deceased, and at the time of said decree or judgment in said proceedings in the said Court of the State of Montana was so entered and ever since has been in the State of Massachusetts, and could never be disposed of except by decree made by the proper Court in said State of Massachusetts.

(6) It does not appear from the face of the bill that the proceeds of the decree or judgment of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver

Bow, made and entered on or about Aug. 24, A. D. 1897, or any part of said proceeds, or that the estate of Andrew J. Davis, deceased, or any part thereof, was ever assigned at law or in equity to Robert G. Ingersoll, deceased, or since his death to his legal representative, to secure the payment of the claim sued upon, or any part thereof, or that any lien legal or equitable upon the proceeds of said decree or judgment or upon any part thereof, or upon the estate of said Andrew J. Davis, deceased, or upon any part of said estate, was ever given to the said Robert G. Ingersoll or his legal representative to secure the payment of the claim sued upon or any part thereof.

2. This defendant also demurs to the bill of complaint upon the further ground that it appears from the face thereof that there is a defect of parties defendant in this, that Ellen S. Cornue is an absolutely necessary party.

3. This defendant also demurs to the bill of complaint upon the further ground that the United States Circuit Court has no jurisdiction to grant the relief prayed for in the said bill of complaint, or any part thereof

HORACE G. ALLEN.

Solicitor and of Counsel for Defendant JOHN H. LEYSON, *as Administrator of the estate of* ANDREW J. DAVIS, *Deceased*,
23 Court Street, Boston, Mass.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

HORACE G. ALLEN,
of Counsel for Defendant LEYSON.

DEMURRER OF ANDREW J. DAVIS, TRUSTEE.

[FILED OCT 2, 1903.]

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said complainant's bill of complaint contained to be true in such manner and form as same are therein set forth and alleged, demurs to said bill and for causes of demurrer shows:

First. That the complainant has not in and by her said bill shown that she is entitled to any relief in equity against this defendant or against any other defendant therein named.

Second. Because it appears by said bill that any rights of the complainant against these defendants, as set forth in said bill, have been determined by action in the District Court of the Second Judicial District of the State of Montana, as set forth in said bill.

Third. The allegations of said bill do not entitle the complainant to a lien upon any property held by John H. Leyson as administrator of the estate of Andrew J. Davis, deceased, in Massachusetts.

Fourth. This court has no power or authority to grant the relief prayed for, because granting an injunction restraining or entering a decree determining the disposition of any property in the possession of John H. Leyson as administrator of the estate of Andrew J. Davis, deceased, in Massachusetts, would be an interference with the proceedings of the Probate Court for the County of Suffolk having jurisdiction of the matter, and would be unauthorized and illegal.

HORACE G. ALLEN,
Solicitor for ANDREW J. DAVIS, *Trustee.*

I certify that the foregoing demurrer is in my opinion well founded in point of law.

HORACE G. ALLEN,
of Counsel for the Defendants.

STATE OF MONTANA.

Andrew J. Davis, being duly sworn, deposes and says: I am the within named defendant and the foregoing demurrer is not interposed for delay.

ANDREW J. DAVIS.

Sworn to before me this twenty-eighth day of September, 1903.

GEORGE W. SPROULE,
Clerk U. S. District Court,
District of Montana.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1757.

EVA A. INGERSOLL, *Administratrix*,

v.

JOSEPH A. CORAM *et al.*

ORDER OF COURT.

AUGUST 7, 1903.

On complainant's bill of complaint in the above-entitled action, of which a copy is hereto prefixed, it is ordered that a copy of said complaint and of this order be served on each of the defendants Charles H. Palmer, trustee, and Andrew J. Davis, trustee, personally, and that they and each of them be and are hereby directed to appear and plead, answer or demur to the said complaint on or before Tuesday, the eighth day of September next, the first Monday of said September being a legal holiday, at the September Rules, in the clerk's office of the above entitled Court, said service being made twenty days before said eighth day of September, 1903, and that in default of appearance and pleading by said defendants as hereby ordered, the Court will proceed in this cause as if said defendants had been served with process in this District, and complainant will be entitled to an order that the bill be taken *pro confesso*.

By the Court,

BENJ. H. BRADLEE, *Deputy Clerk*.

RETURN OF SERVICE OF ORDER FOR APPEARANCE AND SERVICE OF ATTESTED COPY OF BILL OF COMPLAINT.

[Filed August 21, 1903.]

United States of America,
District of New Jersey.

Office of United States Marshal.

Trenton, August 11, 1903.

I hereby certify that on this tenth day of August, 1903, I receiv an attested copy of that certain Order of Court made by the Circ Court of the United States, First Circuit, District of Massachuset August 7, 1903, in the case pending in said Court, and entitle "*Eva A. Ingersoll, Administratrix of the estate of Robert G. Ing soll*, v. *Joseph A. Coram et al.*," under Section 738 of the Revi Statutes of the United States, requiring the defendant the s Charles A. Palmer, trustee, to appear, plead, or demur, in s action, attested by Benj. H. Bradlee, Deputy of the Clerk of s Court, and under the seal of said Court, and that I personally serv said Order, on August 11, 1903, upon said defendant Charles Palmer as trustee, by delivering to and leaving with his wife, M E. Palmer, at his residence personally, at the County of Atlan District of New Jersey, said attested copy thereof so received by on said day as aforesaid.

And whereas said Order of Court requiring the appearance defendant Charles H. Palmer as trustee, as above set forth served, required that said defendant be served with an attested c of the bill of complaint in the action, I hereby certify that on tenth day of August, 1903, I received an attested copy of the bil complaint filed in the office of the Clerk of the Circuit Court of United States, First Circuit, for the District of Massachusetts, J 15th, 1903, in said case entitled "*Eva A. Ingersoll, Adm'x Joseph A. Coram et al.*," attested by Benj. H. Bradlee, Deputy the Clerk of said Court, and under the seal of said Court, and

sonally served said attested copy of said bill of complaint on August 11th, 1903, upon said defendant Charles H. Palmer, by delivering to and leaving with his wife, Mary E. Palmer, at his residence personally, at the County of Atlantic, District of New Jersey, said attested copy so received by me aforesaid.

THOMAS J. ALCOTT,
Marshal of the United States for District of New Jersey.

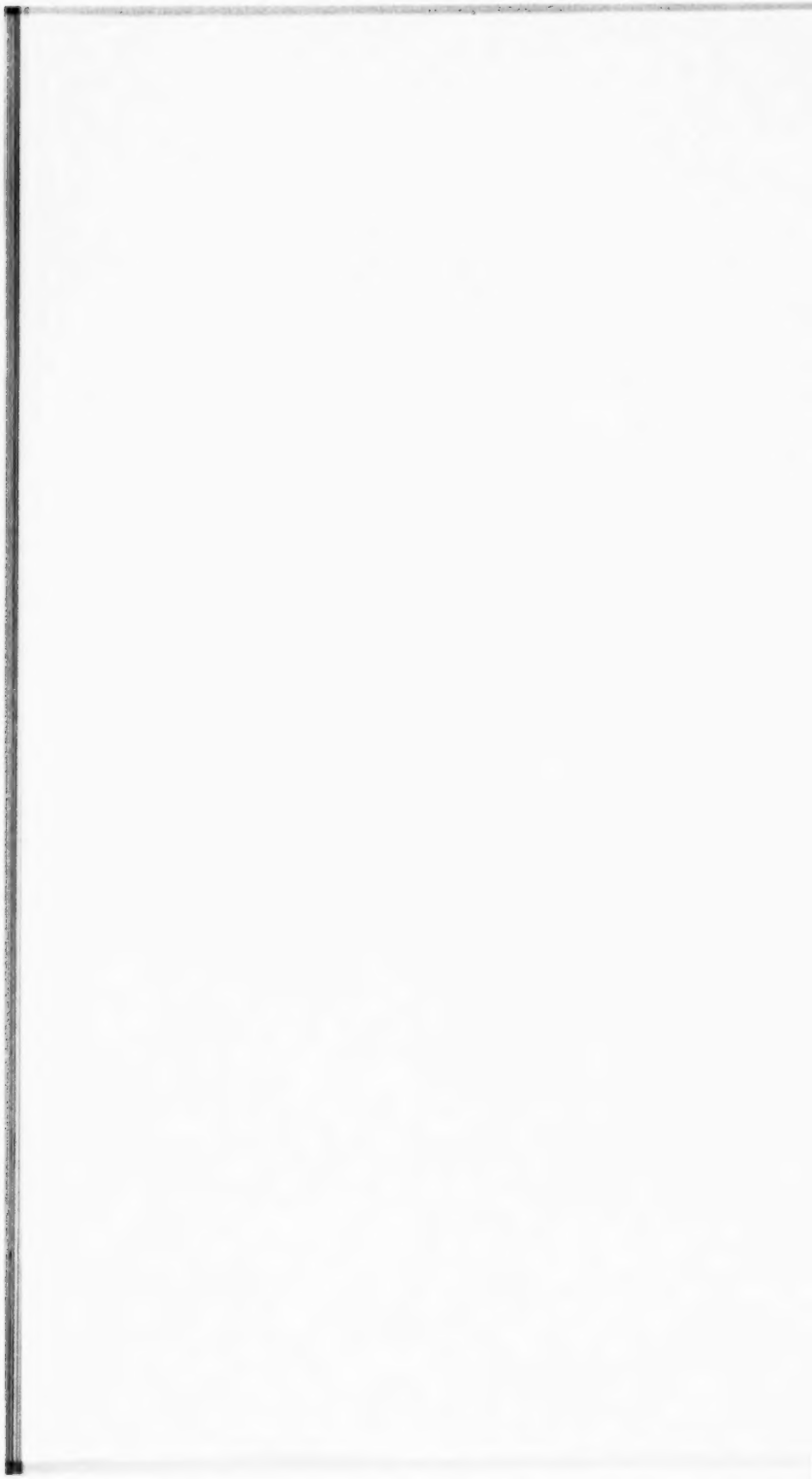
UNITED STATES OF AMERICA, } ss.
DISTRICT OF }

Thomas J. Alcott, United States Marshal for said District, being first duly sworn, says that the above returns of the service of Order requiring Charles H. Palmer, trustee defendant, to appear, etc., and of attested copy of bill of complaint, in the action, "*Eva A. Ingersoll, Adm'x, v. Joseph A. Coram et al.*," United States Circuit Court, First Circuit, District of Massachusetts, are wholly true and correct.

Subscribed and sworn to before me this August 15, 1903.

BENJAMIN F. HAVENS,
Deputy Clerk United States District Court, District of New Jersey.

[SEAL]



SUBPOENA TO ANDREW J. DAVIS AS TRUSTEE.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

[SEAL] TO ANDREW J. DAVIS as trustee, of Butte, Montana, GREETING:

For certain causes, offered before the Circuit Court of the United States of America, for the First Circuit, within and for the Massachusetts District, as a Court of Chancery, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally be and appear before our said Circuit Court at the Rules, to be holden at the office of the Clerk of our said Court, in Boston, in said district, on Tuesday, being the eighth day of September next (the first Monday of said September being a legal holiday), to answer to a bill of complaint exhibited against you in our said Court, wherein Eva A. Ingersoll, of Dobbs Ferry, County of Westchester, State of New York, as administratrix of the estate of Robert G. Ingersoll, deceased, late of said place, is complainant and you are one of the defendants; and to do further and receive that which our said Circuit Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall hereon.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, at Boston, this seventh day of August A.D. 1903, in the one hundred and twenty-eighth year of the Independence of the United States of America.

BENJ. H. BRADLEE, *Deputy Clerk.*

Memorandum. The defendant is to enter his appearance in the suit in the Clerk's Office on or before the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

RETURN OF SERVICE ON ANDREW J. DAVIS OF ORDER FOR APPEARANCE AND SERVICE OF ATTESTED COPY OF BILL OF COMPLAINT.

[FILED SEPTEMBER 4, 1903.]

UNITED STATES OF AMERICA.

MONTANA DISTRICT, ss. BUTTE, Mont., August 12, 1903.

I hereby certify that I have served the within subpoena by delivering to Andrew J. Davis a true copy thereof at Butte, in the County of Silver Bow, Montana, District of Montana.

Dated Butte, Montana, August 12, 1903.

CHARLES F. LLOYD, *U. S. Marshal,*
by E. D. ELDERKIN, *Deputy.*

Marshal's costs:

Service,	$2 00
Street car fare,	10
Total,	$2.10

UNITED STATES OF AMERICA, }
DISTRICT OF MONTANA. }

OFFICE OF UNITED STATES MARSHAL,
BUTTE, Mont., August 12, 1903.

I hereby certify that on this twelfth day of August, 1903, I received an attested copy of that certain order of Court, made by the Circuit Court of the United States, First Circuit, District of Massachusetts, August 7, 1903, in the case pending in said Court and entitled, "*Eva A. Ingersoll, Administratrix of the estate of Robert G. Ingersoll, v. Joseph A. Coram et al.,*" under Section 738 of the Revised Statutes of the United States, requiring the defendant the said Andrew J. Davis to appear, plead, or demur, in said action, attested by Benj. H. Bradlee, Deputy of the Clerk of said Court, and under the seal of said Court, and that I personally served said order on August 12, 1903, upon said defendant Andrew J. Davis

by delivering to and leaving with said Andrew J. Davis, personally, at the County of Silver Bow, District of Montana, said attested copy thereof so received by me on said day as aforesaid.

And whereas said order of Court requiring the appearance of defendant Andrew J. Davis, as above set forth and served, required that said defendant be served with an attested copy of the bill of complaint in the action, I hereby certify that on the twelfth day of August, 1903, I received an attested copy of the bill of complaint filed in the office of the Clerk of the Circuit Court of the United States, First Circuit, for the District of Massachusetts, June 15, 1903, in said case, entitled "*Eva A. Ingersoll, Admx.*, v. *Joseph A. Coram et al.*," attested by Benj. H. Bradlee, Deputy of the Clerk of said Court, and under the seal of said Court, and personally served said attested copy of said bill of complaint on August 12, 1903, upon said defendant Andrew J. Davis by delivering to and leaving with said Davis, personally, at the County of Silver Bow, District of Montana, said attested copy so received by me aforesaid.

C. F. LLOYD,
Marshal for the United States, District of Montana,
by E. D. ELDERKIN, *Deputy U. S. Marshal.*

UNITED STATES OF AMERICA, } ss.
DISTRICT OF }

E. D. Elderkin, Deputy United States Marshal for said District, being first duly sworn, says that the above returns of the service of order requiring Andrew J. Davis, defendant, to appear, etc., and of attested copy of bill of complaint in the action *Eva A. Ingersoll, Admx.*, v. *Joseph A. Coram et al.*, United States Circuit Court, First Circuit, District of Massachusetts, are wholly true and correct.

Subscribed and sworn to before me this twelfth day of August, 1903.

GEORGE W. SPROULL,
[SEAL] *Clerk U. S. District Court, District of*
by FREDERICK H. DRAKE, *Deputy Clerk.*

Marshal's fees—
Services, $2.00
Acknowledgement, .25
$2.25

ADOPTION OF DEMURRER OF JOSEPH A. CORAM ET AL. BY CHARLES H. PALMER, TRUSTEE.

[Filed November 5, 1903.]

This defendant, Charles H. Palmer, trustee, hereby adopts as his own the demurrer heretofore filed herein by the defendants Joseph A. Coram and others.

FREDERICK N. WIER.
Solicitor and of Counsel for Defendant
CHARLES H. PALMER, *Trustee.*

I hereby certify that the demurrer herein adopted by Charles H. Palmer, trustee, is in my opinion well founded in point of law.

FREDERICK N. WIER,
of Counsel for CHARLES H. PALMER, *Trustee.*

COMPLAINANT'S MOTION TO AMEND BILL BY JOINING ADMINISTRATOR OF THE ESTATE OF ELIZABETH S. LADD.

[Filed December 28, 1903.]

And now comes the complainant in the above-entitled action and says that when she filed her bill she was informed and believed that Elizabeth S. Ladd named as a party defendant was alive and a resident of Springfield, Massachusetts; that since the bill was filed she has ascertained that said Elizabeth S. Ladd died at Springfield, Massachusetts, on November 25th, 1902, a considerable time prior to the filing of the plaintiff's bill; that Charles H. Ladd, a resident of Springfield, Massachusetts, and a citizen of the Commonwealth of Massachusetts, is the duly appointed administrator of the estate of said Elizabeth S. Ladd, having been duly appointed by the Probate Court for the County of Hampden in said Commonwealth of Massachusetts.

Wherefore your complainant moves to amend her bill of com-

plaint by joining the said Charles H. Ladd, administrator of
estate of Elizabeth S. Ladd, as a party defendant in place of
said Elizabeth S. Ladd, and to that end moves to amend her bil
follows:

(1) By inserting before the words "Elizabeth S. Ladd" wh
the same first appears on page 1 of the plaintiff's bill the wo
"Charles H. Ladd, administrator of the estate of".

(2) By inserting the same words before the words "Elizabeth
Ladd" on the second page of the plaintiff's bill as printed.

(3) By inserting at the end of the paragraph near the botton
page 2 of the bill as printed the words following, to wit, "that
Elizabeth S. Ladd died intestate at Springfield, Massachuse
November 25, 1902, a resident of said Springfield; that said Cha
H. Ladd is the duly appointed qualified and acting administrato
the estate of said Elizabeth S. Ladd".

(4) By inserting on page 17 of the plaintiff's bill as prin
before the words "Elizabeth S. Ladd" the words "Charles H. La
administrator of the estate of".

(5) By inserting before the word "Elizabeth" at the botton
page 41 of the bill as printed the words "Charles H. Ladd, adm
istrator of the estate of".

By her Solicitors,

E. N. HARWOOD
HOLLIS R. BAIL

December 26, 1903. This may be filed and allowed.

T. D. KENNESON,
by F. N. W.

FREDERICK N. WIER,
Solicitors for Respondents Co
ROOT, *and* CUMMINGS, *Executor*,
for HENRY A. ROOT *and* CHARLES
PALMER, C. H. LADD, M. L. DUN
and C. H. LADD, *Adm'r*.

L. S. DABNEY,
Solicitor for JOHN H. LEYSON, *Ad*

H. G. ALLEN,
Solicitor for A. J. DAVIS, *Truste*

OPINION OF THE COURT.

December 30, 1903.

PUTNAM, J. The pith of this suit, which is in equity, is to the effect that one Andrew J. Davis, who, in his lifetime, was a resident of the city of Butte in the State of Montana, died in March, 1890, leaving no descendants, but an instrument which was offered for probate as his last will and testament; that this, if allowed, would have disinherited his next of kin except one brother, to whom was given the bulk of his estate; that some of the next of kin resisted the probate thereof, proceeding in the names of Henry A. Root and Sarah Maria Cummings, who were also of the next of kin; that the estate of said Andrew J. Davis was of the value of from $2,000,000 to $5,000,000; that a portion of the next of kin, to wit, Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar and Ellen S. Cormie, said Root directly and the other next of kin through said Root and one Joseph A. Coram, retained Robert G. Ingersoll, whose administratrix the complainant is, to contest the will, using his professional services as a lawyer; that said Robert G. Ingersoll was to be paid, on certain conditions to be hereinafter named, $100,000, of which $5,000 has been paid; that the remainder has not been paid, and is owing with interest; that the next of kin named, either directly or through said Root and said Coram, assigned or pledged the interests which they claimed in the estate of Andrew J. Davis as security for the amount so to be paid to said Robert G. Ingersoll; that, also, under the laws of Montana, which State was the *locus* of the proceedings herein referred to, Robert G. Ingersoll had a lien as a lawyer on said shares; that the condition on which the agreement to pay Robert G. Ingersoll was made had been satisfied, so that the remainder of the $95,000 became due him; that the will was in substance defeated, and the next of kin became entitled to their shares in the estate, so that the assignment, pledge or lien attached; that a portion of the estate is in the hands and possession of John H. Leyson, as ancillary administrator of the

goods and estate of Andrew J. Davis, appointed as such by the Probate Court in and for the County of Suffolk in the State of Massachusetts, and duly qualified as such; that consequently the said assignment, pledge or lien attached to the shares of the several next of kin to that portion of the estate which is in the hands of Leyson as such ancillary administrator; and that, therefore, the complainant is entitled to have the assignment, pledge or lien enforced in equity, and, as incidental thereto, to have the amount which was due to said Robert G. Ingersoll, with interest thereon ascertained, and judgment therefor rendered against such of the persons named as were and are personally liable. All these details we will repeat more at length, and, in the course thereof, state precisely the prayers of the bill.

The complainant is a citizen of the State of New York, and all the persons whom we have named, except Ellen S. Cornue, are citizens of other States than New York. Ellen S. Cornue is not made a party to the bill for reasons which we will state later; but it is claimed that she has such an interest as defeats this jurisdiction of this Court in view of the fact that she is a citizen of the same State as the complainant.

The parties made respondents to the bill are Joseph A. Coram, Henry A. Root, Charles H. Palmer, Andrew J. Davis, Jr., John H. Leyson, as administrator, Elizabeth S. Ladd and her husband, Charles H. Ladd, Mary Louise Dunbar and Herbert P. Cummings, as executor of the last will and testament of Sarah Maria Cummings, already named, who is deceased. The relation to this litigation of such of these parties as we have not heretofore named will be explained, but they are not material to the case. The real issue is between the complainant and the five next of kin whom we have described, except Ellen S. Cornue.

In order that the case may be properly understood in some of its aspects, it is necessary to state that, if there had been no will, the estate, under the laws of Montana, would have been distributed in eleven shares, one eleventh going to the descendants *per stirpes* of each deceased brother and sister. Consequently, Sarah Maria Cummings, as a sister of Andrew J. Davis, would have been entitled to

one eleventh, or two twenty-seconds: Henry A. Root and Ellen S. Cornue, as children of Anna C. Root, a deceased sister, each to one twenty-second: Elizabeth S. Ladd, a child of Sophronia Firman, a deceased sister, to one eleventh, or two twenty-seconds: Mary Louise Dunbar, one of the children of Roxanna Dunbar, a deceased sister, to one twenty-second, making a total of seven twenty-seconds, or, as alleged in the bill, three hundred fifty parts out of eleven hundredths.

The parties against whom a judgment is prayed for as incidental to the working out of the alleged lien are residents of this district, or have voluntarily appeared: so there is no difficulty on that score. Subpoenas have been duly issued against all persons named as parties respondent in the prayers of the bill who are residents in this district and duly served with one exception: and all non-residents have been brought in by an order issued in accordance with section 738 of the Revised Statutes, as amended or superseded by section 8 of the act of March 3, 1875, 18 Stat. 470, 472.

The court has been informed that Elizabeth S. Ladd has deceased, and the bill has not been revived in that particular: so there can be no judgment until that defect is cured. There is also a question made by the respondents with reference to the non-joinder of Ellen S. Cornue, who is a citizen of the same State as the complainant: which question will be disposed of by us in connection with matters of a fundamental character. Also, some of the respondents who have been duly served have not demurred, pleaded nor answered, and indeed have not even appeared: and the complainant has failed to enter an order of *pro confesso* as against them, or any of them. Of course, no judgment can be rendered until that failure, also, is made good. In both of these particulars, the court justly complains of the parties that they did not see to it that the record was put in proper form before the case was submitted.

All the parties respondent, except as stated, have demurred. It is not necessary to state the details of the demurrers because, aside from the questions of jurisdiction which we have already disposed of, all the propositions submitted to us at the hearing may be raised on a general demurrer.

A question seems to be made with reference to jurisdiction in equity over the general subject matter of the bill, but the enforcement of pledges and other liens securing obligations of any kind have always been favorite sources of jurisdiction in chancery. Indeed, at the common law, there was no suitable remedy for realizing any kind of security, as all the common law allowed was the taking, and the retention, of possession until the debt was paid. Consequently, with reference to pledges of choses in action, or an interest in an unsettled estate, the common law afforded no practical remedy of any kind. We can go even further and refer to the fact that, at common law, an assignment of a chose in action, either by the way of a sale or of a pledge or any form of lien thereon, as in the present case, was ineffectual: and, with reference to all these, the chancery gave a remedy, and protected such assignees and holders of liens of that class. Although the common law now protects them, yet, according to well settled rules in the Federal courts, the remedy in equity has not been defeated, but continues a concurrent one. Moreover, in the present case, the interests of the parties have been so incidentally complicated that it would be practically impossible for the common law to deal effectually with the questions before us. Among other things, it will be found that the assignments, pledges, or liens relate only to undivided partial interests in various shares of the estate under consideration: and, with reference to undivided interests, the common law does not even yet give effectual protection to assignees, pledgees or lienors.

The respondents also claim, as appears by the bill, that portions of the estate of Mr. Davis which are in this district are under administration by the local Court of Probate, and, therefore, *in custodia legis* to such an extent that this court cannot take jurisdiction to enter any decree in reference thereto. Notwithstanding the proceedings in the Probate Court, this court has the same jurisdiction which any court of superior jurisdiction of the State of Massachusetts would have. The State courts of general jurisdiction constantly and properly exercise certain limited powers with reference to interests in estates in the courts of probate, and this to the extent

which the present suit in equity requires. The rules and authorities touching this whole topic are sufficiently referred to by the Circuit Court for the District of Maine in Hale *v.* Collin, 111 Fed. Rep. 567, affirmed by the Circuit Court of Appeals in Hale *v.* Collin, 120 Fed. Rep. 470, and, also, by the opinion of the Circuit Court of Appeals in Sherman *v.* The American Congregational Association, 113 Fed. Rep. 609. So far as present considerations are concerned, the action of this court would be plainly subordinate to whatever proceedings the local Probate Court may take within its proper jurisdiction, and the complainant takes her chances in reference thereto. For example, we note that the administration in Massachusetts is strictly ancillary, and we note also that, under some circumstances, the ancillary administrator may be required by the court having jurisdiction of his accounts to remit any proceeds in his hands to the proper administrative court at the place of domicile of the deceased. Whether, if such an order should be entered, this court could grant to the complainant any effectual remedy, we leave, in connection with all other questions of that character, until the occasion for disposing of them arises, if it ever does. For the present, we are only called on to determine the conflicting rights of divers claimants to sundry shares in the estate of Mr. Davis, leaving the extent of those shares to be determined by another tribunal having jurisdiction thereof, and also leaving for future determination what would be the powers of this court when that tribunal takes action in reference thereto, if it does. In that respect we certainly proceed no further than do the State courts of general jurisdiction when they permit a garnishment by a creditor of the interest which an heir at law or legatee may have in the estate of a deceased person, nor, as we have already said, any further than the local courts of general jurisdiction are constantly yielding to the demands of litigating proponents.

Something was said at the hearing before us touching the question of laches, but nothing of this nature seems to have been insisted on. Moreover, the bill having been filed within the customary period, namely, six years after the entry of the decree on August 24, 1897, out of which the rights of the complainant's intestate arose, if they

ever arose, *prima facie* laches is not established: and there are not sufficient facts in the record to estabish laches on mere equitable principles.

The proposition is also made to us that the bill is multifarious. We are not sure that this relates so much to the demurrer as to the question of interlocutory injunction which is in the case, and which we will have occasion to refer to later: but, in any event, the bill is not multifarious. On the other hand, it is in all respects in exactly the form which the rules of equity practice require: that is to say, a lien cannot ordinarily be established without also establishing the personal liability of the person whose indebtedness the lien secures, if there is any such personal liability: and, where a bill requires the personal liability to be thus incidentally established, it follows that, according to other fundamental rules in equity which require that the subject matter of a suit should be completely disposed of in one proceeding, judgment and execution ordinarily go for the amount of the personal liability ascertained.

The bill claims the lien arising in behalf of attorneys under the statutes of Montana in addition to a contract lien. It is possible that, if the complainants could establish a lien under the statutes, the working out of the same would require different parties and a different judgment from what are required in working out contract rights. In that event, the bill might be charged with multifariousness so serious that the court itself would be compelled to take notice of it. But all we need to say as to this is that, for various reasons not necessary for us to detail, no statutory lien can be maintained, and that that portion of the bill must be regarded as ineffectual: and, as it is specially demurred to, it must be stricken out. Even if this were not done, we are not now prepared to hold definitely that the bill is multifarious for the reason we suggest: but, this being done, it is left free from any such criticism.

We now come to the substantial merits of the case. These turn on the following paper, which unquestionably was delivered to the complainant's intestate by the parties who signed it, all of whom are respondents:

"BUTTE CITY, Mont., August 17, 1891.

R. G. INGERSOLL, Esq., Butte City, Montana.

Sir: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

HENRY A. ROOT,
J. A. CORAM."

Mr. Ingersoll was, as the bill alleges, both an attorney and counsellor at law, and was employed with reference to the subject matter of the paper which we have quoted in both capacities. The employment was before August 17, 1891, and services had been rendered before that date, so that, as the bill says, the paper in question was "made, signed and delivered" to Mr. Ingersoll "during the rendition" of his services in the prosecution of the contest against the alleged will. Whatever its history, the respondents undertake to establish therefrom some substantial propositions favorable to themselves. First of all, they say that the writing was a mere offer. This cannot be questioned on the face of the paper; but the bill does not stop there, because it positively alleges that, through this paper, Root and Coram "promised and agreed to and with the said Robert G. Ingersoll" that he should have and be paid the amount named therein on the terms therein stated. In other words, the bill alleges positively and in terms, which, of course, are admitted on the demurrer, that a contract was made in accordance with the paper of August 17, 1891.

The respondents also say that, there being a previous contract for services, this of August 17, 1891, constituted a new arrangement, and they inquire what became of the old one; but clearly there is nothing in this question, and none of the suggestions based on it

require our consideration. By the very terms of the paper of August 17, 1891, referring, as it does, to "services rendered and to be rendered," the entire relations between the parties were covered into it, and what preceded was absorbed by it.

The first question, therefore, we have to determine with reference to the agreement of August 17, 1891, is who and whose interests it bound. Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cornue and Henry A. Root entered into a stipulation shown by the bill under date of September 29, 1890, preceding the agreement with Mr. Ingersoll on which this bill is based, by virtue of which all the parties named except Root assigned to Root one undivided third part of all their interest in the estate of Mr. Davis. This provided that whatever services and disbursements Mr. Root had rendered, or should thereafter render in the contest against the will in question, should be compensated for out of said undivided interests, and that, the parties to the instrument being thus relieved of all personal obligations to Root, the residue of the third interests thus assigned to him, if any, remaining after compensating him as stated should continue his absolute property. Thus the third undivided interests of the ladies named became from that time the absolute property of Root, and they retained no hold thereon. Therefore, it follows that, if Mr. Ingersoll's claim bound only this third undivided interest assigned to Root, and other interests assigned to Coram, as we will explain further on, so far as any lien on assets was concerned, and also if it bound personally, either contingently or otherwise, only Root and Coram, neither Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, or Ellen S. Cornue have any concern in this litigation; and the fact that Ellen S. Cornue has not been made a party thereto is immaterial, and the other ladies named should be discharged therefrom. The instrument of September 25, 1890, carefully guarded the remaining two-thirds interests in Mr. Davis's estate retained by each of the ladies who were parties thereto and carefully protected those interests, and also the ladies themselves, against any personal liability. It is to be noted that the transferees in the instrument were not only Mr. Root but one Gideon Wells, who subsequently deceased, and

who, therefore, did not sign the paper of August 17, 1891, and consequently does not appear in this litigation. It contains the following: "And the said Root on his part agrees to procure counsel, pay their charges, and do all things necessary properly to secure the interests of the parties above named in said estate as heirs-at-law and next of kin of said Davis." It also contains the following: "It being understood and agreed that this assignment shall be in full for all of such claims and demands, and that no further liability shall exist against the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar on account thereof. And the said Root shall not be authorized in any way to hold or render either of the above named personally liable or responsible for any of said matters or things."

Nothing in the bill overrules what we find in this instrument. Therefore, it is plain that nothing therein, and nothing in the agreement of August 17, 1891, bound personally any of the ladies named, or permitted Root and Coram to pledge their two-thirds interests not thus assigned to Root, or to impose any lien thereon. Therefore, it follows that Ellen S. Cornue is not a necessary party to the bill, and the other ladies named, to wit, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, having no interest therein, must be dismissed therefrom. This determination, therefore, overrules all objections to the bill growing out of any questions of the proper parties thereto.

The subject matter of what interests are bound by the agreement of August 17, 1891, does not, however, entirely end here. While neither of the ladies referred to, nor any of the interests which belonged to them on August 17, 1891, are involved in this litigation yet, the bill alleges that "during the times herein mentioned" "Coram" "acquired and still has, owns, and holds all the remaining interests and shares claimed and finally acquired by said Elizabeth S. Ladd and Mary Louise Dunbar in and to said estate of Andrew J. Davis." This allegation is positive, alike as to time, dates and title. The expression "during the time herein mentioned" covers, of course, August 17, 1891; and the expression "owns" excludes any remaining interest, contingent or otherwise, in Elizabeth S. Ladd

and Mary Louise Dunbar. Therefore, with reference to the rema
ing two-thirds of the interests which these two ladies assigned
Coram, the agreement of August 17, 1891, imposed a lien on th
by its express terms: yet that fact does change the conclusions
have stated, that these ladies are not necessary and proper par
to the bill.

Then comes a more obscure allegation, as follows: "Your ora
is informed and believes the said Joseph A. Coram also acquired
now has some interest in the shares" "acquired by said Henry A. R
Ellen S. Cornue and Sarah Maria Cummings, or some of them."
that can be said about this is that it is altogether too indefinite, h
as to dates, interests acquired and persons, to be regarded as ot
than inconsequential: so that they can in no way affect the conc
sions which we may reach.

The result is that the interests which we have to consider are fi
the entire shares of Elizabeth S. Ladd and Mary Louise Dunbar
the estate of Mr. Davis and which are now held, one-third by R
and two-thirds by Coram, the entire share of Root, who was a pa
to the paper of August 17, 1891, and the one undivided third of
shares of Mary Louise Dunbar and Ellen S. Cornue, assigned
Root by the instrument of September 25, 1890; and we are also
regard the personal obligations of Coram and Root. As to the
however, it is enough to say, without going into the details, that,
the face of the bill, a personal obligation exists on the part of e
of them; but what they are cannot be ascertained until the bil
heard on answer and proofs, nor is there any occasion for anticip
ing what conclusions in reference thereto may then be reached.

The next step in the history of the case is that, after the trial
a jury covering several weeks, in which Mr. Ingersoll seems to h
been the leading counsel and made the principal argument for
contestants whom we have named, the jury disagreed, and the
afterwards, with the consent and under the advice of Mr. Ingers
and with, also, the consent of Mr. Coram, an adjustment
reached, which resulted in a decree of the court having jurisdict
over the probate of the will, as follows:

"In the District Court of the Second Judicial District of the State of Montana, within and for the County of Silver Bow.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings against the probate of the will of the said deceased, wherein John A. Davis is proponent and Henry A. Root et al., contestants; and the contest of Harriet Shetfield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith to revoke the probate of said will.

Be it remembered, that on the twenty-fourth day of August, 1897, the petition in the above entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the court has been heretofore made on the twenty-fourth day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contest now pending are represented by attorney present in court.

It is ordered that the contests heretofore instituted in this court by Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, be, and the same are hereby dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this court, heretofore made on the twenty-seventh day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements, and the order of this court confirming the making, executing and delivering the same, it is ordered, adjudged and decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of said Andrew J. Davis, deceased, with the will annexed, keep, retain and hold in his possession and under his control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreements, said order and the provisions thereof.

It is hereby ordered, adjudged and decreed, in pursuance of said petition, said compromise agreement and order confirming them, that the rights of the respective parties in said estate of said Andrew J.

Davis, deceased, and so held, retained and controlled by said administrator, and to be distributed by him, be and the same are, hereby established and declared to be as follows, to wit: that is to say, subject to the bequests in said will of Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate. The parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:

Two hundred eleven hundredths (200/1100) thereof in kind to John E. Davis as administrator of the estate of John A. Davis, deceased: two hundred and fifty eleven hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue: forty four eleven hundredths (44/1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis: fifty eleven hundredths (50/1100) thereof in kind to Calvin P. Davis: fifty eleven hundredths (50/1100) thereof in kind to Harriet Wood: twenty five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith: fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees, appointed in and by the compromise agreement, dated, April 23, 1893, are entitled to have and receive as such trustees and for the purpose of such trust four hundred and thirty one eleven hundredths (431/1100) of said estate in kind.

It being further ordered, however, that no portion of the real estate owned by said Andrew J. Davis and situated in the State of Iowa shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be effected by this cause and proceeding are, by consent in open court, adopted and made the basis of this order and decree according to the terms and provisions of said contracts and agreements.

Done in open court this twenty-fourth day of August, A.D. 1897.

JOHN LINDSAY, *Judge*."

In all respects, we think the effect of this decree is clear: and in those as to which we are bound by the decisions of the Montana courts, the Supreme Court of that State has come to a clear conclu-

sion favorable to the complainant, as we will explain hereafter. The shares to which the five next of kin named in this bill were originally entitled, and which interests were represented by Mr. Root, and in behalf of which he retained Mr. Ingersoll, amounted altogether, as we have said, to 350 parts out of 1100 parts. It is said that, by the decree which we have quoted, they received 515½ parts. Exactly how this came about we need not explain, but apparently it was by bargaining in part with the other heirs or next of kin, and in part by allowances covering the expenditures incurred in behalf of their shares in contesting the will, to which the other next of kin had not contributed. A portion of the 515½ parts were assigned to, and held by, Andrew J. Davis, Jr., and Charles H. Palmer, as trustees in behalf of the five next of kin whose shares are concerned in this litigation. On that account, Andrew J. Davis, Jr., and Mr. Palmer are made parties to the bill, as they should have been, although no decree, whatever it may be, can substantially interest them. The bill does not in detail allege the nature of the trust, which is unfortunate, because, on final hearing on bill, answer and proofs, it may transpire that there is something therein which would result in the necessary conclusion that, after all, the parties whose shares are here concerned did not receive their 350 parts in any proper sense of the expression. But, so far as the record now submitted to us is concerned, no question of this kind arises; because it is alleged in the bill that this assignment to the trustees was "for the use and benefit of said five contesting heirs", and it is also further alleged that said five contesting heirs "acquired and got absolute right and title" to 515½ parts. Moreover, the respondents, in their briefs, make no question on this score, but admit that the five next of kin named received "not only their shares, but more". They claim, of course, that the shares were not their shares as next of kin; but, so far as the amount is concerned, no issue is made. The question as to the nature of the shares which they acquired we will return to later.

The allegations of the bill negative not only any possibility that Mr. Ingersoll did not render such services as were from time to time requested by Root, but also any suggestion that he was not at all times faithful to, and diligent in, the interests which he represented;

and it also states that the adjustment, and the decree resulting from, was secured with the aid of his professional labors. T says:

"Said Robert G. Ingersoll not only rendered services and e in the prosecution of said contests for and on behalf of said fi mentioned in said agreement and promise made to and with aforesaid, in fulfilment thereof on his part, but he also advis counseled and aided in consummating and effectuating said a ments and proceedings by which said decree determining sai tests in favor of said five heirs, represented by him, was ob whereby said five heirs were awarded, decreed and became with title to and got five hundred fifteen and a half eleven hun (515½ 1100) of all and singular the funds and other pr both real and personal, of said estate of Andrew J. Davis, de as aforesaid".

It also alleges more definitely as follows: that the "five ing heirs", meaning those whom we have named, "got a right and title" to the interests which they finally secured "t the prosecution of said contests and decree", meaning the relating to the will by said Robert G. Ingersoll as their a and counsellor, and the decree we have quoted. The bill con "Whereby, and by reason of the prosecution of said cont proceedings, and decree determining the same, said will was d in so far as it could affect the rights, shares, or interests in said estate, of said five heirs mentioned in said agreement", u the agreement of August 17, 1891.

Of course, on the demurrer, all these allegations are ad and, indeed, it is not questioned that Mr. Ingersoll rendered services as a counsellor-at-law and attorney as was desired l representing the interests he did represent, and that the result, whatever it was, was obtained by, through, and w assistance as a counsellor and attorney. There is no question fore, that, so far as rendering services was concerned, and co ting to the result, Mr. Ingersoll was entitled to the conditio to the same extent as if he had secured a verdict of a jury the will, followed by a final decree refusing it probate. The does not rest there at all, but it puts itself upon two propo One is that, within the meaning of the paper of August 17

the will was not "defeated," and, the other that, within its meaning, the clients of Messrs. Root and Coram "did not get their shares".

It is hardly claimed, if it is claimed at all, that the paper of August 17, 1891, was insufficient to pledge or give a lien on the interests to which it referred, or that the prayers of the bill are not suited to the enforcement of a lien of that character. If such propositions were seriously made, they would be easily disposed of. It is true that the language of the contract is expressed very much like the phraseology of demonstrative legacies. Such phraseology is sufficient to charge specific property with the payment of a legacy, and there is no question that, on a conveyance by Root of the interests referred to in the paper of August 17, 1891, to a third person, burdened by such language as we find here with the payment of Mr. Ingersoll's fee, would create a trust therefor. Upon all settled rules with reference to the construction of such instruments, we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll.

No doubt, the formal prayer of the bill is, in some respects, inapt; but, at one place, the bill distinctly alleges that the complainant has "a valid, lawful and existing claim and lien upon, and interest in" the shares involved in this litigation. In the same connection, it alleges that the complainant is entitled to enforce the payment of the alleged indebtedness by subjecting thereto the said "funds and effects" already referred to. The principal relief prayed for is that the personal liability of Messrs. Root and Coram may be ascertained, and that the amount reserved by the agreement of August 17, 1891, "be declared, adjudged and decreed to be a lien resting upon, and adhering to, all and singular the shares, parts, and parcels of, and interest in, said funds and effects of the estate of Andrew J. Davis, deceased, acquired for said Henry A. Root, and one third part thereof acquired for his four associates, heirs", etc. The bill also contains a prayer for general relief; so there can be no question that the lien exists, provided the terms of the agreement of August 17, 1891, were complied with, and that it is sufficiently alleged in the bill, and that the prayers of the bill are sufficient to require its enforcement.

We come now to the underlying question in the case: were th
terms of the contract of August 17, 1891, complied with? Althoug
evidently this contract was informal, and it concerned the confide
tial relations between counsel and attorney on one side and clie
on the other, so that, therefore, only its substance was regarded b
either party to it, yet the respondents insist on giving it a ver
strict, close and technical construction. First of all, we have alread
seen that the result, whatever it was, was secured with the aid
the efforts of Mr. Ingersoll, and of his advice, and that no sugge
tion is made that he failed in his professional duty in any respec
While this particular topic is not, of course, made an express cond
tion of the contract, it is implied. Therefore, it needs that w
should expressly lay it aside, as we have done.

Coming to the expression "our clients get their shares", th
respondents admit, as we have seen, that the persons referred t
received in kind the full proportions of the estate which they woul
have received if the will had been rejected by the jury and the court
and the estate had been administered as intestate. Therefore, o
this point their position is strictly contrary to the substance of th
agreement, and absolutely narrow and technical. It is enough t
say that the language of the agreement does not require so close
construction, and that, the shares of the persons concerned havin
been substantially received, its terms, on any fair rule of interpre
tation, have been complied with in that particular. Not only at thi
point, but at various other points, the respondents, as well as th
Supreme Court of Montana, in the case interpreting this contract t
which we will hereafter refer, are compelled to insert words whic
the agreement does not contain, for the purpose of making sure tha
their narrow construction should be sustained. At this particula
point, the respondents say that the word "shares" refer to shares t
come to the parties concerned "as next of kin and heirs at law"
Thus, as we have said, they inject into the agreement what is no
there. Such an injection of words not appearing in a contract, o
a statute, may be required when evidently necessary to work out it
probable purpose, and to thus avoid unreasonable and unjust con
clusions: but it never is required, and cannot be permitted, when

the injection of additional phraseology narrows the apparent general purpose and defeats what, except for the addition, would be both a reasonable and a just result.

Again, in the same line of reasoning, the respondents assert that what the parties concerned got, they got, not as the property of the deceased, but as the property of John A. Davis, the proponent. Neither is there anything in the contract which calls for the introduction of this qualification. It looks simply to the persons concerned getting their "shares" without any limitation in terms referring to the question whether or not the shares were obtained directly or indirectly. Even if the respondents were entitled to call for a technical construction in this respect, they are fully met by the terms of the decree of the twenty-fourth day of August, 1897, and of the decision of the Supreme Court of Montana enforcing and interpreting the same.

Who are next of kin according to the statutes of Montana, and who share directly in the estates of persons domiciled in Montana at their decease, are strictly local questions, as to which the decisions of the highest tribunal of the State would ordinarily be conclusive. As to this particular, the phraseology of the decree and the decisions of the highest court of the State of Montana are strictly with the complainant. The decree says: "The parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit". Then the decree divides the estate into 1100 parts, and assigns to various next of kin concerned several of said 1100 parts, all "in kind". This, on its face, can be interpreted only as giving the next of kin the "property of the deceased", or portions thereof, and not at all distributing it "as the property of John A. Davis". The Supreme Court of Montana, in *In re* Davis' Estate, 71 Pacific Rep. 757, 27 Montana Rep. 490, on an issue directly made, under such circumstances that none of the rulings to which we will refer can be held as a dictum, held that the court which entered the decree of the twenty-fourth of August, 1897, had jurisdiction to enter the same, and that the same was conclusive on the parties in interest. The case was an appeal from an order of

the lower court referred to, making a partial distribution of Mr. Davis's estate, on the petition of Henry A. Root and others. An appeal was taken against the order of distribution by the administrator, and by some other parties, because, among other reasons given, Root was neither an "heir, devisee, or legatee" within the meaning of those words as used in the statutes of Montana providing for such appeals; but the court rejected this contention, and the opinion says, among other things: "The petitioners", meaning Root and those associated with him, "are in effect distributees". Referring to the decree of the twenty-fourth of August, 1897, the opinion further says: "The order itself became the basis of administration, and controlling as to the devolution of the property. But whatever the language of the opinion, the decision was directly to the point that Root, and those associated with him, came, with reference to their application for distribution, within the terms of the statute, "heir, devisee or legatee". Therefore, whether regarding the true rule for construing this informal agreement, or conceding that the respondents, with the view of defeating its purposes, were entitled to bring into it the terminology which we say they have sought to bring into it, and conceding that, in any view, they are entitled to a narrow, technical construction of the words "get their shares", their positions are met by the application of the decision of the highest court of the State where the contract was made and intended to be carried out.

This leaves only the question whether or not the will was "defeated" within the meaning of the contract. It is true the will contained certain bequests to Pet Davis, Thomas Jefferson Davis and Miss Bergett. The will was made in 1866; the bill states that these were "minor bequests of maintenance", and that some of the three persons named had deceased. So far as the record is concerned, there is nothing to cause us to conclude that these bequests were of any actual value in 1897. In the presentation of the case to us no reference has been made to them by either party except incidentally, and no point made on their account. Therefore, on this demurrer, we must assume that they are inconsequential. Had they been bequests absorbing a large portion of the estate, then, by the terms

of the decree, it might well be said that the will had not been defeated in any proper sense of the word. It is sufficient, however, for the present purpose, that it is not denied that the parties named in the agreement of August 17, 1891, received what was the equivalent of their full shares of the estate, and more. Therefore, we must conclude that the bequests are of minor consequence, or such a division of the estate could not have been accomplished. At any rate, for the reasons stated, they pass from our consideration. Such being the fact, it is difficult to understand how it can be maintained, as a matter of substance, that the will has not been "defeated", when the decree disposing of the estate ignores and rejects all of its provisions. As we have already said, an informal contract, like this under consideration, is to be interpreted according to matters of substance. Under the decree 1897 the will became a mere name and only a husk. Of course the decree is to be taken as a whole, and, taken as a whole, the will is named in it only to be annulled and disregarded. It is impossible to understand how, under the circumstances, in any true sense of a contract like that under consideration, it can justly be claimed that the will was not defeated.

Here again, however, the respondents insist on injecting words not found in the contract. They say that the statutes establishing the probate practice in Montana provide for the special verdict of a jury, with a judgment to follow it, "either admitting the will to probate, or rejecting it": and they ask whether there can be any doubt that the contract was made in the light of this statute, and they maintain that what the parties had in mind was a judgment rejecting the will in accordance with the terms of the statute. But nothing in the contract adopts the statute. Nowhere does the contract use the word "rejected". The whole of this is sought to be injected, as we have said, for the purpose of defeating a reasonable construction of the contract, and, therefore, for reasons already stated, it is not permissible.

Thus, taking up the case *de novo*, and independently of the decision and opinion of the Supreme Court of Montana in Harris *v.* Root, 72 Pacific Rep. 129, 27 Montana, 560, on which the respondents rely with much confidence, it is our view that all the terms of

the contract of August 17, 1891, have been fully and substantially met: and, upon the demurrers as the case now stands, it is with the complainant.

The suit of Harris *v.* Root was brought by one John S. Harris, who had been appointed ancillary administrator in Montana of the goods and estate of the complainant's intestate. The respondents are correct in maintaining that the essential subject matter of the suit was the same as that now before us, and that the opinion rendered in behalf of the court was directly against Harris as administrator thereon. The respondents also state with full accuracy the rules of *res judicata* as enforced in the Federal courts. If, as the record stands, the judgment in Harris *v.* Root had been on the merits, and if, also, the ancillary administrator in Montana had been in the sense of the law in privity, the judgment of the Montana court would have been an estoppel and would have defeated this bill.

Looking at the record submitted to us with reference to the motion for a temporary injunction in this case, in which appear the entire proceedings in the Montana courts in Harris *v.* Root, the aspect there presented to us leads strongly to the conclusion that the judgment was based on the merits, and that the dismissal was something more than a mere nonsuit: so that, on the face of these papers, notwithstanding the peculiarity of the Practice Acts of Montana with reference to dismissal of suits, we are strongly impressed with the view that the final judgment therein would operate as a bar towards all in privity. Nevertheless, the bill fails to make a part of itself the record proper containing these proceedings. It sets up this litigation only incidentally in its charging part, with the view of meeting any suggestion of laches, and it alleges in terms a non-suit. Of course, therefore, this allegation, admitted on demurrer, has nothing in the record to qualify it. Consequently, as the suit stands before us, in no event does the Montana litigation estop the complainant with reference to her present bill. But in no aspect can it operate as an estoppel. The law is settled beyond question that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction: so that no judgment by or against Harris as ancillary administrator in Montana could

avail for or against an ancillary administrator appointed by the courts of Massachusetts, bringing a suit in that State, or in this District, although the cause of action was identically the same. This rule is so thoroughly established that we need not dwell upon it, only to say that it has been fully recognized and enforced by the Supreme Court in Ashden *v.* Nixon, 1 How. 167, 197; Stacy *v.* Thrasher, 6 How. 44, 58 and sequence; Johnson *v.* Powers, 139 U. S. 156, 159; Carpenter *v.* Strange, 141 U. S. 87, 104.

Nevertheless, the result in Harris *v.* Root and the opinion of the court therein cannot be overlooked. First of all, if the application for a temporary injunction had been an ordinary application for such an injunction, there can be no doubt that the proceedings in Harris *v.* Root would have barred it. The underlying interests were the same; and, on an ordinary motion for temporary injunction, we should have said that the complainant had had, in a certain sense, her day in court, and could not be allowed by subsequent litigations, one, two, three, or more, to vex the respondents by such applications. But, in this case, the order for an injunction was not for the usual purpose of an *ad interim* injunction However, by well settled rules, on the question of construction of this contract, and, also, on the questions involved relating to a compliance with its terms, neither the opinion nor the decision of the Supreme Court of Montana, inasmuch as the latter does not operate absolutely as an estoppel, can bind this court. Yet they are entitled to very great consideration, and, therefore, we should yield to the opinion if we could reasonably do so. But it is impossible for us to accept its propositions.

We will state generally that the line of the opinion is in the same direction as that taken by the respondents, in that, instead of availing itself of the just and reasonable rules of construction applicable to informal instruments of this character, it insists on close, technical propositions. It takes no notice, however, of the respondent's claim that the shares obtained by the parties named in the agreement of August 17, 1891, did not come to them as next of kin. Its fundamental defect is in the interpretation it puts on the nature of Mr. Ingersoll's retainer, thus, at the very first step, making a departure from the path which leads to a true construction of the contract.

The opinion says that Mr. Ingersoll "was willing to embody in the contract the provision that neither Root nor Coram should be liable, except upon the complete success of the enterprise through a contest". Referring to this particular, and, also, to other particulars, the opinion proceeds that counsel for the defendants contended that "this is the only construction of which the contract is susceptible"; and it concludes as to this that the court agrees with this contention. No such phraseology, however, can be found in the contract. So far as a contest is concerned, it merely assumes that one is pending, and that the compensation to be made to Mr. Ingersoll is for his services therein; but it does not in terms render it a condition that the complete success, that is, the defeating of the will, must come "through a contest". In other words, if after the agreement of August 17, 1891, was made, and after the long trial in which Mr. Ingersoll was subsequently engaged when the jury disagreed, as we have already said, the proponents of the will had suddenly abandoned their claim that it should be probated, and thereupon the court had allowed it, Mr. Ingersoll would, by the terms of his contract, have been entitled to his stipulated fee. There can be no question on this point; and, yet, by thus inserting in the contract what does not there appear, and by which no reasonable or just purpose can be accomplished, the court in Harris *v.* Root entered on a path which inevitably led it astray. Whatever occurs in the opinion subsequently to this flows out of it, especially the proposition that Mr. Ingersoll's retainer required him to prosecute the contest, and the further proposition that his retainer did not authorize him to compromise the controversy, and that, when additional authority for that purpose was conferred upon him by his clients, it was in substance a new retainer operating as a mutual abandonment of the contract. Independently of the fact that, as the bill stands, whatever Mr. Ingersoll may have done in the way of aiding a mere compromise, if there had been in legal effect only a compromise, would not have been a violation of his retainer, but simply performing additional services for which he might have been entitled to additional compensation.

An extract we have already made from the bill puts this correctly,

in saying that Mr. Ingersoll not only rendered services and counsel in the prosecution of the contest, "but he also advised and counseled, and aided, in consummating and effectuating the arrangements and proceedings by which said decree determining said contest" "was obtained." Not only is it impossible from these allegations to infer an abandonment of the original retainer, but the retainer itself, as shown by the contract of August 17, 1891, was of too general and liberal a character to be put within the narrow lines laid down for it in Harris *v.* Root.

Moreover, the line of reasoning in the opinion under consideration travels in a circle. It argues that Mr. Ingersoll was not entitled to compensation unless the result contemplated by the contract was secured by a contest, but in doing this it assumes that what was secured was not the legitimate result of the contest made by him. As we have seen, the court was not justified in making this assumption. We are confident that there is nothing in this opinion which requires that we should depart from the natural methods, applicable by settled rules to the solution of questions arising under informal contracts like that at bar.

There is no doubt that the particular form of result by which the will in this case was defeated, and by which the parties concerned derived their shares in Mr. Davis's estate, was not anticipated when the contract of August 17, 1891, was made; yet, as said in Pollock's Principles of Contracts, 7th ed. 257: "In such cases, any rule not inconsistent with justice is better than uncertainty." We think we have complied with that suggestion; and we have, also, given proper effect to the well settled rule, repeated in Addison's Law of Contracts, 10th ed. 12, to the effect that the terms of contracts are to be understood in "their plain and ordinary and popular sense", unless for some reason they have acquired "a peculiar sense distinct from the popular sense." Neither of the vital expressions in this contract, that is, the word "defeated" and the words "their shares", has any technical meaning in the law, or "any peculiar sense distinct from the popular sense" in any way acquired. Therefore, we cannot understand why the respondents are entitled to replace the word "defeated", so common in ordinary use, by the statutory "rejected",

or add to the words "their shares" the words "as next of kin", or, in any way, replace either of these crucial expressions by, or add to them, the technical words of the law which the parties to the contract saw fit not to use.

Our conclusion, therefore, is that, on the record now before us, the bill should be sustained except as against Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar, and except so far as it claims a statutory lien. We need not express our views, however, at this stage of the case, as to the method of working out the details of what the bill seeks to obtain.

The conclusion to which we have come may require some modification of the *ad interim* injunction ordered in this case; and, if either of the parties to the bill desires, application can be duly made therefor, and will be heard by the court.

Inasmuch as it is settled law that, whatever order is now entered, it will only be of an interlocutory character, and that there can be no order actually dismissing any parties from the record until the final decree; and, as it may be ultimately held, on hearing on bill, answer and proofs, or on appeal, that the parties respondents who are now ordered to be discharged, should not be, the court reserves all questions of costs to abide the ultimate result.

It is ordered that, after the bill has been perfected as to parties, in the manner in which it should be perfected as set out in the opinion passed down this day, there will be an order for an interlocutory decree, holding that the demurrers are good and sufficient so far as they relate to all portions of the bill claiming a statutory lien, and to those portions making Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar respondents; that so much of the bill as seeks to establish a statutory lien be dismissed; that Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar shall be dismissed as parties respondent; also, adjudging that the said demurrers are insufficient in law as to all other portions of the bill and other parties made respondents therein; and that such other respondents may answer within such time as shall be fixed by the court.

AMENDMENT TO BILL OF COMPLAINT.

[Filed January 14, 1904.]

To the Honorable Judges of the Circuit Court of the United States for the District of Massachusetts:

Eva A. Ingersoll, of Dobbs Ferry, Westchester County, State of New York, as administratrix of the estate of Robert G. Ingersoll, deceased, by leave of Court in that behalf first had and obtained, brings this her amendment of her bill of complaint heretofore filed in this court on June 15, 1903.

And thereupon your orator complains and makes amendment of her bill of complaint herein as follows:

1. By inserting immediately before and in connection with the words "Elizabeth S. Ladd" where the same appear on page 1 of complainant's bill the words, "Charles H. Ladd as administrator of the estate of".

2. By inserting immediately before and in connection with the words "Elizabeth S. Ladd" where the same appear on page 2 of complainant's bill the words, "Charles H. Ladd as administrator of the estate of".

3. By inserting at the close of the paragraph which ends with the words "twenty-one years" on page 3 of complainant's bill as filed, and on page 2 thereof as printed, a paragraph as follows:

"That said Elizabeth S. Ladd died intestate at Springfield, Massachusetts, on November 25, 1902, a resident of said Springfield; that said Charles H. Ladd is the duly appointed qualified and acting administrator of the estate of said Elizabeth S. Ladd."

4. By inserting immediately before and in connection with the words "Elizabeth S. Ladd" where the same appear on page 17 of complainant's bill as printed, and on page 23 thereof as filed, the words "Charles H. Ladd as administrator of the estate of".

5. By inserting immediately before and in connection with the word "Elizabeth" where the same appears on page 11 of complain-

ant's bill as printed, and on page 55 thereof as filed, the words "Charles H. Ladd as administrator of the estate of".

Wherefore your orator prays as she has before prayed in her original bill, and that said defendant Charles H. Ladd as administrator of the estate of Elizabeth S. Ladd may answer, but not under oath, such oath being hereby waived, according to the practice of this Court all and singular the matters and things charged in complainant's original bill of complaint, if the Court shall so adjudge that he be a necessary party thereto.

EVA A. INGERSOLL.
as Administratrix of the Estate of ROBERT G. INGERSOLL, *deceased, Complainant,*
by E. N. HARWOOD, *and* HOLLIS R. BAILEY,
her Solicitors.

DEMURRER OF CHARLES H. LADD, MARY LOUISE DUNBAR AND CHARLES H. LADD, ADMINISTRATOR OF THE ESTATE OF ELIZABETH S. LADD.

[Filed by Consent January 14, 1904.]

And now come the above named respondents and adopt as their own the demurrer heretofore filed in the above entitled case by the respondents Joseph A. Coram and others.

By their Solicitor,
FREDERICK N. WIER.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law and that the same is not interposed for delay.

FREDERICK N. WIER,
Solicitor and of Counsel for Defendants.

ORDER OF COURT.

January 14, 1904.

PUTNAM, J. By leave of Court, the complainant amends the bill by striking out the name of Elizabeth S. Ladd, who deceased before the bill was filed.

By leave of Court, the complainant further amends the bill by making Charles H. Ladd, of Springfield in the State of Massachusetts, a citizen of Massachusetts, individually and as administrator of the goods and estate of Elizabeth S. Ladd, a party defendant, according to the agreement between the parties filed on December 28, 1903.

Appearances of Frederick N. Wier for respondents Charles H. Ladd, Mary Louise Dunbar and Charles H. Ladd, administrator, filed this day, are allowed.

Demurrer of Charles H. Ladd, Mary Louise Dunbar and Charles H. Ladd, administrator, filed this day by leave of Court under agreement of parties.

By leave of Court, amendment made waiving the answer under oath of the parties named in the agreement relating thereto.

By the Court,

BENJ. H. BRADLEE,
Deputy Clerk.

INTERLOCUTORY DECREE.

January 14, 1904.

PUTNAM, J. Ordered: In accordance with the opinion passed down December 30, 1903, it now appearing that the bill has been perfected as to parties, and that all the parties respondent have appeared, as therein required, the demurrers are adjudged good and sufficient so far as they relate to all portions of the bill claiming a statutory lien, and to all those portions making Charles H. Ladd, Charles H. Ladd, administrator of the estate of Elizabeth S. Ladd, Mary Louise Dunbar and Herbert B. Cummings, executor of the

will of Sarah Maria Cummings, respondents, and the bill will be dismissed as against said Charles H. Ladd, Charles H. Ladd, administrator, Mary Louise Dunbar and Herbert B. Cummings, executor.

It is further adjudged and ordered that said demurrers are insufficient in law as to all other portions of the bill, and as to all other parties made respondent thereto, and that as to such portions and parties the bill is sufficient in law; and that such other parties may answer, but not plead, on or before the fourth day of April next; and all questions of costs are reserved.

By the Court,

BENJ. H. BRADLEE,
Deputy Clerk.

ANSWER OF ANDREW J. DAVIS, TRUSTEE.

[Filed March 22, 1904.]

This respondent for answer to complainant's bill, or so much thereof as advised should be answered, says:

First. That he has no reason to doubt and therefore believes the allegations contained in the paragraphs numbered respectively from 1 to 7, both inclusive.

Second. That as to the allegations contained in paragraphs numbered 8, 9 and 10 this respondent is ignorant, and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

Third. That as to the allegations contained in paragraph numbered 11 this respondent can neither admit nor deny whether the reasons and considerations for the order and decree were as alleged in said paragraph or whether the legal representative, heirs and successors in interest of John A. Davis were constrained to yield and did yield consent as therein alleged for the reasons set forth, and will leave complainant to prove same.

He admits that such order and decree were entered in said District Court of the State of Montana as alleged; that this respondent accepted the trust provided therein, and certain property was by said decree allotted to the respondent Charles H. Palmer and this respon-

dent for the uses and purposes set forth in said paragraph numbered 11.

Fourth. As to the allegations contained in paragraphs numbered 12 and 13 this respondent is ignorant and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

Fifth. That he admits the allegations contained in paragraphs numbered 14 and 15, so far as the same relate to decrees entered in said case, but so far as same relate to the employment of or services rendered by Robert G. Ingersoll, or the effect thereof, he is ignorant and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

Sixth. He admits the allegations in paragraph numbered 16.

Seventh. As to the allegations contained in paragraphs numbered 17 and 18, 19, 20, 21 and 22 this respondent is ignorant and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

Eighth. As to the allegations contained in paragraph 23 this respondent admits that a portion of the estate of Andrew J. Davis of the value of four hundred and fifty thousand (450,000) dollars is still in the custody of John H. Leyson as administrator of said estate in Massachusetts, but as to the other allegations in said paragraph contained he is ignorant and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

Ninth. As to the allegations contained in paragraphs numbered 24 and 25 this respondent is ignorant and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

Tenth. As to the allegations contained in paragraph numbered 26, he admits that John H. Leyson, duly appointed and qualified as administrator of the estate of Andrew J. Davis in Massachusetts, holds property in such capacity as alleged, but whether a lien thereon exists in favor of the estate and legal representatives of Robert G. Ingersoll or any part thereof, or as to the effect of the distribution of said funds by said Leyson, as alleged in said paragraph, he is ignorant and can neither admit nor deny, and will leave complainant to prove same if she deems them material.

He admits that said Leyson at the time alleged was commorant of Massachusetts and also had duly appointed Horace G. Allen, a resident of Boston, Massachusetts, as his agent as such administrator upon whom process could be served.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged: without this, that there is any other matter, cause or thing in the said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant: all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct: and prays to be hence dismissed with his reasonable costs and charges in this behalf wrongfully sustained.

ANDREW J. DAVIS.

HORACE G. ALLEN, *Solicitor.*

MOTION FOR LEAVE TO AMEND DATE IN BILL OF COMPLAINT.

Filed March 21 1904.

Comes now complainant in the above-entitled action by her solicitors and moves the Court for leave as permitted by Equity Rule 28 to amend complainant's bill of complaint filed in said action by changing the figure "5" in line 20 on page 23 of said bill as filed, and the same figure in line 11 on page 17 of said bill as printed, to the figure 3, so as to make the date "1895" as now written in said line read 1893 as amended, and that the clerk of the above-entitled Court be directed to make said amendment in the original and printed bill on file in his office in said cause.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Solicitors for Complainant.

STIPULATION FOR AMENDMENT OF BILL OF COMPLAINT.

[Filed March 24, 1904.]

It is hereby stipulated by and between the complainant and defendants in the above-entitled action by their undersigned solicitors that complainant's bill of complaint in the above-entitled action may be amended by changing the figure "5" to "3" where the same is written in line 20 of page 23 of complainant's bill as filed, the same being in line 11 on page 17 of said bill as printed, so that the date "1895" mentioned in said line shall as amended read 1893, and the clerk of the above-entitled Court is hereby authorized and directed to make said amendment in the original and printed bill by changing the figure "5" as it appears in said line of complainant's bill to "3".

E. N. HARWOOD,
HOLLIS R. BAILEY *and*
JOHN H. HAZELTON,
Solicitors for Complainant.

FREDERICK N. WIER,
Solicitor for Defendants
JOSEPH A. CORAM,
HENRY A. ROOT,
CHARLES H. PALMER, *Trustee.*

HORACE G. ALLEN,
Solicitor for Defendants
JOHN H. LEAVSON,
ANDREW J. DAVIS, JR., *Trustee.*

ORDER ALLOWING AMENDMENT OF BILL OF COMPLAINT.

March 24 1904.

PUTNAM, J. On motion of solicitors for complainant in the above-entitled action, all the respondents having assented in writing, it is by the Court

Ordered that complainant be and is hereby granted leave to amend her bill of complaint in the above-entitled action by changing the figure "5" as it appears now written in line 20 on page 23 of said bill as filed in the clerk's office and the same figure in line 11 on page 17 of said bill as printed to the figure 3, so that the date "1895" as orighnally written in said bill shall read 1893 as amended; and that the clerk of this Court make said amendment in said original bill as filed in his office and also in said bill as printed.

By the Court,

L. C. TUCKER,

Deputy Clerk.

ANSWER OF CORAM ET AL.

[Filed April 4, 1904.]

The Joint and Several Answers of Joseph A. Coram, Henry A. Root, Charles H. Palmer, *Trustee*, Charles H. Ladd, *individually and as Administrator of the Estate of* Elizabeth S. Ladd, *Deceased*, Mary Louise Dunbar *and* Herbert P. Cummings, *as Executor of the Last Will and Testament of* Sarah Maria Cummings, *Deceased, to the Bill of Complaint of* Eva A. Ingersoll, *as Administratrix of the Estate of* Robert G. Ingersoll, *Deceased, Complainant.*

These defendants respectively, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint, for answer thereto, and as to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

For answer to the first paragraph of said bill of complaint these defendants admit that on or about March 11, 1890, Andrew J. Davis, then a citizen and resident of the City of Butte, County of Silver Bow and State of Montana, died at said place, leaving an estate consisting of real and personal property situate in the State of Montana and in the Commonwealth of Massachusetts and elsewhere in the United States, and that the said estate was of great value, but they deny that it was, as in said paragraph alleged, of the value of from $2,000,000 to $5,000,000 and call for proof of said allegation. They also admit that the said Andrew J. Davis left him surviving brothers, sisters, nephews and nieces, who were his next of kin and heirs at law and as such entitled to succeed to said estate under the laws of the State of Montana in shares of one eleventh each, there being eleven heirs at law of said decedent *per stirpes*. And these defendants further admit that the persons named in said first paragraph, viz., Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar, were among the next of kin and heirs at law of said deceased and were related to said deceased as therein alleged and were entitled to share

in the estate of said deceased in case he died intestate as therein alleged.

For answer to the second paragraph of said bill of complaint these defendants admit that in July, 1890, John A. Davis, a surviving brother of said Andrew J. Davis, residing as in said paragraph alleged, propounded for admission to probate and record in and by the District Court of the Second Judicial District of the State of Montana in and for said County of Silver Bow, the Court having original domiciliary jurisdiction of the estate of Andrew J. Davis, deceased, a certain writing, dated in the year 1866, which purported to be the last will and testament of said Andrew J. Davis, deceased; that said writing was accompanied by a petition of said John A. Davis, which contained averments in substance as alleged in said paragraph second of the said bill of complaint, and that in said petition the said proponent prayed that said writing be by the judgment of said Court, after proper notice to the heirs of said decedent and hearing of said petition, admitted to probate in and by said District Court as the last will and testament of said Andrew J. Davis, deceased.

For answer to the third paragraph of said bill of complaint these defendants admit that by said writing, so propounded as the last will and testament of said Andrew J. Davis, deceased, all the estate which he left, except three minor bequests of maintenance to three persons, some of whom had died since 1866, was devised and bequeathed to the said John A. Davis, that neither of the said five heirs thereinbefore mentioned was given or bequeathed or devised anything by the terms of said alleged will, and that if said writing had been admitted to probate as the last will and testament of Andrew J. Davis, deceased, without qualification, neither of said five heirs above mentioned would have gotten any part of said estate by virtue of their kinship to said decedent.

These defendants also admit that the said John A. Davis and his heirs, successors and legal representatives prosecuted for a long period of time said petition and proceedings in said District Court to establish and cause said writing so propounded to be admitted to

probate by said Court as the last will and testament of Andrew J. Davis, deceased.

For answer to the fourth paragraph of said bill of complaint these defendants admit that for the purpose of opposing the admission of said alleged will to probate and securing and getting said shares of said estate to which said Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd and Mary Louise Dunbar were entitled as next of kin and heirs at law of said Andrew J. Davis, deceased, as an intestate, associated themselves together for the purpose alleged in said fourth paragraph, and for that purpose, after notice of the propounding of said alleged will for admission to probate, objections to the admission thereof to probate were filed in said District Court of Montana by the said Henry A. Root and Sarah Maria Cummings, respectively, and that the grounds of such objections were in substance those alleged in said paragraph fourth of the bill of complaint.

That said contests of and objections to the admission of said alleged will to probate were pending and were prosecuted in said District Court of Montana from the time of the institution thereof until the same were finally determined as thereinafter set forth.

For answer to the fifth paragraph of said bill of complaint these defendants admit that an agreement between the persons therein stated was made, executed and delivered as therein alleged, and these defendants believe that the copy of said agreement annexed to the bill of complaint and marked "Exhibit A" is an accurate copy of the original agreement, but for greater certainty they ask that the original agreement may be produced on the hearing for the examination and information of court and counsel as to all matters therein contained as alleged in said bill of complaint.

These defendants admit that, after the execution and delivery of said agreement, Gideon Wells, therein named as joint trustee with the said Henry A. Root, died and that no successor of said Wells has ever been appointed to act as joint trustee in the behalf mentioned in said instrument, and that said Henry A. Root during all the times in the bill mentioned acted, and is still acting, as sole representative of his said four associates in reference to said will

contests and other matters in relation to their interests in said estat herein mentioned.

These defendants deny all of the allegations of said paragraph fifth of the bill of complaint not herein already admitted, and cal for proof of each and all of said allegations in said paragraph con tained.

For answer to the sixth paragraph of said bill of complaint these defendants admit that Joseph A. Coram acquired and still has, own and holds all the remaining interests and shares claimed and finally acquired by Elizabeth S. Ladd and Mary L. Dunbar in and to said estate of Andrew J. Davis, deceased, and that the claims, rights and interests of said Coram in said estate were dependent upon the prosecution of said objections to and contests of the validity of said alleged last will and testament of said Andrew J. Davis, deceased, in opposition to the admission thereof to probate instituted in the names of Henry A. Root and Sarah Maria Cummings until said shares of said estate to which said five heirs were entitled as heirs at law of Andrew J. Davis, deceased, were secured to them by grant and assignment from the proponent to said alleged will or by decree of said District Court of the State of Montana having jurisdiction of said estate and contests in the determination of said contests.

These defendants deny that the said Joseph A. Coram also acquired and now has some interest in the shares, parts and parcels of said estate acquired by said Henry A. Root, Ellen S. Cornue and Sarah Maria Cummings, or some of them, through said contests and proceedings therein mentioned.

For answer to the seventh paragraph of said bill of complaint these defendants admit that after said objections to and contests of the validity of said alleged will were instituted and pending in said District Court of Montana, and before any trial of either of said contests was had, the said Henry A. Root and Joseph A. Coram employed Robert G. Ingersoll to act as counsel in the prosecution of said contests in opposition to the admission of said alleged will to probate for and on behalf of said five heirs associated in said contests with said Joseph A. Coram. These defendants, however,

deny that they employed the said Robert G. Ingersoll to act as attorney in the prosecution of said contests.

These defendants also admit that the said Robert G. Ingersoll accepted said employment and in fulfillment thereof rendered valuable services and counsel in the prosecution of said objections and contests.

For answer to the eighth paragraph of said bill of complaint these defendants admit that, during the rendition of said services and counsel by said Robert G. Ingersoll in the prosecution of said objections to and contests of the validity of said alleged will in opposition to probate in said District Court of Montana, said Henry A. Root and Joseph A. Coram signed and delivered to said Robert G. Ingersoll an instrument in writing, and these defendants believe that the copy thereof annexed to the bill of complaint and marked "Exhibit B" is an accurate copy of the original writing, but for greater certainty they ask that the original may be produced on the hearing for the examination and information of the court and counsel as to all matters contained therein as alleged in said bill of complaint. These defendants also admit that the said Joseph A. Coram subscribed said writing by using the initial letters "J. A." to represent his first or Christian name "Joseph A."

For answer to the ninth paragraph of said bill of complaint these defendants admit that the said Robert G. Ingersoll rendered services in the prosecution of said contests mentioned in said writing, both before and after said writing was made and delivered; but these defendants deny that the said Robert G. Ingersoll fully performed the services for which it was promised and agreed as aforesaid he should be paid said fee of $100,000 as compensation, and call for strict proof of said allegation in said paragraph contained.

For answer to the tenth paragraph of said bill of complaint these defendants admit that a trial of the objections filed by said Henry A. Root in opposition to the admission of said alleged will to probate was had in 1891 by the said Court and a jury; that said trial lasted about seven consecutive weeks; that said Robert G. Ingersoll attended said trial and by leave of said Court took an active part in said trial and that the jury disagreed, and that in consequence said

writing was not then admitted to probate as the last will and testament of said Andrew J. Davis, deceased.

These defendants deny the allegations of said paragraph tenth not herein expressly admitted, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the eleventh paragraph of the said bill of complaint these defendants admit that thereafter the said Ingersoll continued to make preparation for another trial of said contests in opposition to the admission of said will to probate, and counselled, advised and aided said contestants in relation thereto.

These defendants further admit that on or about April 28, 1893, an agreement was made between the heirs at law of John A. Davis, deceased, and John E. Davis, administrator of the estate of John A. Davis, deceased, as parties of the first part and Henry A. Root, Sarah Maria Cummings and Mary L. Dunbar, Ellen S. Cornue and Joshua G. Cornue, her husband, Elizabeth S. Ladd and Charles H. Ladd, her husband, parties of the second part, whereby it was among other things provided that if said alleged will should be finally probated the decree to be entered probating said will should provide for the distribution of said estate as follows: To the parties of the first part two elevenths of said estate in kind; to the parties of the second part two and one-half elevenths of said estate in kind; to Charles H. Palmer and Andrew J. Davis, Jr., as trustees, one eleventh of said estate in kind, to be delivered over and transferred by them to the said parties of the second part; the remainder of the estate to Charles H. Palmer and Andrew J. Davis, Jr., to be by them held in trust for the use and benefit of and to be divided equally between the said parties of the first part and the parties of the second part. These defendants, however, deny that the terms of said agreement are correctly set forth in paragraph eleventh of said bill of complaint, and for greater certainty ask that the original of said agreement be produced on the hearing for the examination and information of court and counsel as to all matters contained therein as alleged in said bill of complaint.

These defendants deny the allegations in said paragraph eleventh of the said bill of complaint, except such as have been herein

expressly admitted, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twelfth paragraph of said bill of complaint these defendants admit that on or about March 27, 1895, a decree of said District Court of Montana was entered which admitted the said alleged will to probate as the last will and testament of Andrew J. Davis, deceased, and which also ordered that Harriet R. Sheffield and Henry A. Davis should have and receive each one fiftieth of said estate in kind on the distribution or distributions thereof; that Andrew J. Davis, John E. Davis, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis should receive nineteen forty-fourths of the remainder of the said estate, after providing for the one twenty-fifth of said estate for Harriet R. Sheffield and Henry A. Davis as above, and that Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd and Charles H. Ladd, her husband, and Ellen S. Cornue and Joshua G. Cornue, her husband, should have and receive twenty-five forty-fourths of the remainder of said estate in kind after providing for the one twenty-fifth thereof for the said Harriet R. Sheffield and Henry A. Davis.

These defendants for greater certainty ask that the original of said decree, or a duly exemplified copy thereof, be produced on the hearing for the examination and information of court and counsel as to all matters contained therein as alleged in said bill of complaint.

These defendants deny all of the allegations in said paragraph twelfth of the said bill of complaint, except such as have been herein expressly admitted, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the thirteenth paragraph of said bill of complaint these defendants admit that other contests of said will were instituted in said District Court of Montana by other heirs at law of said Andrew J. Davis, deceased, for the purpose of securing shares of said estate and that said other contests were pending in the said District Court until finally disposed of as thereinafter set forth. These defendants further admit that after the making and delivery

of said agreement between the proponents of said alleged will and said five heirs associated together in said contests thereof as aforesaid, which said agreement was dated April 28, 1893, each and all parties to said last mentioned agreement acting together made adjustments, arrangements and stipulations with each and all other heirs of said Andrew J. Davis, deceased, who had interposed in said District Court of Montana contests and litigation for the purpose of securing a share of said estate, by which it was stipulated and agreed that there should be allotted by decree of said District Court in determining said litigation and contests in respect to said alleged will and estate to said other contesting heirs, severally or in groups, a certain fractional part of the shares or interests of, in and to said estate to which they were entitled as heirs at law of Andrew J. Davis, deceased, and that said fractional portions were allotted to said other heirs as set forth and provided in the decree finally made and entered in and by said District Court in determining said contests and litigation as hereinafter shown, and that the last of said stipulations was made on or about August 6, 1897.

These defendants allege that these adjustments, arrangements and stipulations were contained in three several agreements, one dated on or about March 25, 1895, one dated on or about June 22, 1897, and one dated on or about August 6, 1897.

These defendants for greater certainty ask that the originals of these agreements be produced on the hearing for the examination and information of court and counsel as to all matters contained therein as alleged in said bill of complaint.

For answer to the fourteenth paragraph of said bill of complaint these defendants admit that said District Court by its order duly made and entered on or about August 24, 1897, sanctioned and approved the action of John E. Davis, as administrator of the estate of John A. Davis, deceased, in consenting and entering into each and all of said agreements concerning the entry of a decree or decrees of said District Court determining said litigation in regard to said alleged will and contests thereof and providing for the parcelling and distribution of said estate according to a decree of said District Court then and there duly made and entered of record.

For answer to the fifteenth paragraph of said bill of complaint these defendants admit that on August 24, 1897, the said District Court of Montana made a decree, and these defendants believe that the copy of said decree annexed to the bill of complaint and marked "Exhibit C" is a correct copy of said decree, but for greater certainty they ask that the original decree, or a duly exemplified copy thereof, be produced on the hearing for the examination and information of court and counsel as to all matters contained therein as alleged in said bill of complaint.

These defendants admit that said five heirs and Coram have participated in, and have had and received and had the use and benefit of 515½/1100 of each and all distributions heretofore made of funds and other property of said estate of Andrew J. Davis, deceased, both real and personal.

These defendants admit that Henry A. Root and Joseph A. Coram and their associates in said will contests agreed to, sanctioned, approved and acquiesced in each and all of said stipulations, arrangements and proceedings, but they deny that thereby said contests were successfully determined in their favor as aforesaid, and that thereby said five heirs, for whom said Robert G. Ingersoll rendered said services in the prosecution of said will contests mentioned in said agreement and promise, made and delivered to and with him by said Root and Coram, got the shares to which they were entitled as heirs at law, and they deny that the said Henry A. Root and Joseph A. Coram and their associates in said contests now have absolute right and title thereto, and right to ask, demand, take, receive and receipt therefor, and have the use and benefit thereof.

These defendants admit that the said Ingersoll not only rendered services as counsel in the prosecution of said contests for and on behalf of said five heirs mentioned in said agreement and promise made to and with him as aforesaid in fulfillment thereof on his part, but also advised, counselled and aided in consummating and effectuating said arrangements and proceedings by which the said decree of August 24, 1897, was obtained. These defendants deny that said decree determined said contests in favor of said five heirs, or that by said decree said five heirs were awarded decrees and became

vested with title to and got 5154 1100 of all and singular the funds and other property, both real and personal, of said estate of Andrew J. Davis, deceased.

These defendants further deny the allegations contained in said paragraph fifteenth of said bill of complaint, except such as have been herein expressly admitted, and they call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the sixteenth paragraph of said bill of complaint these defendants admit that on August 26, 1897, said District Court of Montana ordered and directed Leyson, as administrator of said estate of Andrew J. Davis, deceased, to distribute out of the funds of said estate in his custody in the State of Montana and deliver to said five heirs directly $152,272.73, and also to distribute out of the funds of said estate in his custody in the State of Montana and deliver to said trustees, Palmer and Davis, Jr., the sum of $262,518.18 in trust for the use and benefit of the parties to said agreement of April 28, 1893, and that of the said sum last mentioned said five heirs and Joseph A. Coram were entitled to have and receive $161,713.39 as beneficiaries in said trust, and that said sums of money aggregate $313,986.12; that said sums were distributed and paid over to said five heirs and Coram and for their use and benefit to said trustees in accordance with said decree of August 24, 1897. These defendants also admit that by the same order of distribution the said District Court ascertained, fixed, adjudged and determined the value of annuities mentioned in said will to be sums which aggregate all together not exceeding $15,000; that all said annuities were fully paid and fully settled and discharged by the expenditure of not exceeding said last mentioned sum out of the funds of said estate.

These defendants further admit that all real estate belonging to said estate of Andrew J. Davis, deceased, at his death situate in the State of Montana was on February 8, 1898, by order of said District Court, distributed and delivered to the persons and in the undivided shares and interests as mentioned and provided in said decree of said District Court of Montana of August 24, 1897, and that said five heirs and Coram, as assignee of some of them,

received 515¼/1100 undivided parts, parcels and interests in and to said real estate directly and through said Palmer and Davis, Jr., trustees as aforesaid. These defendants deny that the value of the real estate ordered to be distributed and delivered by said decree of February 8, 1898, was of a value exceeding $1,000,000.

These defendants further deny the allegations contained in said paragraph sixteenth of said bill of complaint, except such as have been herein expressly admitted, and they call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the seventeenth paragraph of said bill of complaint these defendants admit that Henry A. Root and Joseph A. Coram and their associates in said will contests have heretofore by deeds of conveyance conveyed away and divested themselves of all right, title and interest in and to said real estate. These defendants deny that said real estate was vested in them by said decree determining said contests.

These defendants further deny the allegations contained in said paragraph seventeenth of said bill of complaint, except such as have been herein expressly admitted, and they call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the eighteenth paragraph of said bill of complaint these defendants admit that by another order made by said District Court of Montana on or about December 3, 1901, and by orders supplemental thereto, heretofore duly made by said Court, 515¼/1100 of $100,000 and 100 shares of the capital stock of the First National Bank of Butte, Montana, have been distributed to said Root and Coram, as the grantee and assignee of the interests in said estate acquired as aforesaid by said Elizabeth S. Ladd and Mary L. Dunbar and to the others of said five heirs, and for their use and benefit to said trustees according to said decree of August 24, 1897, and that the same has been heretofore distributed, paid over and delivered according to the direction of said order.

These defendants further admit that said distribution has practically exhausted the property and funds of the said estate in the State of Montana, and that there is left in the custody of the admin-

istrator of said estate only a small amount of funds and effects of small value in the State of Montana.

These defendants deny the allegations contained in said paragraph eighteenth of said bill of complaint, except such as have been herein expressly admitted, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the nineteenth paragraph of said bill of complaint these defendants deny that by reason of any or all of the facts alleged in said paragraph nineteenth of the bill of complaint the said Ingersoll became entitled to the payment of said compensation of $100,000 promised for said services as aforesaid, together with interest thereon from August 26, 1897, and they deny that title to said shares had been acquired by the defeat of said will through said decree of August 24, 1897.

These defendants further deny that by reason of any or all of the facts contained in said paragraph nineteenth of said bill of complaint an attorney's lien accrued in favor of said Robert G. Ingersoll and his legal representatives, or that such an attorney's lien now exists and is in full force and effect upon portions, parcels and interest of, in and to the funds and other property of said estate of Andrew J. Davis, deceased, so acquired for said five heirs.

These defendants admit that the statutes of the State of Montana which existed and were in force prior to and during all the time from 1887 to July 1, 1895, known as the "Compiled Statutes of Montana", contained in Section 116 of the Fifth Division thereof the provisions set forth in said paragraph nineteenth of said bill of complaint.

These defendants also admit that on July 1, 1895, the said above-mentioned statute was succeeded and superseded by provisions contained in Sections 430 and 1850 of the Code of Civil Procedure of the State of Montana, enacted by the Legislative Assembly of said State, which went into force and effect at the time last mentioned, and that said sections are in the words and figures as set forth in said paragraph nineteenth of the bill of complaint.

These defendants also admit that Section 3454 of said Code of Civil Procedure of the State of Montana, which went into force and

effect July 1, 1895, was in the words and figures set forth in said paragraph nineteenth of the bill of complaint.

These defendants further deny the allegations contained in said paragraph nineteenth of said bill of complaint, except such as have been herein expressly admitted or denied, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twentieth paragraph of said bill of complaint these defendants admit that the legal representatives of the estate of Robert G. Ingersoll have demanded of said Root and Coram payment of $95,000, with interest, and that said Root and Coram have refused to pay the same.

These defendants deny all the other allegations contained in said paragraph twentieth, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twenty-first paragraph of said bill of complaint these defendants admit that Robert G. Ingersoll died about July 21, 1899, at the place therein alleged; that he was then a resident and citizen of said place and left him surviving as next of kin and heirs at law his widow, the complainant, Eva A. Ingersoll, and two daughters, to wit, Maud Ingersoll and Mrs. Walston H. Brown, and that each and all of them are now living.

These defendants further admit that about August 21, 1899, the complainant was appointed administratrix of the estate of Robert G. Ingersoll and duly qualified as such administratrix and ever since has been and now is the duly appointed, qualified and acting administratrix of the estate of Robert G. Ingersoll in New York.

These defendants further admit that on or about May 29, 1903, the complainant was appointed by the Probate Court of Suffolk County, Massachusetts, administratrix of the estate of Robert G. Ingersoll, deceased, in the Commonwealth of Massachusetts, and that she duly qualified as such and is now the duly qualified and acting administratrix of the estate of Robert G. Ingersoll, deceased, in the Commonwealth of Massachusetts.

These defendants deny the allegations contained in said paragraph twenty-first of said bill of complaint, except such as have been

herein expressly admitted, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twenty-second paragraph of said bill of complaint these defendants say, that as to the allegations contained in said paragraph they are ignorant and can neither admit nor deny, and will leave complainant to prove the same at the hearing.

For answer to the twenty-third paragraph of said bill of complaint these defendants admit that there is in the City of Boston, Commonwealth of Massachusetts, money and convertible stocks and bonds belonging to said estate of Andrew J. Davis, deceased, of the value of $450,000, after paying all expenses of administration thereof, in the custody of John H. Leyson, as administrator in Massachusetts.

These defendants deny that said five heirs and Joseph A. Coram are entitled by virtue of said decree of said District Court of the State of Montana of August 24, 1897, to have and receive directly and through said Charles H. Palmer and Andrew J. Davis, Jr., trustees, 515⅓ 11/100 of said funds and effects.

These defendants admit that Henry A. Root and Joseph A. Coram and their associates have petitioned the Probate Court for distribution, as set forth in said paragraph twenty-third of said bill of complaint.

These defendants deny that all of said 515⅓ 11/100 of said funds and effects situate in Boston, Massachusetts, or that any part thereof, is subject to any lien in favor of the estate and legal representatives of Robert G. Ingersoll, deceased, to secure payment of such compensation promised or for any other purpose.

These defendants admit that Sarah Maria Cummings died testate at Ware, County of Hampshire, Commonwealth of Massachusetts, on the day of April, 1901, being then a resident and citizen of said last mentioned place; that in and by her last will and testament she nominated and appointed Herbert P. Cummings as executor thereof; thereafter and on the day of May, 1901, said last will and testament of Sarah Maria Cummings was by order of the Probate Court in and for said County of Hampshire admitted to probate and letters testamentary issued to Herbert P. Cummings, and that he has ever since been and now is the duly appointed, qualified

and acting executor of the last will and testament of Sarah Maria Cummings, deceased.

These defendants admit that all the shares and interest of, in and to said funds and effects of the estate of Andrew J. Davis, deceased, acquired as aforesaid for said Elizabeth S. Ladd and Mary L. Dunbar, and each of them, have been by them, and each of them, sold, assigned and transferred to said Henry A. Root and Joseph A. Coram.

These defendants admit that Charles H. Ladd was the husband of Elizabeth S. Ladd.

These defendants deny all the allegations contained in said paragraph twenty-third of said bill of complaint, except such as have been herein expressly admitted or denied, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twenty-fourth paragraph of said bill of complaint these defendants deny that Henry A. Root and Joseph A. Coram, or either of them, ever admitted that there was owing and due from them, or either of them, to the estate and legal representatives of Robert G. Ingersoll, deceased, the $95,000 claimed in this action. They further deny that the said Henry A. Root and Joseph A. Coram have conspired together or with other persons to do any or all of the things set forth in said paragraph twenty-fourth of said bill of complaint.

These defendants admit that the said Root and Coram are undertaking and attempting to cause all of said funds and effects of the estate of Andrew J. Davis, deceased, to be removed to the State of Montana and to cause the same to be there distributed and delivered, but they deny that their purpose in so doing is the purpose ascribed to them in said paragraph twenty-fourth of said bill of complaint, and allege that their purpose is an entirely lawful one and for the purpose of more speedily securing whatever rights they have in that part of the estate of Andrew J. Davis, deceased, now within the Commonwealth of Massachusetts.

These defendants admit that liens were claimed upon the shares of said five heirs and Coram in so much of the estate of Andrew J.

Davis, deceased, as was situate in the State of Montana, and that all of said liens have been paid and discharged.

These defendants deny all the allegations of said paragraph twenty-fourth of said bill of complaint, except such as have been herein expressly admitted or denied, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twenty-fifth paragraph of said bill of complaint these defendants admit that in July, 1901, the complainant caused an action to be brought in said District Court of the State of Montana in her name as administratrix of the estate of Robert G. Ingersoll, deceased, as plaintiff, against Henry A. Root, Joseph A. Coram, said Leyson, as administrator of the estate of Andrew J. Davis, deceased, and said Charles H. Palmer and Andrew J. Davis, Jr., as trustees in the trust as aforesaid, to enforce payment of said claim existing in favor of the estate and legal representatives of Robert G. Ingersoll, deceased.

These defendants further admit that objection was made in said action that the plaintiff, as administratrix appointed in the State of New York, had no right to maintain said suit, and that thereafter John S. Harris, of the State of Montana, was appointed administrator of the estate of Robert G. Ingersoll, deceased, in said State, and as such administrator was substituted as plaintiff in said suit brought in said District Court in the State of Montana to assert said claim existing in favor of the estate and legal representatives of said Robert G. Ingersoll, deceased; that thereafter and on or about December 11, 1902, when said cause came on to be heard in said District Court of the State of Montana, said Root and Coram, by their attorneys, made objection to the introduction of any evidence whatever in said cause on the alleged ground that the plaintiff's complaint therein did not state facts sufficient to constitute a cause of action; that said District Court sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint, and then and there non-suited said plaintiff and dismissed said complaint on the alleged ground that it did not state facts sufficient to constitute a cause of action, and on no other ground whatsoever.

These defendants deny that the complainant has in said bill of complaint averred, or that she can aver, proof to establish other and further facts in addition to the facts set forth in said former complaint which will cover and supply each and every insufficiency mentioned in the objections to said former complaint brought in said District Court in the State of Montana.

These defendants deny all the allegations of said paragraph twenty-fifth of said bill of complaint, except such as have been herein expressly admitted or denied, and call for strict proof of each and all of said allegations in said paragraph contained.

For answer to the twenty-sixth paragraph of said bill of complaint these defendants admit that John H. Leyson is the duly appointed, qualified and acting administrator of the estate of Andrew J. Davis, deceased, situate in the Commonwealth of Massachusetts, by virtue of letters of administration duly issued to him by the Probate Court of Suffolk County, Massachusetts, March 10, 1898. They admit that said Leyson has duly appointed Horace G. Allen, of Boston, Massachusetts, to act as his agent in Massachusetts.

These defendants deny all the allegations contained in said paragraph twenty-sixth of said bill of complaint, except such as have been herein expressly admitted or denied, and they call for strict proof of each and all of said allegations in said paragraph contained.

These defendants further jointly and severally answering said bill of complaint deny that the complainant is entitled to the relief therein prayed for, or any part thereof, having fully answered all the allegations and charges in said bill of complaint contained as they are advised it is material to make answer unto, and if there be any other matter or thing therein contained not fully answered, traversed, demurred to or denied, they deny the same and pray the same advantage of this answer as though they had specifically and separately pleaded or demurred to each and every allegation or charge therein contained as therein alleged.

These defendants further jointly and severally answering the bill of complaint of the complainant filed herein say: Robert G. Ingersoll died intestate July 21, 1899. At his death he resided and was domiciled in Dobbs Ferry, Westchester County and State of

New York. He left him surviving a widow, Eva A. Ingersoll, the complainant in this action, and as his only next of kin and heirs at law two daughters, Maud Ingersoll and Mrs. Walston H. Brown, each and all of whom are now living. Thereafter and on August 21, 1899, said Eva A. Ingersoll was by order of the Surrogate's Court of Westchester County, New York, appointed administratrix of the estate of the said Robert G. Ingersoll and thereafter duly qualified as such and ever since has been acting and is still acting as such administratrix.

In July, 1891, Eva A. Ingersoll, the complainant in this action, as administratrix of the estate of Robert G. Ingersoll, deceased, appointed by the Surrogate's Court of Westchester County, State of New York, began an action in the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow in which she, as such administratrix, was the sole plaintiff and in which the following persons were the defendants: Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue; Joshua G. Cornue; M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell, individually and as former co-partners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former co-partners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former co-partners in the firm name of Toole & Bach; E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; ——Coram, wife of said Joseph A. Coram; —— Stern, wife of said Winfield S. Stern, and W. M. Bickford.

Subsequently and on November 30, 1901, John S. Harris was duly

appointed by the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow administrator of the estate of Robert G. Ingersoll in the State of Montana, and duly qualified as such administrator and ever since has been and still is acting as such administrator. Subsequently and on December 6, 1901, by order of said District Court, the said Harris as such administrator was substituted as plaintiff in said action in the place of the said Eva A. Ingersoll as such administratrix.

Before the appointment of said Harris as such administrator and while the said Eva A. Ingersoll as such administratrix was still plaintiff in said suit, a complaint was served upon the various defendants to said action. After the appointment of said Harris as such administrator and after his substitution as plaintiff in said action in place of said Eva A. Ingersoll, he served an amended complaint upon the various defendants in said action. All of the defendants appeared in said action and served answers to the said amended complaint. To the answer served by the defendants Root and others the plaintiff served a reply. After the service of said answers and said reply the said Harris, the plaintiff in said action, served amendments to said amended complaint. After service of said answers to said amended complaint all of the defendants, except John H. Leyson as administrator, served answers to said amendments. Thereafter the plaintiff in said action served further and other amendments to said amended complaint and all of the defendants, except John H. Leyson as administrator, served answers to said further and other amendments to said amended complaint.

The issues made by the pleadings in said action came on for trial before the said District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, in December, 1902. A jury having been secured and the opening statement to the jury on behalf of the plaintiff having been made, the introduction of evidence on behalf of the plaintiff was begun. Thereupon the defendants objected to the introduction of any evidence on behalf of the plaintiff upon the ground that the complaint did not state facts sufficient to constitute a cause of action. After hearing the arguments of counsel the Court granted said motion and

ordered the complaint dismissed. Thereafter and on December 12, 1902, a judgment was duly made and entered in said action which ordered, adjudged and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred therein, amounting to the sum of $12.50.

Thereafter the plaintiff in said action duly appealed from the said judgment to the Supreme Court of the State of Montana. Said appeal was argued before the said Supreme Court, in the March term of said Court in the year 1903, and said Court made a judgment affirming the said judgment so appealed from and remitted the transcript of record to the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, with instructions that such execution and further proceedings be had in said cause as according to right and justice and the laws of the State of Montana ought to be had. The judgment of the said District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow made and entered in said action on December 12, 1902, and the said judgment of the said Supreme Court of Montana both stand unreversed and are now in full force and effect.

Each and all of the defendants in the present action were defendants in said action in the said District Court of the Second Judicial District in the State of Montana in and for the County of Silver Bow.

At the time the said Robert G. Ingersoll died, viz., July 21, 1899, the said Henry A. Root resided in the City of Butte in the County of Silver Bow and State of Montana. In July, 1901, when the said action was begun by the said Eva A. Ingersoll, as administratrix, in the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, the said Henry A. Root resided in and has ever since resided in the City of Butte, County of Silver Bow and State of Montana.

At the time the said Robert G. Ingersoll died, viz., on July 21, 1899, the said Joseph A. Coram resided in the City of Lowell, County of Middlesex and Commonwealth of Massachusetts, and has

ever since resided in said place. The said Coram appeared by his attorney in said action in Montana and on May 31, 1902, filed an answer to the amended complaint which had been served by the plaintiff therein, John S. Harris, as administrator of the estate of Robert G. Ingersoll in the State of Montana. At the trial of said action the said Coram, by his attorney, made objection to the introduction of any evidence and the said objection was sustained.

At his death Robert G. Ingersoll was indebted to no one in the State of Montana. The only asset in the State of Montana ever claimed by Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll appointed in the State of New York, or by John S. Harris, as administrator of the estate of Robert G. Ingersoll appointed in the State of Montana, was the alleged indebtedness of $95,000 claimed by them in said action to have been due from the said Henry A. Root and the said Joseph A. Coram to the said Robert G. Ingersoll at his death.

At the time the said action was begun in Montana by Eva A. Ingersoll, as administratrix, etc., in July, 1901, no legal representative of the estate of Robert G. Ingersoll in the Commonwealth of Massachusetts had been appointed and no such legal representative was ever appointed in said Commonwealth until May 29, 1903, when the complainant in this action was appointed by the Probate Court of Suffolk County, Commonwealth of Massachusetts, as administratrix of the estate of Robert G. Ingersoll in the Commonwealth of Massachusetts. This appointment was made long after judgment had been rendered in the action in Montana by the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, and after the judgment of the Supreme Court of the State of Montana which affirmed said judgment.

The said Robert G. Ingersoll at the time of his death was indebted to no one in the Commonwealth of Massachusetts. The only asset in the Commonwealth of Massachusetts which the complainant, as administratrix of the estate of Robert G. Ingersoll in the Commonwealth of Massachusetts, has ever claimed to be within the Commonwealth of Massachusetts is the alleged indebtedness of $95,000

claimed by her in the present action, and the indebtedness so claimed by the complainant in this action is the same alleged indebtedness which was claimed in the action in the State of Montana by John S. Harris, as administrator of the estate of Robert G. Ingersoll in the State of Montana.

The action in said District Court of Montana begun by Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll appointed in the State of New York, and continued by John S. Harris, as administrator of the estate of Robert G. Ingersoll appointed in the State of Montana, was an action brought to establish as against Henry A. Root and Joseph A. Coram the same identical alleged indebtedness to Robert G. Ingersoll which the complainant now seeks to establish as against them in the present action, and to have such indebtedness when established declared a lien upon the interests of Henry A. Root and Joseph A. Coram in so much of the estate of Andrew J. Davis as was in the State of Montana and the lien foreclosed and the property subject thereto applied to the payment of such indebtedness and to the discharge of such lien.

The indebtedness sought to be established and recovered by John S. Harris, as administrator of Robert G. Ingersoll in the State of Montana, was the identical indebtedness which the complainant in the present action now seeks to establish and recover. The facts set forth in the complaint in the Montana action for the purpose of showing that Henry A. Root and Joseph A. Coram were indebted in the sum of $95,000 and interest to Robert G. Ingersoll, deceased, in his lifetime and to John S. Harris, as his administrator, were precisely the same facts which are now set forth by the complainant in her bill of complaint for the purpose of showing that Henry A. Root and Joseph A. Coram were indebted in the sum of $95,000 and interest to Robert G. Ingersoll, deceased, in his lifetime and to the present complainant as his administratrix in the Commonwealth of Massachusetts.

The facts which were set forth in the complaint in the Montana action for the purpose of establishing a lien upon the interests of

Henry A. Root and Joseph A. Coram in so much of the estate of Andrew J. Davis, deceased, as was situate in the State of Montana, were precisely the same facts which are now set forth by the complainant in her bill of complaint in the present action for the purpose of establishing a lien upon the alleged interests of Henry A. Root and Joseph A. Coram in so much of the estate of Andrew J. Davis as is now situate in the Commonwealth of Massachusetts.

By reason of the foregoing facts these defendants claim that the complainant herein is estopped and barred from maintaining this action against the defendants herein.

These defendants further jointly and severally answering the bill of complaint of the complainant filed herein say: That after the making of the contract alleged in the complaint and before any breach thereof and during the lifetime of Robert G. Ingersoll, deceased, it was mutually agreed by and between the said Robert G. Ingersoll and the defendants Henry A. Root and Joseph A. Coram that the said contract should be waived, abandoned and rescinded, and the same was waived, abandoned and rescinded accordingly. And these defendants further allege that, since said waiver, abandonment and rescission, said contract has not had any further existence, force or effect and cannot be made a basis of this or any other action.

These defendants further jointly and severally answering the bill of complaint of the complainant filed herein say: That there is a defect of parties defendant in this action, inasmuch as Ellen S. Cornue, who, as appears from the bill of complaint herein, was at the time this bill was filed a citizen of the State of New York, and who has ever since been and now is a citizen of said State, is an absolutely necessary party defendant in this action.

These defendants, jointly and severally further answering said bill of complaint of the said complainant, deny that the said complainant is entitled to the relief, or any part thereof, as prayed for in said bill of complaint, and all the matters and things which are set forth in the answer of these defendants, these defendants are ready and willing to prove as this Honorable Court shall direct, and

they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HENRY A. ROOT.
CHARLES H. PALMER, *Trustee*,
by HENRY A. ROOT, *Atty.*
CHARLES H. LADD, *individually and as Administrator, etc.*,
by HENRY A. ROOT, *Atty.*
MARY LOUISE DUNBAR,
by HENRY A. ROOT, *Atty.*
HERBERT P. CUMMINGS, *as Executor of the Last Will and Testament of* SARAH MARIA CUMMINGS,
by HENRY A. ROOT, *Atty.*
JOSEPH A. CORAM,
by HENRY A. ROOT, *Atty.*

FREDERICK N. WIER,
Solicitor.

ANSWER OF JOHN H. LEYSON, ADMINISTRATOR.

(Filed by Consent April 29, 1904.)

Answer of John H. Leyson, *Administrator with the will annexed in Massachusetts, one of the Respondents.*

This respondent, for answer to complainant's bill or so much thereof as advised should be answered, says:

First. That he has no reason to doubt and therefore believes to be true the allegations contained in paragraphs numbered respectively from 1 to 5, both inclusive.

Second. That as to the allegations contained in paragraphs numbered 6, 7, 8, 9, 10, 11, 12 and 13, this respondent is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

Third. That as to the allegations contained in paragraphs numbered 14 and 15, he is informed and believes that decrees substantially in the form alleged were rendered in said District Court of the State of Montana, but as to the other allegations contained in said paragraphs he is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

Fourth. That as to the allegations contained in paragraph numbered 16, he admits that decrees in substantial conformity to the allegations therein were passed, and alleges that he has complied with the same; that as to the other allegations contained in said paragraph he is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

Fifth. That as to the allegations contained in paragraphs numbered 17, 18, 19, 20, 21 and 22, he is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

Sixth. That as to the allegations contained in paragraph numbered 23, this respondent admits that as administrator of the estate of Andrew J. Davis in Massachusetts there is in his custody in the State of Massachusetts money and bonds belonging to said estate of the value of four hundred and fifty thousand ($450,000) dollars,

but as to all other allegations in said paragraph contained he is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

Seventh. That as to the allegations contained in paragraphs numbered 24 and 25, this respondent is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

Eighth. That as to the allegations contained in paragraph numbered 26, this respondent admits that he is the duly appointed qualified and acting administrator of the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts by virtue of appointment and issuance of letters of administration to him by the Probate Court for the County of Suffolk and Commonwealth of Massachusetts, and that as such administrator he has the custody of all funds belonging to said estate in said Commonwealth of Massachusetts, and also that he has duly appointed Horace G. Allen, a resident of Boston, as his agent as such administrator in Massachusetts upon whom process may be served; that as to all other allegations in said paragraph contained he is ignorant and can neither admit nor deny and will leave complainant to prove same if she deems them material.

And further answering this respondent says that all property belonging to the estate of Andrew J. Davis in Massachusetts is held by him as administrator with the will annexed of said Andrew J. Davis in Massachusetts by virtue of his appointment by the Probate Court of the County of Suffolk; that he should not be enjoined by this Honorable Court as prayed for by the complainant, for the reason that that if ordered by said Probate Court for the County of Suffolk to distribute or transmit to Montana the whole or any part of said estate he is by virtue of said appointment obliged to comply with such order and decree of the Probate Court.

And this defendant denies any and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that any other matter, cause or thing in the said complainant's bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby

well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant: all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct: and prays to be hence dismissed with his reasonable costs and charges in this behalf wrongfully sustained.

By his Attorneys,

L. S. DABNEY,
H. G. ALLEN.

REPLICATION TO ANSWER OF DAVIS ET AL.

FILED BY CONSENT MAY 2, 1864

The Replication of the above-named Complainant to the Separate Answers of the above-named Defendants, ANDREW J. DAVIS, JR., *as Trustee, and* JOHN H. LEYSON, *as Administrator of the Estate of* ANDREW J. DAVIS, *Deceased.*

This replicant, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, saving and reserving to herself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto saveth that she does and will aver, maintain and prove her said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answers contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by her said bill she hath already prayed.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Solicitors for Complainant.

REPLICATION TO ANSWER OF CORAM ET AL.

FILED MAY 2, 1894.]

The Replication of the above-named Complainant to the Joint and Several Answers of the above-named Defendants, JOSEPH A. CORAM, HENRY A. ROOT, CHARLES H. PALMER, *Trustee*, CHARLES H. LADD, *Individually and as Administrator of the Estate of* ELIZABETH S. LADD, *Deceased*, MARY LOUISE DUNBAR, *and* HERBERT P. CUMMINGS, *as Executor of the Last Will and Testament of* SARA MARIA CUMMINGS, *Deceased*.

This replicant, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, saving and reserving to herself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto sayeth that she does and will aver, maintain and prove her bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by her said bill she hath already prayed.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Solicitors for Complainant.

EVIDENCE FOR COMPLAINANT.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED, BEFORE ME.

BENJAMIN H. BRADLEE,
Special Examiner.

BOSTON, MASS., May 19, 1904.

Present: EDGAR N. HARWOOD, Esq., *of Counsel for Complainant.*

Adjourned to May 24, 1904, at 10 A.M., pursuant to the following stipulation this day filed:

STIPULATION.

It is hereby stipulated and agreed by and between the undersigned solicitors for complainant and defendants that instead of taking testimony and proofs on the part of said complainant before Benjamin H. Bradlee, special examiner, on May 19, 1904, pursuant to notice thereof heretofore duly served, the said special examiner may adjourn the hearing for the commencement of taking said evidence over to ten o'clock in the forenoon of May 24, 1904, at the office of the Clerk of the United States Circuit Court in Boston, Massachusetts; and that the testimony or deposition of any and all witnesses produced before said special examiner to give testimony in said cause may be taken down stenographically or in typewriting by any skilful stenographer or typewriter appointed by said special examiner for that purpose, and put into typewriting and read over to the witness whose testimony it is, and then signed by such witness as provided by the rules of the Supreme Court for Courts of Equity, and we hereby approve any skilful stenographer or typewriter whom said special examiner may select and appoint for said service.

And we hereby further stipulate that original documents or papers filed with said special examiner by either party as evidence in said cause may be withdrawn by the party filing the same after all parties and their solicitors have had full opportunity to examine the

same and said special examiner has taken copy thereof, provided that such original documents and papers shall be available for use at the final hearing if called for by either party.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Solicitors for Complainant.

FREDERICK N. WIER,
Solicitor for JOSEPH A. CORAM, HENRY A. ROOT, CHARLES H. PALMER, *Trustee*, CHARLES H. LADD, *personally and as Administrator of* ELIZABETH S. LADD, MARY LOUISE DUNBAR *and* HERBERT P. CUMMINGS, *Executor.*

H. G. ALLEN,
Solicitor for JOHN H. LEYSON, *Adm'r, and* ANDREW J. DAVIS, JR., *Trustee.*

Dated at Boston, Mass., May 19, 1904.

BOSTON, MASS., May 24, 1904.

Present: E. N. HARWOOD, Esq., HOLLIS R. BAILEY, Esq., *and* JOHN H. HAZELTON, Esq., *Counsel for Complainant;*
LARKIN D. TRULL, Esq., FREDERICK N. WIER, Esq., *and* THADDEUS D. KENNESON, Esq., *Counsel for Defendants.*

DEPOSITION OF EVA A. INGERSOLL.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name, and place of residence.

Ans. Eva A. Ingersoll; New York, N. Y.

Int. 2. State about how long you have resided in the State of New York.

Ans. About nineteen years.

Int. 3. You are over the age of twenty-one years, are you?

Ans. I am.

Int. 4. Are you a natural born citizen of the United States?

Ans. I am.

Int. 5. And you claim to be a citizen of the State of New York, do you?

Ans. I do.

Int. 6. Are you the complainant in this suit pending in the United States Circuit Court for the District of Massachusetts entitled Eva A. Ingersoll, Administratrix of the Estate of Robert G. Ingersoll, deceased, against Joseph A. Coram, Henry A. Root and others, defendants?

Ans. I am.

Int. 7. Did you know Robert G. Ingersoll in his lifetime?

Ans. I did.

Int. 8. How long did you know him?

Ans. Since 1860.

Int. 9. What relation were you to him?

Ans. His wife.

Int. 10. State about how long you and Mr. Ingersoll were husband and wife.

Ans. From 1862 to 1899.

Int. 11. Is Mr. Robert G. Ingersoll now living or deceased?

Ans. He is dead.

Int. 12. State, if you remember, when Mr. Ingersoll died.

Ans. July 21st, 1899.

Int. 13. Was Mr. Robert G. Ingersoll known and addressed by any other title than his given and surname?

Ans. Colonel Ingersoll.

Int. 14. State whether or not Robert G. Ingersoll was addressed and referred to in written correspondence by some other title than his given and surname.

Ans. As Colonel Ingersoll.

Int. 15. If in this examination I use the expression Colonel Ingersoll, to whom do you understand I refer?

Ans. To Robert G. Ingersoll.

Int. 16. Are you acquainted with Henry A. Root, one of the defendants in this action?

Ans. I am.

Int. 17. State about how long you have known him.

Ans. Between eleven and twelve years, I should think.

Int. 18. State about how frequently you have met him since the commencement of the year 1891.

Ans. A great many times.

Int. 19. State, if you know, whether or not said Henry A. Root was acquainted with Colonel Ingersoll.

Ans. He was.

Int. 20. State, if you know, how Henry A. Root usually addressed Robert G. Ingersoll.

Ans. As Colonel and Colonel Ingersoll.

Int. 21. In your bill of complaint in this action you mention a certain written document, a copy of which you say you attach thereto marked "Exhibit A": have you that document in your possession?

Ans. I have.

Int. 22. Have you that document now in your hand?

Ans. I have.

Int. 23. Is that the document you mention and refer to in your bill of complaint in this action, and of which you say you attach a copy to said bill of complaint marked "Exhibit A"?

Ans. It is.

[*Counsel for complainant offers and puts in evidence the writing last mentioned by the witness, and requests the special examiner appointed to take the testimony in this case to mark the same "Complainant's Exhibit A" for identification for use in evidence in this suit.*]

Int. 24. In your bill of complaint in this action you mention a certain writing of which you say in said bill of complaint you attach a copy thereto marked "Exhibit B": state whether or not you have the original of the last mentioned writing in your possession.

Ans. I have.

Int. 25. Have you the last mentioned document now in your hand?

Ans. I have.

[*Counsel for complainant offers and puts in evidence the writing last mentioned by the witness, and requests the special examiner to*

mark the same "Complainant's Exhibit B" for use in evidence in this suit.]

Int. 26. How did these last mentioned writings come into your possession?

Ans. They were found in Robert G. Ingersoll's desk.

Int. 27. And you have them in your possession in what capacity?

Ans. As his administratrix — of Robert G. Ingersoll.

Int. 28. Have you, in your possession, as administratrix of Robert G. Ingersoll, deceased, certain letters which purport to have been signed and sent by Henry A. Root, one of the defendants in this action, to Colonel Robert G. Ingersoll?

Ans. I have.

Int. 29. The writing which you have put in evidence marked "Complainant's Exhibit B" refers to services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased: can you state of your knowledge whether or not Colonel Ingersoll performed services in the matter referred to?

Ans. He did.

Int. 30. You may state whether or not the letters which you last mentioned as having in your possession relate to said will contest.

Ans. They do.

Int. 31. Have you in your hand a large number of letters which purport to have been signed by Henry A. Root, relating to the matter of said will contest, addressed to Col. Robert G. Ingersoll?

Ans. I have.

Int. 32. How did you come into possession of the letters last mentioned?

Ans. I found them in Robert G. Ingersoll's desk.

Int. 33. And you took possession of said letters in what capacity?

Ans. As administratrix of Robert G. Ingersoll.

[*Counsel for complainant offers and puts in evidence in this case the letters last mentioned by the witness, the same being thirty-one several letters which purport to be signed by defendant Henry A. Root addressed to Col. Robert G. Ingersoll, and requests the special exam-*

ing to mark the same Complainant's Exhibits, numbering the same by Roman numerals from I. to XXXI., except the number II., which has been marked on another exhibit already introduced; and counsel for complainant now files the same with the special examiner herein for inspection by defendants, their counsel and solicitors, pursuant to Rule 14 of the Circuit Court of the United States for the District of Massachusetts.

Counsel for complainant also states for the information of counsel for defendants present that the thirty-one letters last mentioned, embraced in the last offer, have heretofore been introduced in evidence in this case by verified copy attached to the affidavit of Clinton V. Farrell, filed herein in support of complainant's motion for interlocutory injunction and printed on pages 7 to 15, inclusive, of the record heretofore printed in this case, and I now pass the originals of said letters to counsel for defendants.

Counsel for defendants objects to these letters being offered together, and asks that if they are to be offered in evidence they should be offered separately, so that separate objections to the admission of each letter may be made of record. Counsel for defendants also objects to the admission of each and all of them upon the ground that no one of them has been proved to have been written by Mr. Root. Counsel for defendants also objects to each separately on the ground that each one of these letters, if written by Mr. Root to Col. Ingersoll, was written while the relation of client and attorney and counsel between Mr. Root and Col. Ingersoll existed, and that each letter so offered was a privileged communication between client and attorney and counsel. Counsel for defendants further objects to each letter as immaterial, incompetent and irrelevant and inadmissible under the issues in this action.

Complainant's counsel here and now offers all reasonable opportunity to defendants' counsel to examine each and every one of said last-mentioned letters severally and individually, with ample time and opportunity to record each and all objections which counsel for defendants desire to record thereto in the record, the said exhibits being marked and identified severally by the numbers aforesaid, so that they can be referred to severally in any objection sought to be interposed thereto.

and for that purpose counsel for complainant now delivers said letters to counsel for defendants and awaits their objection.

Counsel for defendants objects to the admission in evidence of the letter dated January 17, 1891, on the following grounds: that it has not been proved to have been written by Mr. Root; that if written by Mr. Root to Col. Ingersoll, it was written while the relation of client and attorney and counsel between Mr. Root and Col. Ingersoll existed, and was, therefore, a privileged communication between client and attorney and counsel. Counsel for defendants also objects to the same as immaterial, incompetent and irrelevant and inadmissible under the issues in this action.

Counsel for defendants objects to the introduction in evidence of the letter dated December 17, 1891, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the letter dated October 12, 1891, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the admission in evidence of the letter dated October 27, 1891, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated 4th April, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated April 19, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated July 29, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated August 9, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated August 12, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the

letter dated August 19, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated August 22, 1892, upon the same grounds taken to the admission of the letter dated January 17, 1891. Also to the copy of the letter purporting to be signed C. H. Palmer, dated August 18th, 1892, and directed to H. A. Root, upon the ground that it is immaterial, irrelevant and incompetent, and inadmissible under the issues in this case.

Counsel for defendants objects to the introduction in evidence of the letter dated September 7, 1892, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated October 21, 1892, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated November 16, 1892, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated November 23, 1892, upon the same grounds which were taken to the admission of the letter dated January 17, 1891. Counsel for defendants also further objects to the introduction in evidence of what purports to be a letter signed H. A. Root, dated November 23, 1892, and directed to M. J. Connell, upon the ground that it is immaterial, incompetent and irrelevant, and inadmissible under the issues in this case.

Counsel for defendants objects to the introduction in evidence of the letter dated December 19, 1892, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated March 27, 1893, upon the same grounds which were

taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated April 10, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated May 2, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891. Counsel for defendants also takes special objection to the introduction in evidence of so much of said letter as is entitled "Dixon Matter".

Counsel for defendants objects to the introduction in evidence of the letter dated May 12, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated June 6, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated July 10, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated August 5, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated August 12, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated September 1, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated September 6, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated October 24, 1893, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated April 20, 1894, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated May 8, 1894, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

Counsel for defendants objects to the introduction in evidence of the letter dated August 9, 1894, upon the same grounds which were taken to the admission in evidence of the letter dated January 17, 1891.

The foregoing exhibits are marked by the special examiner as follows: Document offered as the original of Exhibit A to complainant's bill of complaint is marked "Complainant's Exhibit A, B. H. B., Special Examiner".

A document offered as the original of Exhibit B to complainant's bill of complaint in this suit, and also as a Complainant's Exhibit II., is marked "Complainant's Exhibit B & II., B. H. B., Special Examiner".

Letter dated January 17, 1891, is marked "Complainant's Exhibit I., B. H. B., Special Examiner".

Letter dated December 17, 1891, is marked "Complainant's Exhibit III., B. H. B., Special Examiner".

Letter dated October 12, 1891, is marked "Complainant's Exhibit IV., B. H. B., Special Examiner".

Letter dated October 27, 1891, is marked "Complainant's Exhibit V., B. H. B., Special Examiner".

Letter dated April 4, 1892, is marked "Complainant's Exhibit VI., B. H. B., Special Examiner".

Letter dated April 19, 1892, is marked "Complainant's Exhibit VII., B. H. B., Special Examiner".

Letter dated July 29, 1892, is marked "Complainant's Exhibit VIII., B. H. B., Special Examiner".

Letter dated August 9, 1892, is marked "Complainant's Exhibit IX., B. H. B., Special Examiner".

Letter dated August 12, 1892, is marked "Complainant's Exhibit X., B. H. B., Special Examiner".

Letter dated August 19, 1892, is marked "Complainant's Exhibit XI., B. H. B., Special Examiner".

Letter dated August 22, 1892, is marked "Complainant's Exhibit XII., B. H. B., Special Examiner".

Letter dated September 7, 1892, is marked "Complainant's Exhibit XIII., B. H. B., Special Examiner".

Letter dated October 24, 1892, is marked "Complainant's Exhibit XIV., B. H. B., Special Examiner".

Letter dated November 16, 1892, is marked "Complainant's Exhibit XV., B. H. B., Special Examiner".

Letter dated November 23, 1892, is marked "Complainant's Exhibit XVI., B. H. B., Special Examiner".

Letter dated December 19, 1892, is marked "Complainant's Exhibit XVII., B. H. B., Special Examiner".

Letter dated March 27, 1893, is marked "Complainant's Exhibit XVIII., B. H. B., Special Examiner".

Letter dated April 10, 1893, is marked "Complainant's Exhibit XIX., B. H. B., Special Examiner".

Letter dated May 2, 1893, is marked "Complainant's Exhibit XX., B. H. B., Special Examiner".

Letter dated May 12, 1893, is marked "Complainant's Exhibit XXI., B. H. B., Special Examiner".

Letter dated June 6, 1893, is marked "Complainant's Exhibit XXII., B. H. B., Special Examiner".

Letter dated July 10, 1893, is marked "Complainant's Exhibit XXIII., B. H. B., Special Examiner".

Letter dated August 5, 1893, is marked "Complainant's Exhibit XXIV., B. H. B., Special Examiner".

Letter dated August 12, 1893, is marked "Complainant's Exhibit XXV., B. H. B., Special Examiner".

Letter dated September 1, 1893, is marked "Complainant's Exhibit XXVI., B. H. B., Special Examiner".

Letter dated September 6, 1893, is marked "Complainant's Exhibit XXVII., B. H. B., Special Examiner".

Letter dated October 24, 1893, is marked "Complainant's Exhibit XXVIII., B. H. B., Special Examiner".

Letter dated April 20, 1894, is marked "Complainant's Exhibit XXIX., B. H. B., Special Examiner".

Letter dated May 8, 1894, is marked "Complainant's Exhibit XXX., B. H. B., Special Examiner".

Letter dated August 9, 1894, is marked "Complainant's Exhibit XXXI., B. H. B., Special Examiner".

Counsel for complainant states upon the record for the information of defendants and their solicitors and counsel that proof of the signatures respectively subscribed to each and all of the exhibits heretofore offered and put in evidence on the part of complainant has been omitted as being deemed unnecessary, at the present time, of introducing and putting in evidence each of said exhibits, and notice of the filing thereof with the special examiner herein, subject to examination and inspection by defendants and their counsel and solicitors, is now given and will be hereafter formally served on counsel for defendants pursuant to Rule 11 of this Court.

Counsel for complainant further states that each and all of the foregoing documents, writings, contracts and letters having been severally marked as complainant's exhibits, and numbered and identified by such marking as aforesaid, complainant's counsel now offers opportunity to defendants' counsel to make and record any further objections to either of said exhibits they may desire, and submits such documents and writings to them for that purpose.

Counsel for complainant calls attention of counsel and solicitors for defendants, and defendant Henry A. Root, who is now present before the examiner, to a demand in writing served on counsel for defendants on May 11, 1904, that certain original letters, claimed to have been written and mailed to defendant Henry A. Root, mentioned in said demand, be produced at this hearing, and inquires whether or not the said original letters will be produced by defendants, or any of them, or their counsel, in response to said demand.

Counsel for defendants states that he is unable to produce papers

requested and demanded, as no one of them is in the possession of his clients, and has no knowledge where they, or any one of them is, assuming that such letters ever have existed or do now exist.

Counsel for complainant offers in evidence the aforementioned demand for the production of certain letters, and requests the special examiner herein to make such demand part of the record herein, and identify it as evidence on the part of complainant by marking the same "Complainant's Exhibit Demand to Produce Certain Letters, B. H. B., Special Examiner".]

Int. 34. Have you in your possession, as said administratrix, a letter-press copy book containing a copy of a certain letter dated, so far as an impression copy shows, "May 1st 1"?

Ans. I have.

[Complainant's counsel requests the special examiner herein to mark said letter-press copy-book "Complainant's Exhibit Letter-Press Copy-Book No. 1", for identification for use in evidence in this case in order to exhibit the said letter-press impression copy mentioned by the witness.

Counsel for defendants asks counsel for complainant whether he intends thereby to offer the letter-press copy in evidence at this time.

In response to the above question counsel for complainant states that he does intend to offer in evidence and put in evidence in this suit the said letter mentioned by the witness dated "May 1st 1", an impression copy of which appears on pages 129 and 130 of said letter-press copy-book, which complainant's counsel has requested the examiner to mark, that is, to mark the book for identification thereof in order to introduce the impression copy of said letter appearing on pages 129 and 130 as Complainant's Exhibit Letter-Press Copy-Book No. 1. Complainant's counsel now shows to defendants counsel the said letter-press impression copy on pages 129 and 130 of said book.

Counsel for defendants has no objection to the letter book containing pages 129 and 130, referred to by counsel for complainant, for identification. He does object to the admission in evidence of the impression contained in said book on pages 129 and 130, upon the ground that the same is secondary evidence and that no ground what-

ever has yet been laid for the admission of the same in evidence, because no proof has been made that any original letter of which this is claimed to be a copy was ever written by Colonel Ingersoll, or ever mailed by him, or anybody representing him, to Mr. Root and no proof of any original letter was ever received by Mr. Root. It is not the proper way to prove the existence of an original letter to offer a letter-press copy in evidence. Counsel for defendants also objects to it on the ground that it is incompetent, irrelevant and immaterial, and inadmissible under the issues in this action.]

Int. 35. On what page or pages of said letter-press copy-book do you find the impression copy of the letter last mentioned?

Ans. 129 and 130.

Int. 36. Do you know the handwriting from which the impression copy of the letter you last mentioned was made?

[*Counsel for defendants objects to the question upon the ground that it is improper method of attempting to prove the existence and contents of an original letter. The letter-press copy is nothing but secondary evidence, and the original cannot be proved from the copy.*]

Ans. I do.

Int. 37. Whose handwriting is it?

[*Counsel for defendants makes the same objection to this question as he did to the last.*]

Ans. R. G. Ingersoll's.

Int. 38. Have you seen Colonel Robert G. Ingersoll write?

Ans. I have.

Int. 39. Have you seen him subscribe his name?

Ans. I have.

Int. 40. He was your husband since 1862?

Ans. He was.

Int. 41. And did he correspond with you much or little?

Ans. Much.

Int. 42. State whether or not you have seen him write frequently.

Ans. Very frequently.

Int. 43. State whether or not you have seen and examined letters and other writing written by Colonel Ingersoll to a great number, or otherwise.

Ans. A great number.

Int. 44. State whether or not all of the letter from which the impression copy was made, which appears on pages 129 and 130, was written with pen and ink.

[*Counsel for defendants objects to this question upon the same grounds as he did to the last question objected to, and on the ground that the witness is incompetent to testify upon this subject. Counsel for defendants further objects to the question on the ground that it is a matter of inference.*]

Ans. It was.

Int. 45. Do you recognize the signature an impression copy of which appears subscribed at the bottom below the writing on page 130 of said last mentioned letter-press copy-book?

[*Counsel for defendants objects to the question on the same ground as he did to the last question objected to.*]

Ans. Yes, I do.

Int. 46. Whose signature is it?

[*Same objection.*]

Ans. R. G. Ingersoll's.

Int. 47. State whether or not the impression copy on the pages last mentioned of the book last mentioned appear to show a clear and distinct impression of the writing from which said copy was made.

[*Counsel for defendants objects to the question upon the ground that the question is one for the court and not for the witness, and if he is mistaken in this it is a question for expert testimony, and the witness is not shown to be an expert in handwriting or competent to draw inferences as to handwriting.*]

Ans. Yes, it is clear and distinct.

Int. 48. You may state from whose handwriting was the impression copy of the letter last mentioned and the signature signed thereto made.

[*Counsel for defendants objects to the question upon the ground that this is an improper method of attempting to prove the existence of an original letter and the handwriting of such original letter and the contents of the same; that the impression is secondary evidence, and it*

is not competent for this witness to infer from the impression the handwriting of the original.]

Ans. R. G. Ingersoll's.

[*Counsel for complainant states that he will ask this witness further questions as to how she came into possession of said last mentioned letter-press copy-book, where the same was found, etc., after introducing and identifying the several other letter-press copy-books — said question being reserved until that time for convenience and brevity. Counsel for complainant further states for the information of defendants and their counsel and solicitors that complainant will hereafter undertake to prove the actual writing of the original letters from which impression copies are claimed to be exhibited here, and also the mailing of such originals through the United States post office; but for convenience counsel for complainant will vary the time of offering all that character of proof as they are able to obtain the presence of witnesses, and will, at the present time, offer and put in evidence each and all of the impression copies of letters which complainant has to exhibit here, of course subject to the proper additional proof which may be required in the premises.*]

Int. 49. Have you in your possession a letter-press copy-book containing an impression copy of a letter dated, so far as the impression copy thereof shows, "July 11 3"?

Ans. I have.

Int. 50. Have you said last mentioned letter-press copy-book now before you?

Ans. I have.

[*Counsel for complainant thereupon requests the special examiner herein to mark the last mentioned letter-press copy-book for identification of said book "Complainant's Exhibit Letter-Press Copy-Book No. 2" for use of said book for the purpose of introducing the impression copy of certain writing found upon page 440 thereof.*]

Int. 51. On what page of said last mentioned letter-press copy-book do you find the letter last mentioned by you?

Ans. On page 440.

Int. 52. Do you recognize the handwriting from which the im-

pression copy of the letter found on said page 440 of said last mentioned letter-press copy-book was made?

[*Counsel for defendants objects to the question that this is not the proper way of proving the original of which this is claimed to be an impression; that the impression is but secondary evidence, and that it is not proper to prove from secondary evidence the existence and authenticity of the original.*]

Ans. I do.

Int. 53. Whose handwriting was it?

[*Counsel for defendants makes the same objection to this question as to that last.*]

Ans. R. G. Ingersoll's.

Int. 54. Do you mean Colonel Robert G. Ingersoll mentioned in your bill of complaint, in your last preceding answer?

Ans. Yes.

Int. 55. Who signed the name "R. G. Ingersoll" to the letter from which said last mentioned impression copy was made?

[*Counsel for defendants objects to the witness answering this question unless she knows; he objects to her answering it as a matter of inference from the impression in the letter-book, as that is but secondary evidence, and it is not the proper method of proving the signature to the original.*]

Ans. R. G. Ingersoll.

[*Counsel for complainant offers and puts in evidence the impression copy of the letter found on page 440 of said last mentioned letter-press copy-book, and requests the special examiner herein to mark said page "Complainant's Exhibit XXXIII.", for use in evidence in this suit.*

Counsel for defendants objects to the admission in evidence of the same upon the ground that it is but secondary evidence, and that no foundation for the admission of secondary evidence has been laid, as it has not been proved that Mr. Ingersoll ever wrote an original letter or signed an original, of which this is claimed to be a copy, or that Mr. Root ever received the same, or that the same was ever mailed to Mr. Root properly directed or with postage prepaid.]

Int. 56. Have you in your possession, as said administratrix, a

letter-press copy-book containing an impression copy of a letter dated, so far as the impression copy thereof shows, "July 17th 4"?

Ans. I have.

[*Counsel for complainant requests the special examiner herein to mark the last mentioned letter-press copy-book "Complainant's Exhibit Letter-Press Copy-Book No. 3" for identification, for the purpose of introducing and using the page of said book on which appears the impression copy of the letter last mentioned.*]

Int. 57. On what page of the last mentioned letter-press copy-book do you find the letter which you last mentioned?

Ans. Page 443.

Int. 58. Do you recognize the handwriting from which the impression copy of the writing on said page 443 of said last mentioned letter-press copy-book was made?

[*Counsel for defendants objects to the question on the ground that the impression is but secondary evidence, and that it is not proper to prove the existence and authenticity of the original from the copy.*]

Ans. I do.

Int. 59. Whose handwriting is it?

[*Counsel for defendants objects to this question on the same grounds as he objected to the last question, and objects to the witness answering, unless she knows that Colonel Ingersoll signed the original, and can testify of her own knowledge, and not as a matter of inference from the copy.*]

Ans. R. G. Ingersoll's.

Int. 60. State whether or not all of said letter was written by the same hand.

[*Counsel for defendants makes the same objection to this question as to the last, and also objects that Mrs. Ingersoll is not competent as an expert to answer the last question, and that the same is opinion evidence.*]

Ans. It was.

Int. 61. Who subscribed the name "R. G. Ingersoll" appearing at the bottom of the writing on said page 443 of the last mentioned letter-press copy-book?

[*Counsel for defendants objects upon the same grounds as to the question heretofore asked, and that the evidence sought is a mere matter of inference and opinion, to which the witness is not competent to testify, and that this is an improper method of proving the signature to the original.*]

Ans. R. G. Ingersoll.

[*Counsel for complainant offers and puts in evidence said letter-press copy of the letter found on page 143 of said last mentioned letter-press copy-book, and requests the special examiner herein to mark said page "Complainant's Exhibit XXXIV.", for identification for use as evidence in this case.*

Counsel for defendants objects to the introduction of this copy in evidence upon the ground that it is secondary evidence, and that no proper foundation for its admission has been laid, as it has not been proved that Colonel Ingersoll wrote or signed the original, or that the same was ever received by Mr. Root, or was ever mailed to him, properly addressed and with postage prepaid.]

Int. 62. Have you in your possession, as said administratrix, a letter-press copy-book containing a letter dated, so far as the impression copy thereof shows, "Aug 23 4", to which appears to be subscribed the name "R. G. Ingersoll"?

Ans. I have.

[*Counsel for complainant requests the special examiner herein to mark the said last mentioned letter-press copy-book "Complainant's Exhibit Letter-Press Copy-Book No. 4", for identification for use in exhibiting and introducing in evidence the page and other pages thereof, upon which appears the impression copy of the letter last mentioned by the witness, and also for use in exhibiting and introducing another page of said book in evidence for use of the impression copy appearing thereon which will be hereafter pointed out by the witness.*]

Int. 63. On what page of said last mentioned letter-press copy-book, or pages thereof, do you find the letter-press impression copy of the letter which you last mentioned?

Ans. Pages 29, 30, 31 and 32.

Int. 64. Do you recognize the handwriting from which the impres-

sion copy of the writing on said pages 29, 30, 31 and 32 of said last mentioned letter-press copy-book was made?

[*Counsel for defendants objects upon the ground that the copy is secondary evidence, and that it is not proper to prove the existence and authenticity of the original from the copy.*]

Ans. I do.

Int. 65. State whether or not all of said last mentioned letter was written by the same hand.

[*Same objection.*]

Ans. It was.

Int. 66. Whose handwriting is it?

[*Counsel for defendants objects to this question on the same ground, and that the witness, not being an expert, is not competent to testify to what is necessarily a matter of opinion.*]

Ans. R. G. Ingersoll's.

Int. 67. Who subscribed the name "R. G. Ingersoll" to the original from which the impression copy of said name was made on page 32 of said letter-press copy-book at the close of the letter which you last mentioned?

[*Objected to on the same grounds, and the witness should not answer unless she knows that the original was signed by R. G. Ingersoll otherwise than by inference from the copy.*]

Ans. R. G. Ingersoll.

[*Counsel for complainant offers and puts in evidence the letter-press copy of said letter found on pages 29, 30, 31 and 32 of said letter-press copy-book last mentioned by the witness and marked for identification as aforesaid, and requests the special examiner herein to mark such impression copy of said last mentioned letter "Complainant's Exhibit XXXV." for use in evidence in this suit.*

Counsel for defendants objects to the introduction of this copy in evidence upon the ground that it is secondary evidence and that no foundation for its introduction has been laid, as it has not been proved that Colonel Ingersoll wrote and signed an original, of which this is a copy, or that the same was ever mailed, properly addressed to Mr. Root and with postage prepaid.]

Int. 68. Do you find in said last mentioned letter-press copy-book

an impression copy of another letter dated "Apl 3 5", so far as the impression copy thereof shows, with the name "R. G. Ingersoll" subscribed thereto?

Ans. I do.

Int. 69. On what page of said letter-press copy-book do you find the last mentioned letter?

Ans. Page 422.

Int. 70. State whether or not all of the letter from which the impression copy was made, which appears on said page 422 of the last mentioned letter-press copy-book, was written with pen and ink.

[*Counsel for defendants objects upon the ground that this calls for expert evidence and that the witness has not been shown to be competent to testify as such.*]

Ans. Yes, it was.

Int. 71. Do you recognize the handwriting from which the last mentioned letter-press impression copy was made?

[*Counsel for defendants objects upon the ground that the copy is secondary evidence, and that it is not proper to prove the existence and authenticity of the original from the copy.*]

Ans. I do.

Int. 72. Whose handwriting is it?

[*Counsel for defendants objects to the question upon the same grounds as the last question.*]

Ans. R. G. Ingersoll's.

Int. 73. Who subscribed the name "R. G. Ingersoll" to the letter from which the last mentioned letter-press copy was made?

[*Counsel for defendants objects upon the same ground as he objected to the last question, and also objects to the witness answering unless she knows who signed the name otherwise than by way of inference from the copy, she not being an expert.*]

Ans. R. G. Ingersoll.

[*Counsel for complainant offers and puts in evidence the letter-press impression copy of said letter found on page 422 of said letter-press copy-book last mentioned by the witness, which book has been heretofore marked for identification "Complainant's Letter-Press*

Copy-Book No. 4, and requests the special examiner herein to mark said page 422 "Complainant's Exhibit XXXVI.", for use of the writing thereon as evidence in this case.

Counsel for defendants objects to the introduction in evidence of this copy upon the ground that it is secondary evidence, and that no proper foundation for the admission of secondary evidence has been laid, as it has not been shown that R. G. Ingersoll wrote and signed an original, of which this is a copy, or that the same was ever received by Mr. Root, or that the same was ever mailed, properly addressed to Mr. Root and with postage prepaid.]

Int. 74. Have you in your possession as said administratrix a letter-press copy-book containing an impression copy of a letter dated "New York Jan. 25 '96", addressed at the top thereof "My dear Clayburg", and subscribed at the close of said letter "R. G. Ingersoll"?

Ans. I have.

[*Counsel for complainant requests the special examiner herein to mark said last mentioned letter-press copy-book "Complainant's Exhibit Letter-Press Copy-Book No. 5", for identification for use in evidence in this case of the page thereof, on which appears the impression copy of the letter last mentioned by the witness.*]

Int. 75. On what page of the last mentioned letter-press copy-book do you find the impression copy of the letter which you last mentioned?

Ans. Page 17.

Int. 76. State whether or not all of the letter, from which the impression copy, appearing on said last mentioned page, was made, was written with pen and ink.

[*Counsel for defendants objects to the witness testifying as she is not shown to be an expert, and this calls for opinion evidence, such as only an expert is qualified to give.*]

Ans. It was.

Int. 77. Do you recognize the handwriting from which said last mentioned impression copy was made?

[*Counsel for defendants objects upon the ground that this copy is*

but secondary evidence, and that it is not proper to prove from it the existence and authenticity of the original.]

Ans. I do.

Int. 78. Whose handwriting is it?

[*Counsel for defendants objects upon the same grounds as to the last question, and also to the witness answering this question, unless she knows the signature, otherwise than by way of inference from the copy.*]

Ans. R. G. Ingersoll's.

Int. 79. Who subscribed the name "R. G. Ingersoll", which appears at the close of the said last mentioned impression copy, to the original from which said last mentioned copy was made?

[*Counsel for defendants objects to the witness answering this question, unless she knows who signed it, otherwise than by way of inference from the copy.*]

Ans. R. G. Ingersoll.

Int. 80. Do you know a former acquaintance of Colonel Ingersoll's named Clayburg?

Ans. I do.

Int. 81. Where does the said Clayburg reside?

Ans. Montana.

Int. 82. Do you know what business or profession said Clayburg was engaged in during the years from 1894 to 1897?

Ans. Lawyer.

[*Counsel for complainant offers and puts in evidence the letter-press impression copy of the letter appearing upon page 17 of said last mentioned letter-press copy-book, and requests the special examiner herein to mark said page "Complainant's Exhibit LIV.", for identification for use as evidence in this suit.*

Counsel for defendants objects to the admission in evidence of this copy upon the ground that it is secondary evidence, and no proper foundation has been laid for the admission thereof, as no proof has been made that Colonel Ingersoll ever wrote the original or signed the original, or that Mr. Clayburg ever received the original, or that the same was ever mailed to him, properly directed, and with postage prepaid; also upon the further ground that no connection between

Mr. Clayburg and Mr. Root is shown, and upon the further ground that self-serving declarations, such as those contained in this copy, are inadmissible, and upon the further ground that it is immaterial, incompetent and irrelevant, and inadmissible under the issues in this action.]

Int. 83. How did you come into possession of the letter-press copy-books, of which you have heretofore spoken, and which have been marked by the special examiner for identification for use in evidence in this case as above mentioned?

Ans. In Colonel Ingersoll's desk in his office.

Int. 84. Did you find them in Colonel Ingersoll's office after his decease?

Ans. Yes, I did.

Int. 85. And you have possession of them now, as administratrix of the estate of Robert G. Ingersoll, deceased?

Ans. Yes, sir.

Int. 86. Have you any of the original letters in your possession from which the impression copies were made, heretofore mentioned by you?

Ans. I have not.

Int. 87. Have you knowledge of the claim of indebtedness mentioned in your bill of complaint in this action, claimed to be owing by defendants, Henry A. Root and Joseph A. Coram, to you as administratrix of the estate of Robert G. Ingersoll, deceased.

Ans. Yes, I have.

Int. 88. You may state, if you know, for what consideration or service Henry A. Root and Joseph A. Coram, mentioned as defendants in this action, became indebted to Colonel Robert G. Ingersoll.

[*Counsel for defendants objects upon the ground that it is immaterial, incompetent and irrelevant, and that the contract sued upon itself prescribes the consideration to be given, and the witness is not competent to testify of her own knowledge as to the services, or as to whether they were performed under the contract sued on, or under some other contract, or under no contract.*]

Ans. For services in the Davis will case.

Int. 89. Do you refer to the services mentioned in the paper

writing which you spoke of this morning in your testimony and which was introduced in evidence herein and marked "Exhibit B & H."?

Ans. I do.

Int. 90. Was that contest known as the Davis will case?

Ans. Yes.

Int. 91. Where was that Davis will case litigated?

Ans. In the State of Montana.

Int. 92. Were you ever in Butte, Montana?

Ans. Yes.

Int. 93. State who, if anyone, went with you to Butte, Montana.

Ans. Robert G. Ingersoll.

Int. 94. How many times did you go to Montana?

Ans. Twice, —I think three times, but I am sure of twice.

Int. 95. State who, if anyone, accompanied you each time when you went to Montana.

Ans. The first time, Mr. Robert G. Ingersoll. The second time, Robert G. Ingersoll and my daughter.

Int. 96. You say you are not sure whether you went there the third time or not?

Ans. I wouldn't swear to it.

Int. 97. Do you know what business, or engagement, occasioned Mr. Robert G. Ingersoll going to Montana at the times you have mentioned when you accompanied him?

Ans. I do.

Int. 98. And what did he go there for?

Ans. He went there as the principal attorney in the Davis will case.

Int. 99. Do you know whether or not Colonel Ingersoll had any other business, or engagement, which did, or would, occasion his going to the State of Montana, except that you have mentioned?

Ans. Not any.

Int. 100. Were you aware, or had you knowledge, prior to the death of Colonel Ingersoll, that he had the contract set forth in the paper, introduced in evidence here by you, marked "Exhibit B & H."?

Ans. I was.

Int. 101. State, if you know, what was due and owing to Colonel Robert G. Ingersoll on said contract from Henry A. Root and Joseph A. Coram, for the services mentioned therein at the time of the death of Colonel Robert G. Ingersoll.

[*Counsel for defendants objects upon the ground that this witness has not been shown competent to testify upon this question, and that the question itself calls not simply for a fact, but for a conclusion and inference.*]

Ans. Ninety-five thousand dollars, with interest.

Int. 102. State, if you know, how much had been paid on said contract to Colonel Ingersoll during his lifetime.

[*Counsel for defendants makes the same objection to this question as to the last.*]

Ans. Five thousand dollars.

Int. 103. After the death of Colonel Ingersoll, did you undertake, as administratrix of his estate, to obtain payment of the balance which you say and claim is due from Joseph A. Coram and Henry A. Root on said contract for the services therein mentioned?

Ans. I did.

Int. 104. Has Henry A. Root since the death of Colonel Ingersoll communicated with you in respect to said indebtedness?

Ans. He has.

Int. 105. In what way did you receive such communications?

Ans. By letter through the United States mail.

Int. 106. About what date did you receive first communication from Mr. Root on the subject mentioned?

Ans. September 2, 1899.

Int. 107. What is the date of the first letter you received from Mr. Root on the subject mentioned?

Ans. September 2.

Int. 108. Have you the envelope in which said last mentioned letter came to you?

Ans. I have.

Int. 109. Is the last mentioned envelope attached to said last mentioned letter?

Ans. It is.

Int. 110. From looking at the said envelope postmark can you state about what date you received said letter?

Ans. Fourth September, 1899.

Int. 111. About how long was the date last mentioned after the decease of Col. Ingersoll?

Ans. Between five and six weeks.

Int. 112. Are you acquainted with the signature and handwriting of Henry A. Root?

Ans. I am.

Int. 113. State whether or not you have seen a good deal of his handwriting and a great many of his signatures.

Ans. I have.

Int. 114. Do you think you are well enough acquainted with his handwriting and signature to state whether or not the writing on the letter you last mentioned and the signature subscribed thereto is that of Henry A. Root?

Ans. I am.

Int. 115. State to the best of your knowledge, understanding and belief, from what knowledge you have of the handwriting of said Henry A. Root, who wrote the said letter last mentioned, and subscribed the name "Henry A. Root" subscribed thereto?

Ans. Henry A. Root.

[*Adjourned.*]

BOSTON, MASS., May 25, 1901.

[*Counsel for complainant offers and puts in evidence the letter last mentioned by the witness and requests the special examiner herein to mark the same "Complainant's Exhibit XLIII.", for identification for use in evidence in this case, and also mark the envelope attached to said letter, and spoken of by the witness in connection therewith, "Envelope with Complainant's Exhibit XLIII.", for identification for use in evidence in this case.*]

Int. 116. This letter which you have just introduced in evidence, and which has been marked "Complainant's Exhibit XLIII." mentions the "Davis Estate", and speaks of your "interest": state what, if any, interest you had in reference to the Davis estate.

[*Counsel for defendants objects to the question as immaterial, irrelevant and incompetent, and that the letter speaks for itself.*]

Ans. The interest of what Mr. Ingersoll was to receive for services as lawyer.

Int. 117. Do you refer, in your last answer, to what he was to receive for services as mentioned and stipulated in the paper introduced in evidence here marked "Complainant's Exhibit B & H."?

[*Counsel for defendants objects to the question as leading.*]

Ans. I do.

Int. 118. At the time the last mentioned letter was written, had you any other interest whatever in reference to the Davis estate?

Ans. None whatever.

Int. 119. State whether or not, on or about May 21st, 1900, you received another letter from said Henry A. Root bearing that date.

Ans. I did.

Int. 120. I will ask you to state whether the last mentioned letter is in reference to the subject of the indebtedness which you claim to be owing, as mentioned in your bill of complaint in this action.

[*Counsel for defendants objects to the question as immaterial, irrelevant and incompetent, and upon the ground that the letter itself will show what it has reference to.*]

Ans. It was.

Int. 121. State how the last mentioned letter was brought to you.

Ans. By the United States mail.

Int. 122. Whose name is subscribed to the last mentioned letter?

Ans. Henry A. Root.

Int. 123. Is that the signature of the defendant Henry A. Root?

Ans. It is.

[*Counsel for complainant offers in evidence the contents of the last mentioned letter, in so far only as the same contains statements of said defendant Henry A. Root against his interest, or against the interest of his co-defendant having an interest in the subject matter of this action, and each and all statements in said last mentioned letter which may be taken, or construed, as being in the interest, or in favor of the interest of said Henry A. Root, or any of his co-defendants in this action, who have an interest in the subject matter thereof, are ex-*

cluded from this offer, and complainant's counsel requests the special examiner to mark said last mentioned letter "Complainant's Exhibit XLIV.", for identification for use in evidence in this action, in so far as complainant has offered the contents thereof, and to that extent he now introduces and puts said letter in evidence.

Counsel for defendants asks that counsel for complainant be required to specify the portions of this letter, which he claims are against the interest of Mr. Root, or of his associates, which he offers in evidence. He also objects to the admission of any part of the letter in evidence as against any of the defendants, other than the defendant Henry A. Root, upon the ground that Mr. Root is not shown to have had any authority to represent anybody but himself.

In response to the request of counsel for defendants that complainant's counsel be required to specify the portions of this letter which he claims are against the interest of Mr. Root, or of his associates, which he offers in evidence, counsel for complainant says that he has sufficiently indicated the portions of said letter which he offers in evidence as he believes in the offer and introduction thereof, and with that offer leaves the matter to the court.

Counsel for defendants insists that the form of the offer made by complainant's counsel is unprecedented, and he still insists that before the letter, or any part thereof, shall be marked he shall be required to specify parts of the letter which he offers in evidence so that counsel for defendants may know what parts are to be received in evidence and what parts are not to be received, in order that counsel for defendants may intelligently object to the offer made.

Counsel for defendants objects to this letter being offered in evidence until his request has been complied with, and asks that the question be certified by the special examiner to the court for its determination.

The special examiner marks the letter, offered by counsel for complainant, "Complainant's Exhibit XLIV., B. H. B., Special Examiner", and at the request of counsel for defendants certifies the above to the court for instructions.

LOWELL, J. The court directs that the counsel for complainant

must either put the whole letter in evidence or specify the parts he wishes to introduce in evidence.

To which ruling complainant's counsel excepts, and exception is allowed.

In response to the request that counsel for complainant specify the parts of said last mentioned letter, which he wishes to introduce in evidence at this time, and in conformity with the ruling of Judge Lowell in that behalf recorded, counsel for complainant specifies the following statements contained in said last mentioned letter, and reads the same into the record as follows:]

"May 21st, 1900.

My dear Mrs. Ingersoll:—

Mr. Farrell asked me the other day when I called at your house if I would not write a letter to you and state just the situation of the relations between your late husband and myself in so far as the Davis estate matter is concerned.

I wrote him that I would see Mr. Coram in a few days and talk the subject over with him, and then I would be able to say definitely and with more exactness just what the situation was then and is at this time, because I wanted to see if Mr. Coram's recollection confirmed my own.

Now, the situation is exactly this:

The agreement with Col. Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis estate for his services. That agreement was made at the time the will was first offered for probate. At that time the estate amounted to upwards of $5,000,000.

As you know, Col. Ingersoll went out there I think three or four times.

A partial distribution was had and I received a certain considerable amount of money from this fund and from my own interest in the estate, and with it I came to New York. I had, as I recollect it, something like $30,000, in my possession when I came to New York.

I saw Col. Ingersoll. I said to him 'Colonel, how much do you think you should receive in this first distribution?' he said to me 'How much do you think?', I said to him 'I would rather for you to say.' He then said he would rather have me say. Then I asked him if he thought it would be fair for him to receive a fee of $5,000 from this distribution. I thereupon sent him a check for $5,000.

There is now a substantial fund in Boston amounting to between $400,000. and $500,000., which I am using every effort in my power to get. I can assure you now, as I said before, I will do everything

in my power to see that you receive as much from that fund as I can. This money is practically all the money. There is besides now in Butte, belonging to the estate $100,000., and there are some bank-shares in Butte which will be distributed later.

The portion of the estate which, in my judgment, is of very great value, and of very much more value than the money, is the mining property, and when we realize upon that, which I hope we shall do before long, I have every reason to think that there will be a very substantial amount to which you will be entitled, and I suggest that you also have that looked into, so that you may know from sources, other than myself, that you are fairly treated.

If I can tell you, or anyone whom you desire to have investigate the subject, anything further, I am at your service at any time.

Among the great regrets which I have is the fact that Col. Ingersoll devoted so much time to this cause, and that there is so little for you out of it, but as I said before, I do really believe that from the mining properties, we will, as soon as they can be properly handled, receive very large benefits.

Very truly yours,

HENRY A. ROOT.

Mrs. Robert G. Ingersoll, 117 East 21st Street, New York City."

The foregoing statements contained in said last mentioned letter, which has been marked for identification for use in evidence in this cause "Complainant's Exhibit XLIV.", for identification, counsel for complainant now offers and puts in evidence as statements and admissions made by said defendant Henry A. Root against interest, and counsel for complainant will hereafter at any time he may deem the same proper, either in rebuttal or otherwise, introduce in evidence in this cause any other statements contained in said letter which complainant deems proper and useful in support of her contention in this case.

Counsel for defendants asks counsel for complainant whether he has now specified all the portions of said letter now marked "Complainant's Exhibit XLIV.", for identification, which he now intends to offer in evidence in this case. The counsel wishes to know so that he may take his objections intelligently at this time.

Counsel for complainant has designated and specified above the portions of said letter which he wishes to offer and to put in evidence at the present time. He may, however, on rebuttal or at any other

stage of the case when it is proper for complainant to introduce evidence herein desire to use other statements contained in said letter.

Counsel for defendants objects to the introduction in evidence of those portions of the letter now marked "Complainant's Exhibit XLIV.", for identification, which has been read by counsel for complainant, upon the ground that they are inadmissible as against any defendant except Henry A. Root, and that as against him they are immaterial, irrelevant and incompetent, and upon the further ground that counsel has unfairly selected the portions which he has so read, inasmuch as he has omitted words from sentences and has read only portions of sentences, and has sought thereby and has thereby given to the language read a meaning which the letter read as a whole does not convey, and upon the further ground that the statements read do not constitute admissions or statements against the defendant Henry A. Root.

Counsel for defendants claims that the letter should be offered and admitted as a whole or that no part thereof should be admitted.]

Int. 124. Did you receive another letter from said Henry A. Root on or about August 24, 1901, bearing that date and subscribed "Henry A. Root"?

Ans. I did.

Int. 125. Have you that letter now before you?

Ans. I have.

Int. 126. State in whose handwriting the same is.

Ans. Henry A. Root's.

Int. 127. Whose signature is subscribed thereto?

Ans. Henry A. Root's.

[*Counsel for complainant offers and puts in evidence said last mentioned letter, and requests the special examiner herein to mark the same "Complainant's Exhibit XLV.", for identification for use in evidence in this case.*

Counsel for defendants objects to the admission of said letter as to all of the defendants represented by him except Henry A. Root.]

Int. 128. The writer of the last mentioned letter says therein "I want to see if we can't come to some arrangement". Please state whether or not there was at the time of the date of said letter existing or pending any matter whatever about which you could come to

some arrangement with said Henry A. Root, except the claim of indebtedness mentioned in your bill of complaint in this action.

Ans. There was no other.

Int. 129. Are you acquainted with Clinton P. Farrell?

Ans. I am.

Int. 130. How long have you known him?

Ans. About all his life, — about thirty-three years.

Int. 131. What relation is said Clinton P. Farrell to you?

Ans. My brother-in-law.

Int. 132. Where does he reside?

Ans. New York.

Int. 133. State where he resides also in reference to your own residence.

Ans. The same place.

Int. 134. State whether or not you requested or directed said Clinton P. Farrell to undertake for you as administratrix of the estate of Robert G. Ingersoll, deceased, to obtain payment of the indebtedness you claim to be owing and due from said Joseph A. Coram and Henry A. Root, as mentioned in your bill of complaint in this action.

Ans. I did.

Int. 135. State whether or not Mr. Farrell acted for you in that behalf.

Ans. He did.

Int. 136. Are you acquainted with John H. Hazelton, attorney at law, of New York, State of New York?

Ans. I am.

Int. 137. State whether or not you engaged and directed said Mr. Hazelton to act for you as your attorney, as administratrix of the estate of Robert G. Ingersoll, deceased, in seeking payment of said indebtedness which you claim Coram and Root are owing to you, as administratrix of the estate of Robert G. Ingersoll, deceased, mentioned in your bill of complaint in this action.

Ans. I did.

Int. 138. State whether or not Mr. Hazelton acted in that behalf for you.

Ans. He did.

Int. 139. How long has said Mr. Hazelton been your attorney as administratrix of the estate of Robert G. Ingersoll, deceased?

Ans. All of the time since I was appointed administratrix of the estate of Robert G. Ingersoll, deceased.

Int. 140. State whether or not you found among the papers left by Colonel Ingersoll a certain letter bearing date December 15, 1894, and signed C. H. Palmer.

Ans. I did.

Int. 141. Have you said letter now before you?

Ans. I have.

[*Counsel for complainant offers and puts in evidence the letter last mentioned by the witness, and will give notice of the filing thereof with the special examiner here in pursuant to Rule 11 of this court, and will hereafter, if occasion should require, introduce testimony as to the handwriting and signature contained in said last mentioned letter, and counsel for complainant now requests the special examiner here in to mark said letter for identification and for use in evidence in this case as "Complainant's Exhibit XLII".*

Counsel for defendants objects to the admission in evidence of this letter on the ground that it has not been proved to be a letter written and signed by C. H. Palmer, and upon further ground that it is immaterial, incompetent and irrelevant, and inadmissible under the issues in this action. There is no evidence for the genuineness and authenticity of the letter.

Counsel for complainant now states on the record that the examination of Mrs. Eva A. Ingersoll in-chief is now closed, subject to recall, in case occasion should require.

Counsel for defendants asks counsel for complainant whether the examination-in-chief of Mrs. Ingersoll is closed, inasmuch as counsel for defendants does not wish to cross-examine the witness until the examination-in-chief is closed.

Complainant's counsel at the present time has no further questions to ask this witness in-chief, but if occasion should require, they reserve the right to recall her for further examination.

Counsel for defendants does not admit that counsel for complain-

that has any right to be reserved, or which he can reserve at this time for further examination-in-chief, and proceeds to the cross-examination of this witness on the assumption that the examination-in-chief is completed.

Cross Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 142. At his death, on July 21, 1899, Colonel Ingersoll resided, did he not, at Dobb's Ferry, Westchester County, State of New York?

Ans. He did.

Cross-Int. 143. How long, before his death, had he had a continuous residence in the State of New York?

Ans. November, 1885.

Cross-Int. 144. Did Colonel Ingersoll leave a will?

Ans. He did not.

Cross-Int. 145. You were appointed administratrix of the estate of Robert G. Ingersoll by the surrogate of Westchester County, State of New York, about August 21st, 1899, were you not?

Ans. I was.

Cross-Int. 146. You were also appointed administratrix of the estate of Robert G. Ingersoll, deceased, in the Commonwealth of Massachusetts, by the Probate Court of Suffolk County, on May 29th, 1903, were you not?

To which question, counsel for complainant objects on the ground that the same is not cross-examination, and on the further ground that the facts called for by said question have been expressly admitted by the answer of the defendants.

Ans. I was.

Cross-Int. 147. Has any other legal representative of the estate of Colonel Ingersoll in the Commonwealth of Massachusetts ever been appointed?

To which question counsel for complainant objects on the ground that the same is not cross-examination, and is entirely irrelevant to any issues made by the pleadings in this action.

Ans. None that I know of.

Cross-Int. 148. Did Colonel Ingersoll, at his death, owe any debts to your knowledge?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination, nor is the inquiry relevant to any issue in this action.*]

Ans. Not to my knowledge.

Cross-Int. 149. Have any claims against the estate ever been presented to you as administratrix?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination, nor relevant to any issue in this case.*]

Ans. I couldn't say, a few dollars might have been; nothing of any importance.

Cross-Int. 150. Did you, as administratrix, advertise for the presentation of any claims against the estate?

[*To which question counsel for complainant objects on the same ground as stated in the foregoing objection.*]

Ans. My representative did.

Cross-Int. 151. If there were any debts, they were all paid years ago, were they not?

Ans. Yes, sir.

Cross-Int. 152. And before the suit brought in Montana by yourself, as administratrix, against Henry A. Root and others, in July, 1901, was begun?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination, nor is it relevant to any issues whatever in this case.*]

Ans. I think they were, but I don't know.

[*Adjourned.*]

BOSTON, MASS., May 26, 1904.

Cross-Int. 153. How many children did Colonel Ingersoll leave at his death?

[*To which question complainant's counsel objects on the ground that the same is not cross-examination, and on the further ground that the same is alleged and expressly admitted in the pleadings.*]

Ans. Two.

Cross-Int. 154. And their names, please.

Ans. Eva Robert Ingersoll Brown and Maud Robert Ingersoll.

Cross-Int. 155. You and your two children are the only persons now interested in the estate of Colonel Ingersoll?

Ans. Yes.

Cross-Int. 156. [*Counsel for defendants calls the witness' attention to Complainant's Exhibit A.*] When did you first see that instrument?

[*To which question complainant's counsel objects on the ground that the same is immaterial.*]

Ans. I don't remember.

Cross-Int. 157. Was that found among Colonel Ingersoll's papers after his death?

Ans. I suppose it was. I don't know how I would come by it any other way.

Cross-Int. 158. I call your attention to Complainant's Exhibits I. to XXXI. inclusive, with the exception of Exhibit H., and also to Complainant's Exhibit XLIII., Complainant's Exhibit XLIV., for identification, and Complainant's Exhibit XLV., and ask you if those are the only letters from Mr. Root, which were found among the papers of Colonel Ingersoll after his death, or which you have received from Henry A. Root since Colonel Ingersoll's death?

Ans. I suppose these are the important ones. I couldn't say.

Cross-Int. 159. Are they the only ones of which you now know?

Ans. All I can think of; I couldn't say, as I said before.

Cross-Int. 160. Are there not some letters from Mr. Root other than these of which you know?

Ans. As I said before, I couldn't say.

Cross-Int. 161. Has Mr Hazelton been the only attorney who has acted for you as admini-tratrix of the estate of Colonel Ingersoll?

Ans. No.

Cross-Int. 162. What other attorney has acted for you?

Ans. Well, I left that with Mr. Hazelton and Mr. Farrell. Judge Harwood also has acted for me.

Cross-Int. 163. Did Judge Harwood act for you before you began

the action in the State of Montana, which is referred to in paragraph twenty-five of the bill of complaint?

Ans. He acted all the time in this case.

Cross-Int. 164. In what case? Do you mean the case in Montana or the present case?

Ans. Both cases.

Cross-Int. 165. Has Judge Harwood ever acted for you except in these two cases?

Ans. No.

Cross-Int. 166. You have testified, have you not, that you intrusted to Mr. C. P. Farrell, your brother-in-law, and to Mr. John H. Hazelton, as the attorney for you as administratrix, the collection of the claim made by you as administratrix against Henry A. Root and Joseph A. Coram for the services of Colonel Ingersoll rendered in the suit called Davis will case?

Ans. And Judge Harwood. I couldn't say what Mr. Hazelton and Mr. Farrell have done besides. I intrusted entirely to their judgment.

Cross-Int. 167. You mean to the judgment of Mr. Farrell, Mr. Hazelton and Judge Harwood, do you?

Ans. As attorneys. I trusted to friends also.

Cross-Int. 168. Do you mean to other friends other than these?

Ans. Scores of friends, in fact everyone who loved Mr. Ingersoll.

Cross-Int. 169. What attorneys have you ever employed to collect this claim?

To which question counsel for complainant objects on the ground that the testimony called for is not cross-examination, nor is the same relevant or material to any issues in this case.

Ans. I don't know: I left it entirely with Mr. Hazelton and Mr. Farrell from the first.

Cross-Int. 170. Mr. Hazelton is an attorney, is he not?

Ans. He is.

Cross-Int. 171. Mr. Farrell is not an attorney at law, is he?

Ans. No, he is not,— just an advisor.

Cross-Int. 172. Have you ever employed any other attorneys to collect this claim besides Mr. Hazelton and Judge Harwood?

To which question counsel for complainant objects on the ground that the same is not cross-examination, and is irrelevant and immaterial to the issues in this case on the further ground that the attorneys of record in this case are shown by the papers and pleadings therein and includes attorneys, as shown by the record, other than the ones mentioned in the question.

Ans. I refer you to Mr. Hazelton and Mr. Farrell and Judge Harwood. I left it all in their hands. They may have employed others. They had my consent to.

Cross-Int. 173. You have employed Mr. John H. Hazelton, have you not?

Ans. I have.

Cross-Int. 174. You have employed Judge Harwood, have you not?

To which question counsel for complainant objects on the ground that the same is not cross examination; that it is irrelevant and a reiteration of the question asked and answered several times.

Ans. I have.

Cross-Int. 175. Have you employed Hollis R. Bailey, of Boston?

To which question complainant's counsel objects on the ground that the testimony called for is irrelevant to the issues in this case and is a matter shown by the record.

Ans. Judge Harwood has, I think, with my consent, of course.

Cross-Int. 176. Before you employed Judge Harwood and Hollis R. Bailey did Mr. Hazelton, as your attorney, have full authority from you as administratrix to take the proper steps to collect the claim in question?

To which question counsel for complainant objects on the ground that the testimony called for thereby is immaterial.

Ans. I gave full authority to Mr. Farrell, and he knew my wishes in the matter.

Cross-Int. 177. What were your wishes in the matter, Mrs. Ingersoll?

To which question counsel for complainant objects on the ground that the same is indefinite.

Ans. To get this money that was owing to me. That was very important.

Cross-Int. 178. You received from Mr. Root, about May 21st, 1900, the letter which has been marked "Complainant's Exhibit XLIV.", for identification, did you not?

Ans. I did.

Cross-Int. 179. Did you read the letter after receiving it?

Ans. I usually read my letters when I receive them from persons I have long waited to have some good news from.

Cross-Int. 180. Did you read this letter when you received it, Mrs. Ingersoll?

Ans. I did.

Cross-Int. 181. After receiving this letter, did you discuss it with Mr. Farrell, or Mr. Hazelton, or with both of them?

Ans. I certainly did with Mr. Farrell, and I think I did with Mr. Hazelton.

Counsel for defendants offers in evidence so much of Complainant's Exhibit XLIV., for identification, as has not already been read in evidence and made a part of this deposition by complainant's counsel, and asks the special examiner to mark the same "Defendants' Exhibit I.".

To the reception in evidence of the statements in said letter referred to in the foregoing offer, made by and on behalf of defendants, counsel for complainant objects on the ground that the same endorses statements in the interest, or in favor of the interest, of the defendant Henry A. Root and his co-defendants, and that such statements are the written statements of Henry A. Root, and, therefore, inadmissible, either in his favor or in favor of any of his co-defendants in this suit. And on the further ground that other statements in said letter, offered in evidence by defendants, are narrations of facts alleged and asserted by the said Henry A. Root, author of said letter, and are not admissible in evidence as offered by or on behalf of the said Root or any of his co-defendants. And on the further ground that certain statements in said letter purport to be statements of what is alleged in said letter or asserted therein, as having been said by Robert G. Ingersoll, who was deceased at the date said letter

was written, and all that character of assertion are objected to, and are inadmissible and incompetent, under the statutes of the United States, in reference to alleged declarations of deceased persons offered by the author of such statements.

Counsel for defendants asks leave to read the whole of the letter offered in evidence into the record, and that so much of it as has already been read into the record by counsel for complainant be underscored, simply for the purpose of distinguishing what complainant's counsel has offered and read into the record as evidence, from that which defendants' counsel offers and introduces in evidence.

The special examiner permits the same to be read in accordance with such request and marked accordingly.

STERN & RUSHMORE,
Attorneys and Counsellors,
16 Wall St., New York.
Simon H. Stern. Chas. E. Rushmore.

May 21st, 1900.

My dear Mrs. Ingersoll:

Mr. Farrell asked me the other day when I called at your house, if I would not write a letter to you and state just the situation of the relations between your late husband and myself in so far as the Davis Estate matter is concerned.

I wrote him that I would see Mr. Coram in a few days and talk the subject over with him, and then I would be able to say definitely and with more exactness just what the situation was then and is at this time, because I wanted to see if Mr. Coram's recollection confirmed my own.

Now, the situation is exactly this:

The original agreement with Col. Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis Estate for his services. That agreement was made at the time the will was first offered for probate. At that time the Estate amounted to upwards of five million dollars, and that agreement was made on account of the magnitude of the estate, and was a very reasonable one, considering what the estate then amounted to.

As you know, Col. Ingersoll went out there, I think three or four times; the cause was tried and the result was a mis-trial. Then came attacks on the body of the estate. A. J. Davis, Jr., claimed that the First National Bank in Butte which was then worth over

a million and is now worth over two million, had been given to hi
by A. J. Davis, the deceased. He succeeded in this contention an
the estate lost that bank.

The Butte & Boston mining stock, amounting to 90,000 share
was worth at the time of Judge Davis' death, about $1,500,000
That company failed, and the estate was fortunate in being able t
sell that stock altogether for the sum of $180,000.

The First National Bank of Helena, one-half of the stock of whic
was owned by the estate, we then supposed was perfectly good, an
we estimated the interest of the estate in that bank to be worth
very nearly half a million dollars. That bank failed, and the estat
was obliged to pay $175,000 assessment, because of its ownership
of this stock, and never received a penny for the stock, and neve
will.

After all these things had occurred, Col. Ingersoll favored and
urged a settlement in compromise with the heirs of John A. Davis
and I, after many efforts, succeeded in effecting a settlement.
had prepared a draft of the compromise settlement which was
signed by all the heirs. Col. Ingersoll went over it and changed
it in many respects, and thoroughly approved of it. By this com
promise agreement a certain, and very considerable proportion of
the shares of my aunt and sister and cousins and myself, were
turned over to Captain C. H. Palmer, who was selected by us as
the trustee to receive those interests, and with such interests pay
off the obligations which we had incurred, including the fee to
Col. Ingersoll.

A partial distribution was had and I received a certain consider-
able amount of money from this fund and from my own interest in
the estate, and with it I came to New York, first, however, paying off
a fractional part of the money which had been advanced for the
litigation. There was about twenty per cent. paid to the creditors
who had advanced moneys for our side. I had, as I recollect it,
something like $30,000 in my possession when I came to New
York.

I saw Col. Ingersoll and told him the situation. I told him that
it was utterly impossible for the agreements which we had made to
be carried out, because of the fact that the estate had been so
depleted by the inroads made upon it and which I have referred to.

Col. Ingersoll said that under the circumstances, of course he
would not and could not possibly claim that the fee which I had
agreed to pay him should be paid, because it was impossible to do
it. He said that for my work of years I should have some com-
pensation, and that he was willing to do what was very reasonable
and fair under the circumstances, which, of course, I knew he would
do. I said to him "Colonel, how much do you think you should

receive in this first distribution?" He said to me, "How much do you think?" I said to him, "I would rather for you to say." He then said he would rather have me say. Then I asked him if he thought it would be fair for him to receive a fee of $5,000 from this distribution. He said he thought that would be very generous. I then suggested to him that I had borrowed in Ithaca $800, from him, which I would, of course, pay, and he said all right, it would be perfectly satisfactory to him to receive this $5,000. Thereupon sent him a check for the $800, and also for $5,000.

He met Mr. Coram about the same time and had a long talk with Mr. Coram on the subject, and told Mr. Coram that of course he could not expect to receive the $100,000 which he would have been entitled to had the estate not so much diminished, but that he was perfectly willing to take what was fair and reasonable, and that he told me so, and that was the arrangement then in existence.

There is now a substantial fund in Boston, amounting to between $100,000 and $200,000 which I am using every effort in my power to get. An application to distribute that came before the Probate Court in Boston yesterday. I was present and urged that the cause be heard, but the other side secured a postponement of it until the 5th day of September, but the Judge said then he surely would dispose of the matter, and I would suggest to you that you have somebody on your own account take an interest in that and ascertain all of the facts in regard to it: ascertain how much money will be then or whenever it is, distributed to our side; see what the claims on it are, and I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money. There is besides now in Butte belonging to the estate $100,000, and there are some bank shares in Butte, which will be distributed later, but there seems to be a disposition on the part of the administrators and of his lawyers, to grab everything they can get hold of and distribute nothing. Still, we may get something out of that.

The portion of the estate which, in my judgment, is of very great value, and of very much more value than the money, is the mining property, and when we realize upon that, which I hope we shall do before long, I have every reason to think that there will be a very substantial amount to which you will be entitled, and I suggest that you also have that looked into, so that you may know from sources other than myself that you are fairly treated.

I make these suggestions to you as to having someone look into the subject, not because I think that you would fail to have confi-

dence in my word, but because it would be very much more satisfactory to me if you ascertain the facts from a source entirely outside of myself.

The whole Davis estate has been a sad, unfortunate experience as far as I am concerned. I spent ten of the best years of my life in it, and I greatly regret it. Mrs. Corune, whom you know, and who would be entitled to a very substantial sum of money, has received up to the present time only a pittance and is as anxious as I that you should receive as much as possible, and I have not up to the present time received pay enough, or anything like pay enough, out of the estate to pay the carfare which I have expended in trying to get our interests in the estate.

If I can tell you, or anyone whom you desire to have investigate the subject, anything further, I am at your service at any time.

Among the great regrets which I have is the fact that Col. Ingersoll devoted so much time to this cause and that there is so little for you out of it, but as I said before, I do really believe that from the mining properties we will, as soon as they can be properly handled, receive very large benefits.

Very truly yours,

HENRY A. ROOT.

Mrs. Robert G. Ingersoll, 117 East 21st Street, New York City."

Cross-Int. 182. Did Mr. Hazelton or Mr. Farrell ever report to you as to any interviews they had had with Mr. Henry A. Root?

[*To which question counsel for complainant objects on the ground that the same is immaterial, irrelevant to the issues in this case, and is not cross-examination in any respect, and relates to privileged communication between complainant and her attorney.*

Ans. They did.

Cross-Int. 183. Whose signature, if you know, is that subscribed to the paper which I now show you?

Ans. John H. Hazelton's signature.

Cross-Int. 184. Mrs. Ingersoll, will you please read that letter. Was that letter written by your authority and with your knowledge?

[*To which question counsel for complainant objects on the ground that the complainant, as administratrix, could not delegate her authority as such representative to any person whomsoever, on which ground the testimony called for is incompetent.*]

Ans. I don't remember.

Cross-Int. 185. Mr. Hazelton was your attorney on July 13, 1901, was he not?

Ans. He was.

Cross-Int. 186. Had not Mr. Hazelton, previous to this, reported to you that he had had several interviews with Mr. Root with reference to the settlement of the claim made by you as administratrix of Colonel Ingersoll against Henry A. Root and Joseph A. Coram?

To which question counsel for complainant objects on the ground that the same assumes that any such interview was in relation to a settlement, and apparently would exclude interviews in relation to said indebtedness mentioned in complainant's bill generally, and is, therefore, misleading and is ambiguous when applied to the subject under inquiry.

Ans. I often was present with Mr. Farrell. I can't say. I left it with Mr. Farrell.

Cross-Int. 187. *Counsel for defendants repeats the question to the witness.*

To which question counsel for complainant objects on the ground that it calls for supposed communication between complainant and her attorney, which are privileged, and which complainant is not obliged to answer unless the same is so ruled by the court, or some of the judges, on submission of this question.

Ans. I can't say.

Cross-Int. 188. Had Mr. Farrell previously to this time reported to you that he had seen Mr. Root several times with reference to a settlement of the claim made by you as administratrix of Colonel Ingersoll against Henry A. Root and Joseph A. Coram?

To which question counsel for complainant objects on the ground that the same is not cross-examination; that the same is irrelevant and immaterial to any issues in this case, and on the further ground that the same, in reference to time, is ambiguous and indefinite.

Ans. I suppose he had.

Counsel for defendants asks the special examiner to mark the letter dated July 13th, 1901, and signed, as testified to by the witness,

with the signature of John H. Hazelton, as "Defendants' Exhibit No. 2", for identification for use in this action.

Counsel for complainant observes that counsel for defendants has requested the special examiner to mark said last mentioned paper "for use in this action", and now asks counsel for defendants whether he will allow complainant's counsel to see and read said last mentioned paper-writing so as to be able to frame proper objection to the marking the same for use in this action, which we deem as equivalent to a request to mark it "for use in evidence in this action".

As counsel for defendants has simply asked that the paper-writing be marked for identification, and has not offered it in evidence or asked that it be admitted in evidence, he respectfully declines to allow counsel for plaintiff at this time to read or inspect the paper-writing.]

Cross-Int. 189. Counsel for defendants calls the attention of the witness to a paper-writing, and asks her to examine the same and say whether she knows the signature subscribed thereto, and, if so, state whose signature or signatures is, or are, subscribed thereto.

Ans. I, of course, do not know Mr. Palmer's signature. I wouldn't say that was Mr. Root's: I will simply say that I don't know.

Cross-Int. 190. In your opinion is the signature "Henry A. Root" in the handwriting of Henry A. Root?

Ans. I wouldn't swear that it was.

Cross-Int. 191. Have you ever seen that paper-writing before?

Ans. I don't think I have.

Cross-Int. 192. Have you ever seen any other paper-writing than this having the same contents?

Ans. I have not.

[Defendants' counsel asks the special examiner to mark the paper-writing just shown witness "Defendants' Exhibit No. 3", for identification.]

Cross-Int. 193. Do you know the defendant in this action, Joseph A. Coram?

Ans. I do not.

Cross-Int. 194. You have heard of Mr. Coram, have you not?

Ans. I certainly have.

Cross-Int. 195. Through whom have you heard of him?

Ans. Through Mr. Ingersoll, and then this suit all through.

Cross-Int. 196. You have heard of him through Mr. Root?

Ans. I suppose so; I think so.

Cross-Int. 197. Have you heard of him through Mr. C. P. Farrell?

Ans. Yes, I suppose so.

Cross-Int. 198. And through Mr. Hazelton?

Ans. I don't remember.

Cross-Int. 199. Do you know John S. Harris?

Ans. I do.

Cross-Int. 200. How long have you known Mr. Harris?

Ans. Since 1866 or 1867.

Cross-Int. 201. How long have you known Judge Harwood?

Ans. He was judge at the Davis will case when I was present.

Cross-Int. 202. How long have you known Judge Harwood personally?

Ans. I think since that time,— I met him there.

Cross-Int. 203. Is it not a fact that after you had heard from Mr. C. P. Farrell of the negotiations with Mr. Root about a settlement of the claim made by you as administratrix of Robert G. Ingersoll, deceased, against Henry A. Root and Joseph A. Coram you considered that the matter had been adjusted and settled?

To which question counsel for complainant objects on the ground that the same is irrelevant to any issues raised by the pleadings in this case; on the further ground that it calls for a statement of simply the mental attitude of the complainant as an administratrix, expressing a decision touching a matter in which she could not legally act, namely, the compounding and giving away of the rights and interest belonging to an estate without the approval and sanction of the court having jurisdiction of such estate. And on the further ground that the preceding question assumes that the witness had heard of particular matters and things as to which there is no evidence whatever, there being no showing that she had ever heard of or pretended or attempted settlement.

Ans. I did not.

BOSTON, Mass., May 27, 1904.

Cross-Int. 204. During Colonel Ingersoll's lifetime you were not acquainted with business and business methods were you?

Ans. Why, I knew most everything that was going on,— I didn't go into. We talked of it at home.

Cross-Int. 205. After you were appointed administratrix of Colonel Ingersoll's estate, you entrusted the settlement of the same, as I understand, to your brother-in-law, Mr. C. P. Farrell?

[*To which question counsel for complainant objects on the ground the witness could not, as administratrix, legally delegate her duties as such to some other person, and being an attempt to lead this witness to state that she did something that was contrary to her duties as administratrix, and on the further ground that the question is not cross-examination and it has not been shown that any settlement of the estate has been made and that the testimony called for thereby is immaterial and irrelevant to any issue in this suit.*]

Ans. I knew what he was doing: he consulted me.

Cross-Int. 206. You knew what he was doing: what do you mean by that, Mrs. Ingersoll?

[*To which question counsel for complainant interposes the same objections as the last foregoing.*]

Ans. In a general way I knew what he was doing.

Cross-Int. 207. Cross-Int. 205 repeated.

Ans. Answer to Cross-Int. 205 repeated.

Cross-Int. 208. Did Mr. C. P. Farrell act in the settlement of the estate of Colonel Ingersoll?

[*To which question counsel for complainant objects on all ground stated in the last foregoing objection, and on the further ground that there has been shown no settlement of said estate, and on the further ground that a settlement of an estate would be a matter of record, and the record would be the best evidence in that respect.*]

Ans. It never has been settled.

Cross-Int. 209. Have any steps ever been taken towards it-settlement?

To which question counsel for complainant interposes objections on the same ground as stated in the last two preceding objections.

Ans. I have settled all claims that have come to me.

Cross-Int. 210. Any other steps been taken towards its settlement?

To which question counsel for complainant objects on all the grounds stated in objections to the previous similar question, and on the further ground that the record of the court, or courts, in which the administration of said estate and the settlement thereof should be had is the best evidence of what steps have been taken towards the settlement thereof.

Ans. I think that has been answered.

Cross-Int. 211. When was it answered, Mrs. Ingersoll?

Ans. Previously.

Cross-Int. 212. What was the answer?

To which question counsel for complainant interposes the same objection as heretofore recorded to like questions.

Ans. It is on the record there, is it not?

Cross-Int. 213. Do you refuse, Mrs. Ingersoll, to answer my question?

To which question counsel for complainant objects on the ground that the witness has not refused to answer any questions, and has not indicated any disposition to refuse so to do.

Ans. Well as I said before, that was sufficiently answered.

Cross-Int. 214. Mrs. Ingersoll, I asked this question: "Have any steps ever been taken towards its settlement," and you answered "I have settled all claims that have come to me". I then asked you whether any other steps had been taken by you towards its settlement, and to that you said, "I think that has been answered".

Ans. It seems to me that the settlement of debts is sufficient to settle the estate.

Cross-Int. 215. To your knowledge, Mrs. Ingersoll, were any debts due Colonel Ingersoll at his death, and if so, what were they?

To which question counsel for complainant objects on the ground that the testimony called for thereby is immaterial and irrelevant to the issues in this suit, except the debt claimed to be due Colonel

Ingersoll at the time of his death, as set forth in complainant's bill of complaint in this action.]

Ans. A great many were due him besides this one — this was the most important.

Cross-Int. 216. Did you not know that it was your duty, as administratrix, to collect the debts due to Colonel Ingersoll at his death?

Ans. Certainly, I have made every effort to do it, but not with very great success.

Cross-Int. 217. You understood, then, Mrs. Ingersoll, did you not, that the settlement of the estate included the collection of debts as well as the payment of any debts?

Ans. Certainly, the most important to me.

Cross-Int. 218. Then you were in error, Mrs. Ingersoll, were you, when you testified that it seemed to you that the settlement of debts was sufficient to settle the estate?

Ans. It seemed to be more important to settle his debts — more important than my own interests.

Cross-Int. 219. Do you mean by settling his debts paying his debts?

[*To which question counsel for complainant objects on the ground that the witness is presumed to know the usual and ordinary meaning of the terms used, and that the testimony called for is irrelevant and immaterial to the issues in this case.*]

Ans. No other interpretation, I should think, to that question.

Cross-Int. 220. Mrs. Ingersoll, have you talked over the testimony that you should give here this morning with Judge Harwood?

[*To which question counsel for the complainant objects on the ground that the testimony called for is irrelevant and immaterial, and on the further ground that it calls for communications between client and counsel and solicitors, and on the further ground that there has been no question asked or testimony called for or given relevant to any issues in this case.*]

Ans. How could I, not knowing the questions?

Cross-Int. 221. After you were appointed administratrix, you talked with Mr. C. P. Farrell, did you not, with reference to collect-

ing the claim that you made, as administratrix, against Henry A. Root and Joseph A. Coram?

Ans. It was a family topic for weeks; he was included.

Cross-Int. 222. Did you ask him to take steps to collect the claim?

Ans. We consulted together — friends and lawyers.

Cross-Int. 223. Who were the friends and who were the lawyers referred to in your last answer?

Ans. It would take the rest of the day to tell the friends.

Cross-Int. 224. I desire you to do so.

Counsel for complainant objects to the witness being required to attempt to enumerate the names of the friends with whom she may have spoken in reference to said claim as irrelevant, on the ground that the same is entirely irrelevant and immaterial, and would be a waste of time to require the same. Counsel for complainant does not object to the witness stating the name of the attorney, whom she may have consulted on the subject, but does object to the witness being required to give any testimony as to the substance of what was said by the witness or her attorney on said subject in said consultation.

Counsel for defendants insists that complainant's counsel shall not prompt the witness under cross-examination. The witness must either answer the question, or decline to answer the question, and counsel for defendants will then know what proper proceedings should be taken to secure an answer.

Counsel for complainant desires that it be stated in the record that he suggested to the witness that she might, if she saw fit, decline to attempt to enumerate the friends with whom she may have spoken or consulted upon the subject of said claim, without incurring any contempt of court, or without intending to decline to answer any proper question, and counsel for complainant at the same time suggesting to counsel for defendants that he thought it would be proper for us to submit the question, if he insisted upon it, to get some ruling from one of the judges of this court thereon.

Does counsel for complainant advise this witness not to answer my last question?

In response to the foregoing inquiry addressed to counsel for com-

plainant, counsel for complainant says that he has not advised the witness to refuse to answer any questions so far propounded by counsel for defendants. Complainant's counsel has simply suggested to the witness that, in his opinion, it would not be improper for her to decline to communicate the friends with whom she may have advised about the claim in question, if the witness saw fit to decline, until a ruling was had from some of the judges of this court as to whether the witness should answer that part of the question to which reference is made, and counsel for complainant would then advise the witness to do as the judge ruled in the premises, if any such advice was needed.]

Cross-Int. 225. [*Counsel for defendants repeat Cross-Int.* 224.]

Ans. I decline only on account of the time it would take to do the same, and I would insist upon having my book of friends and and looking over the same.

[*Counsel for complainant now asks the special examiner herein to call the witness' attention to the part of the foregoing question as to which the witness has not declined to make answer to, that is, that part in relation to who was the lawyer.*]

[*Answer continued*]: I referred to Mr. Farrell, and Mr. Hazelton and Judge Harwood.

Cross-Int. 226. You did consult your brother-in-law, Mr. C. P. Farrell, did you not, with reference to the proper steps to be taken to collect the claim which you made as administratrix of Colonel Ingersoll's estate against Henry A. Root and Joseph A Coram?

[*To which question counsel for complainant objects on the ground that the testimony called for is not cross-examination, and is irrelevant and immaterial to any issues in this case, and is ambiguous and indefinite and assumes that the witness, who is not a lawyer, consulted with a person who has not been shown to be a lawyer but simply a member of her household, as to what steps would be necessary to collect the claim.*]

Ans. I suppose I did. The whole family; we talked it over.

Cross-Int. 227. Don't you know whether you did or not, Mrs. Ingersoll?

To which question counsel for complainant interposes the same objection as last above stated.

Ans. Of course I do; I thought that answer was sufficient.

Cross-Int. 228. Does the word "suppose" mean "know" with you?

To which question counsel for complainant objects on the ground that the witness is presumed to know the ordinary meaning of the words she uses, and that the court would put the proper meaning and construction upon the same in adjudicating this case.

Ans. It means the opposite.

Cross-Int. 229. You know, do you not, that you did consult with Mr. C. P. Farrell with reference to the steps to be taken to collect the claim in question?

To which question counsel for complainant objects on the ground that the testimony called for thereby is irrelevant and immaterial to any issues in this case, and on the further ground that the witness has answered a similar question, unless the counsel for defendants wishes some special meaning to be attached to his said statement in said question about the "steps to be taken to collect the claim in question".

Ans. I advised him to consult lawyers.

Cross-Int. 230. Do you know what lawyer, or lawyers, he consulted with?

To which question counsel for complainant objects on the ground that it is immaterial and irrelevant, is not cross-examination, and is a reiteration of a similar question heretofore answered by this witness.

Defendants' counsel insists that during the cross-examination of this witness, Judge Harwood shall not repeat the questions, and by a process of emphasizing, prompt the witness as to the answer to be given to the various questions, and defendants' counsel insists that all that Judge Harwood says to the witness shall be taken down so that the court may see how unfair is his method of prompting the witness on cross-examination. Defendants' counsel also objects to the witness consulting with Judge Harwood before answering questions put to her by counsel for defendants.

Counsel for complainant says that he thinks it is proper to state

that the insinuations put into the record by counsel for defendants are entirely unjustified; that counsel for complainant has simply wished, in a few instances where the witness did not appear to understand the question, to have the same presented to the witness so that the witness would clearly understand the same, and has simply asked defendants' counsel, or the writer of the questions, to read the same to the witness. As to taking down what is said by counsel into the record, complainant's counsel is perfectly willing that the same shall be done, but suggests that there ought to be another stenographer or recorder provided to take down that part of the record, and will insist, of course, that it includes the lecture and admonitions and directions given by counsel for defendants to the witness under cross-examination.

Counsel for defendants has made no insinuations, but has simply stated the truth. If counsel for defendants has indulged in any lectures they have been meant not for the witness but for the enlightenment of counsel for complainant, and he regrets that they have failed of that purpose.]

Ans. I don't remember all the lawyers, but I suppose it must be on the record and papers, as several lawyers such as Mr. Dos Passos offered to take the case without any pay.

[*Counsel for defendants moves to strike out the statement with reference to Mr. Dos Passos as not responsive to the question, and will ask that the question be repeated to the witness.*]

Cross-Int. 231. [*Cross-Int. 230 repeated.*]

Ans. I could not say all of them.

Cross-Int. 232. State the names of those whom you can recall?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination; the evidence called for thereby is immaterial and irrelevant and that it calls for information which, in the very nature of things, the witness could not know.*]

Ans. Mr. Hazelton, Judge Harwood,—those are the principal ones,—there are others, but I couldn't mention their names.

Cross-Int. 233. On your examination-in-chief you were asked this question: "Int. 134. State whether or not you requested or directed said Clinton P. Farrell to undertake for you as administratrix of the estate of Robert G. Ingersoll, deceased, to obtain payment of the

indebtedness you claimed to be owing and due from said Joseph A. Coram and Henry A. Root, as mentioned in your bill of complaint in this action", and you answered "I did". Was that answer correct?

To which question counsel for complainant objects on the ground that the same is an improper method of cross-examination of the witness.

Ans. If I understood the question at the time, it was correct.

BOSTON, MASS., June 3, 1904.

Cross-Int. 234. How long had Colonel Ingersoll lived at Dobb's Ferry before his death?

Ans. Eight or nine years — I can't say exactly.

Cross-Int. 235. It was during the summer that he and his family lived at Dobb's Ferry, was it not?

Ans. Yes, it was.

Cross-Int. 236. Colonel Ingersoll's last residence in New York City was at 117 East 21st Street, was it not?

Ans. It was for a short time.

Cross-Int. 237. What was his residence in New York City before he resided at 117 East 21st Street?

To which question counsel for complainant objects on the ground that the testimony called for thereby is immaterial.

Ans. The last place was 220 Madison Avenue.

Cross-Int. 238. Can you tell us how long he lived there?

Ans. Three years.

Cross-Int. 239. And can you tell us his residence immediately prior to that — I mean in the city of New York?

To which question counsel for complainant objects on the same ground as stated in the last foregoing objection.

Ans. 100 Fifth Avenue.

Cross-Int 240. When you received the letter dated May 21st, 1900, signed "Henry A. Root", a part of which has been read in evidence by your counsel, and the balance has been read in evidence by counsel for defendants, did you read the letter through?

Ans. I don't remember. I knew about what it was, of course.

Cross-Int. 241. Do you mean by that that you knew what it was about, or about what it was?

Ans. I knew what it was about.

Cross-Int. 242. I call your attention to Complainant's Exhibit XLV., and ask you whether, after receiving that letter, you, yourself, saw Mr. Root?

Ans. I don't think I did.

Cross-Int. 243. Did you give that letter to Mr. Farrell or to Mr. Hazelton, and request either of them to see or communicate with Mr. Root?

Ans. I think I did.

Cross-Int. 244. To whom?

Ans. I don't remember.

Cross-Int. 245. Did either report to you whether he had seen or communicated with Mr. Root?

[*To which question counsel for complainant objects on the ground that if the question calls for communication from Mr. Hazelton to the witness, the same is a privileged communication between herself and her attorney and counsel, John H. Hazelton; and on the further ground that the testimony called for is in the nature of hearsay, and is immaterial, irrelevant and incompetent.*]

Ans. I suppose they did.

Cross-Int. 246. Do you remember when the action begun by you in Montana was begun?

Ans. I know there was one; I couldn't say just when.

Cross-Int. 247. Tell us, as accurately as you can, please.

Ans. I don't remember just when. The papers in the case will shown when.

Cross-Int. 248. Was it in the year 1901?

Ans. I don't remember; as I said, the papers will show.

Cross-Int. 249. Did you verify the complaint in that action?

Ans. I don't quite know what the word "verify" means.

Cross-Int. 250. Did you swear to the truth of the complaint?

Ans. I suppose I did — nothing could have been done without my doing so, I suppose.

Cross-Int. 251. Do you remember where you swore to it?

Ans. I suppose at my home or Mr. Hazelton's office.

Cross-Int. 252. In New York City?

Ans. It might have been at Dobb's Ferry in New York City before a notary public. I did sign some papers before a notary public, and it might have been this.

Cross-Int. 253. Was the complaint in the Montana action, after it was sworn to by you, sent to Montana?

To which question counsel for complainant objects on the ground that the same assumes, and expressly states, that the witness certified or swore to the truth of the complaint filed in the court in Montana, where the action mentioned in the foregoing questions was brought, while the witness has only stated that she "supposed" that she swore to such complaint; and on the further ground that the testimony called for is irrelevant and immaterial.

Ans. I left that to my attorney entirely. I did not attend to any of the law part; I just gave my advice.

Cross-Int. 254. And was your attorney Mr. Hazelton?

Ans. Mr. Hazelton and Judge Harwood.

Cross-Int. 255. Was Judge Harwood then in New York?

Ans. I don't remember at that time.

Cross-Int. 256. How could you have left it with Judge Harwood if he were not in New York?

Ans. Well, through Mr. Hazelton.

Cross-Int. 257. Did Mr. Hazelton inform you that he had sent the complaint to Judge Harwood in Montana?

To which question counsel for complainant objects on the ground that the same calls upon the witness to state matters and communications which may have taken place between herself and attorney and counsel, which communication, if had, was privileged.

Ans. I don't remember; I left it entirely with my attorneys. I may not have known the details of the matter — just the principal part.

Cross-Int. 258. Did you see Judge Harwood, before that action was begun in Montana, with reference to beginning that action?

To which question counsel for complainant objects on the ground that the testimony called for thereby is irrelevant and immaterial to

any issues in this action, and on the further ground that it calls for privileged communication between the witness and her counsel.]

Ans. I knew that the action was to be begun.

Cross-Int. 259. [*Cross-Int. 258 repeated.*]

Ans. I don't remember.

Cross-Int. 260. Did you not, a few minutes ago, in answer to that question, and before you were interrupted by your counsel, answer that question with the words "I did"?

[*To which question counsel for complainant objects on the ground that the same misstates what occurred in respect to the preceding question. Counsel for complainant merely asked counsel for defendants to have the witness informed, by reading the question which preceded, of the particular action as to which he was inquiring, and did not interrupt the witness, but simply addressed the request to counsel for defendants.*]

Ans. I did not quite understand it if I did.

Cross-Int. 261. According to your best recollection, did you not see Judge Harwood before the action in Montana was begun with reference to bringing that action?

Ans. I don't remember that.

Cross-Int. 262. Did you receive a letter from John S. Harris shortly before that action was begun?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is irrelevant and immaterial to the issues in this case.*]

Ans. I don't think I did.

Cross-Int. 263. Did Mr. Farrell?

Ans. That question can be answered by Mr. Farrell, I think.

Cross-Int. 264. I ask that question of you, Mrs. Ingersoll.

Ans. I couldn't say.

Cross-Int. 265. Did Mr. Hazelton receive a letter from John S. Harris shortly before that action was begun?

Ans. Mr. Hazelton will answer that.

Cross-Int. 266. I ask you, Mrs. Ingersoll, to answer the question.

Ans. I don't know.

Cross-Int. 267. Have you seen a letter from John S. Harris

written either to Mr. Hazelton or Mr. Farrell shortly before the action in Montana was begun by you?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is irrelevant and immaterial to any issues in this case.*]

Ans. I don't remember reading it: I think it was received.

Cross-Int. 268. Was it read to you by anybody?

Ans. It wasn't read to me.

Cross-Int. 269. Were you told the contents of it?

Ans. Some of them.

Cross-Int. 270. By whom were you told such contents?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that the testimony called for thereby is immaterial and irrelevant to any issues in this case.*]

Ans. I don't remember: it was common talk in the house that a letter was received from Mr. Harris.

Cross-Int. 271. What were the contents of that letter which were communicated to you?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination nor relevant to any issue in this case, and on the further ground that the testimony called for is incompetent in any respect, the letter mentioned, if there is any such letter, not having been shown to be lost or destroyed or sought by defendants to be produced at this hearing. Counsel for complainant further states that if counsel for defendants insists on pressing such improper inquiry, and the witness should state matter in reply thereto prejudicial to defendants, counsel for complainant will insist that defendants have made the witness their own in that respect and bound by her statements.*]

Ans. I could not state, but I refer you to Mr. Hazelton or Mr. Farrell. But it can be produced?

Cross-Int. 272. In whose possession is that letter now?

[*Counsel for complainant objects on the ground that the foregoing question is not cross-examination nor relevant nor material to any issue in this case.*]

Ans. I don't know — I don't know whether it is in existence or not.

Cross-Int. 273. What did you mean by your previous answer when you said it can be produced?

Ans. If it is in existence, I said, it is out of my hands.

Cross-Int. 274. It has been in your hands then, has it?

[*Same objection as last foregoing.*]

Ans. It has not.

Cross-Int. 275. In whose hands is it, if it is in existence?

Ans. Mr. Hazelton's or Mr. Farrell's, I suppose.

Cross-Int. 276. Did you retain Judge Harwood as your attorney to begin the action in Montana?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is irrelevant and immaterial to the issues in this case.*]

Ans. I retained Judge Harwood to help me get this debt that that was owing to me, — I suppose it would include that.

Cross-Int. 277. Who recommended you to retain Judge Harwood?

[*To which question counsel for complainant objects on the ground that it is irrelevant and immaterial to the issues in this case, and is not cross-examination.*]

Ans. I chose him myself.

Cross-Int. 278. Are you paying the expenses of this present suit?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and is irrelevant and immaterial to the issues in this case.*]

Ans. I am.

Cross-Int. 279. Have you paid any of the expenses as yet?

[*To which question counsel for complainant objects on the same grounds stated in the last foregoing objection.*]

Ans. All that have been presented to me.

Cross-Int. 280. What have been presented to you?

[*To which question counsel for complainant objects on the ground that it is not cross-examination; that it is irrelevant and immaterial*

to any issues in this case, and advises the witness that, if she sees fit so to do, she may decline to answer the last foregoing question, until counsel for defendants presents the same to one of the judges of this Honorable Court and obtains a ruling as to whether or not the witness should answer said question, and thereupon the witness will do according to the ruling in the premises.]

Ans. I refuse to answer the question until the court so rules.

Cross-Int. 281. Do you base your refusal upon advice of counsel?

[To which question counsel for complainant objects on the ground that the question is immaterial.]

Ans. I should think that would be sufficient.

Cross-Int. 282. Will you kindly answer my question, Mrs. Ingersoll?

Ans. Yes.

Cross-Int. 283. Have you agreed to pay Judge Harwood for his services as solicitor in this case, and if so, how much?

[To which question counsel for complainant objects on the ground that it is not cross-examination; and on the further ground that it is irrelevant and immaterial to either, or any, issue in this case. And counsel for complainant advises the witness that she may decline to answer the last foregoing question until the same is presented to this court, or one of the judges thereof, and a ruling of the same as to whether the witness should answer said question, and thereupon the witness will obey the ruling of the court in the premises.]

Ans. By advice of counsel I decline to answer the question.

Cross-Int. 284. Is it not true that whatever Judge Harwood is to receive in this case for his services is to depend upon his success? Is not his fee to be a contingent one, contingent upon success?

[To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection, and advises the witness that she may decline to answer the last foregoing question until a ruling of the court, or one of the judges of this Honorable Court, is obtained, as to whether or not the witness should be compelled to answer said question, and thereupon the witness will obey the ruling of the court in the premises.]

Ans. By advice of counsel, I decline to answer the foregoing question.

Cross-Int. 285. Is not Judge Harwood to receive a fractional part of whatever may be recovered in this action?

[*To which question counsel for complainant objects on each and all of the same grounds stated in the last foregoing objection, and advises the witness that she may decline to answer the last foregoing question until a ruling of the court, or one of the judges thereof, shall be obtained, as to whether or not the witness should answer said question, whereupon the witness will obey the ruling of the court in the premises.*]

Ans. By advice of counsel, I decline to answer the question.

Cross-Int. 286. Has not Judge Harwood agreed to pay all the expenses of this action?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection, and advises the witness that she may decline to answer said question, until a ruling is obtained from this honorable court, or one of the judges thereof, as to whether or not she shall answer the same, whereupon she will obey the ruling of the court.*]

Ans. By advice of counsel, I decline to answer the question.

[*As the witness, acting under advice of counsel, declines to answer these questions, counsel closes his cross-examination of the witness.*]

Direct Examination resumed.

Int. 287. You were asked something about the subject of indebtedness owing by Colonel Ingersoll in reference to his affairs that he was engaged in during his lifetime, on your cross-examination: I will ask you to state whether or not Colonel Ingersoll was engaged in affairs with people in Massachusetts, which involved large expenditure of moneys, and incurring liabilities in which he might be liable for indebtedness still existing?

[*Defendants' counsel objects on the ground that this is not proper redirect examination, and is immaterial, irrelevant and incompetent.*]

Ans. He was.

Int. 288. You may state whether or not you have recently signed, or executed, papers in reference to the matters last above mentioned,

concerning the affairs in which Colonel Ingersoll was engaged, above mentioned, during his lifetime.

Same objection.]

Ans. I have.

[*The witness states that she wishes to correct her answer to Cross-Int. 250 so that it will read as follows*]:

I did not swear to that complaint.

EVA A. INGERSOLL.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

BOSTON, MASS., May 25, 1904.

DEPOSITION OF ROBERT J. WILSON.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. State your name, age, present place of residence and occupation.

Ans. Robert J. Wilson; age, thirty-five; 32 Park Avenue, Williams Bridge, New York; occupation, post office clerk.

Int. 2. Where did you reside during the period from the beginning of 1891 to the year 1898?

Ans. New York City and State.

Int. 3. Were you acquainted with Robert G. Ingersoll, who died at Dobb's Ferry in the County of Westchester, State of New York, on or about July 21, 1899?

Ans. I was.

Int. 4. How long did you know him?

Ans. Since the year 1886.

Int. 5. Were you employed by said Robert G. Ingersoll during said period?

Ans. I was employed by Robert G. Ingersoll up to within two years of his death, from 1887.

Int. 6. In what capacity were you so employed, and state generally the duties of your employment.

Ans. As general clerk, kept his books, paid his bills, answered his correspondence in his absence and kept track of his engagements generally.

Int. 7. In what profession, or business was Colonel Ingersoll engaged about which you rendered such services, and where?

Ans. Practicing law in New York City.

Int. 8. Are you acquainted with Henry A. Root?

Ans. I am.

Int. 9. Did you see that gentleman sitting here beside Mr. Kennedy, counsel in this case, during a portion of this afternoon?

Ans. I did.

Int. 10. How long have you known said Henry A. Root?

Ans. Since he had his office at No. 2 Wall Street, in the city of New York, about 1887 or 1888.

Int. 11. State whether or not said Henry A. Root was about Colonel Ingersoll's law office in New York City during the period which you have mentioned as having been engaged as clerk for Colonel Ingersoll?

Ans. He was a client, I guess, for about five or six years.

Int. 12. How frequently did you see him about Colonel Ingersoll's law office during the period you have just mentioned?

Ans. Quite frequently.

Int. 13. You may state whether or not you were the one with whom he would meet in entering said law office.

Ans. I was.

Int. 14. Did you ever see said Henry A. Root write?

Ans. I did.

Int. 15. Did you ever see him sign his name to papers?

Ans. I have.

Int. 16. Have you personally received communications from said Henry A. Root?

Ans. I have.

Int. 17. What sort of communications do you refer to?

Ans. Telegraphic and oral.

Int. 18. State whether or not said Henry A. Root requested you

on occasions to find Colonel Ingersoll and deliver communications to him for said Root.

Ans. He did.

Int. 19. How frequently did said Henry A. Root, during the period you have mentioned, call at the law office of Colonel Ingersoll in New York?

Ans. Quite frequently with Mr. Myers and Mr. Cornue.

Int. 20. State whether or not Henry A. Root called at said law office at other times during the period mentioned when he was not accompanied by the persons you last mentioned.

Ans. He called quite frequently alone.

Int. 21. I show you some exhibits which have been introduced in evidence here and marked "Complainant's Exhibit A" and "B" and "I." to "XXXI.", inclusive, and ask you to state whether or not you recognize either of the signatures written on said Exhibit A.

Ans. I recognize one of them.

Int. 22. And whose signature is it that you recognize on said Exhibit A?

Ans. Henry A. Root's.

Int. 23. Do you recognize either signatures written on Complainant's Exhibit B & H.?

Ans. The first signature.

Int. 24. Whose signature is it?

Ans. Mr. Root's.

Int. 25. Have you examined each of the exhibits which I put into your hand and which are marked "Complainant's Exhibits I. to XXXI.", inclusive, with the exception of the Exhibit H.?

Ans. Yes, sir.

Int. 26. Have you examined the signatures subscribed to each of said last mentioned exhibits severally.

Ans. I have.

Int. 27. How frequently have you seen Henry A. Root write?

Ans. Quite a number of times.

Int. 28. I will ask you to state, if you know, whose signature is subscribed to each of said exhibits last above mentioned.

Ans. Henry A. Root's.

Int. 29. Did you take care of such correspondence as the letters which you have just been examining which came to the office of Colonel Ingersoll while you were in his service, as you have explained?

Ans. I did.

Int. 30. State whether or not there are notations of memoranda or label endorsed on the back of some of the letters last mentioned in your own handwriting.

Ans. There are.

Int. 31. Did you state that said Henry A. Root on certain occasions requested you to find Colonel Ingersoll and deliver messages or communications to him for Root?

Ans. I did.

Int. 32. State whether or not Root explained on such occasions why he wished to commit the matter which you have just mentioned to you to be conveyed to Colonel Ingersoll.

Ans. He did.

Int. 33. What reasons did he give?

[*Counsel for defendants objects to the question as immaterial, incompetent and irrelevant and inadmissible under the issues in this action.*]

Ans. It was important to reach Colonel Ingersoll without loss of time.

Int. 34. State whether or not your duties as clerk for Colonel Ingersoll, during the period mentioned, required that you make letter-press copies of letters written and mailed from his office.

Ans. Yes, sir.

Int. 35. I show you a letter-press copy-book which has been marked for identification by the special examiner herein "Complainant's Exhibit Letter-Press Copy-Book No. 1," for identification, and ask you to state whether you ever saw said letter-press copy-book before.

Ans. I have.

Int. 36. You may examine it, and state whether or not you ever made letter-press copies therein.

Ans. I did.

Int. 37. And where was said book kept and to whom did it belong when you made letter-press copies therein?

Ans. It was kept in the office of, and belonged to, Robert G. Ingersoll.

Int. 38. Have you seen Robert G. Ingersoll write?

Ans. I have.

Int. 39. Have you seen him sign his name with pen and ink?

Ans. Thousands of times.

Int. 40. To what extent have you examined and read and had to do with the handwriting of Colonel Robert G. Ingersoll?

Ans. I have had to typewrite his speeches and lectures in the preparation of his briefs.

Int. 41. State whether or not you wrote said typewriting or copied it from manuscript given you in the handwriting of Colonel Ingersoll.

Ans. A greater part of it was written in my presence and given to me by Colonel Ingersoll.

Int. 42. I ask you to examine pages 129 and 130 of the letter-press copy-book last mentioned, and state whether or not you recognize the handwriting shown in the impression copy appearing on said pages.

Ans. I do.

Int. 43. Whose handwriting is it?

Counsel for defendants objects to the question on the ground that the copy of this letter is secondary evidence, and that it is not the proper method of proving the existence and authenticity of the original by an examination of and inference from the copy.

Ans. Colonel Ingersoll's.

Int. 44. When you mention Colonel Ingersoll in the course of your testimony here, to whom do you refer?

Ans. To Robert Green Ingersoll.

Int. 45. Do you know who made the impression copy last mentioned in the letter-press copy-book last mentioned; if so, state?

Ans. I do. I did.

Int. 46. State who wrote the original from which said last mentioned impression copy was made; if you know.

[*Counsel for defendants objects to this question and asks that the witness' knowledge be first inquired of.*

Counsel will qualify the last foregoing question by asking another.]

Int. 47. Do you know who wrote the original letter from which said last mentioned letter-press copy, appearing on pages 129 and 130 of said letter-press copy-book, was made?

[*Counsel for defendants objects to the question unless the witness sets state of his own knowledge as to the original of this particular letter and otherwise than by inference from the letter-press impression, this not being the proper method of proving the existence and authenticity of the original.*]

Ans. I do.

Int. 48. Who wrote said original.

[*Same objection as to the last question.*]

Ans. Robert G. Ingersoll.

Int. 49. State whose signature was subscribed thereto, if you know.

[*Same objection.*]

Ans. Robert G. Ingersoll's.

Int. 50. State, if you remember, what you did with the original letter after making said letter-press copy therefrom.

Ans. I put it in an addressed envelope to Mr. Root and dropped it in the United States mail box, with proper postage on said envelope.

Int. 51. I show you another letter-press copy-book introduced in evidence here marked "Complainant's Letter-Press Copy-Book No. 2", for identification, and ask you to examine the same and especially page 140 thereof, and state whether or not you have seen and used said letter-press copy-book heretofore.

Ans. I have.

Int. 52. State who made the letter-press impression copy appearing on page 140 of said last mentioned book, if you know.

Ans. I did.

Int. 53. To whom did said last mentioned letter-press copy-book belong and where was it when you made the letter-press copy therein, as shown on page 140 thereof?

Ans. To Colonel Robert G. Ingersoll; it was in his law office in New York City.

Int. 54. Who wrote the original, from which letter-press impression copy of the letter last mentioned was made?

[*Counsel for defendants objects to the witness answering this question unless he knows in whose handwriting the original of this particular letter, of which this impression is a copy, otherwise than by an inference from the copy itself.* As the impression is nothing but secondary evidence, this is not a proper method of proving the existence and authenticity of the original.]

Ans. Robert G. Ingersoll.

Int. 55. What did you do with the original letter from which the impression copy was made, as appears on page 110 of said last mentioned letter-press copy-book, after making said impression copy therefrom?

Ans. Sealed it in an envelope properly addressed to Mr. Root, postage prepaid.

[*Counsel for defendants objects to the word "properly" in the answer on the ground that it is not a statement of fact, but a statement of the inference of this witness, and asks to have the same stricken out.*]

Int. 56. What did you do with the letter after having enclosed and sealed it in the envelope addressed as you have mentioned?

Ans. Dropped it in the United States mail box.

Int. 57. Please examine another letter-press copy-book marked "Complainant's Exhibit Letter-Press Copy-Book No. 3", for identification, by the special examiner herein, which I now show you, and state whether you have seen same heretofore.

Ans. I have.

Int. 58. Please examine the impression copy appearing on page 113 of said last mentioned book, which page is marked by the special examiner herein, "Complainant's Exhibit XXXIV.", and state, if you know, who made that letter-press impression copy appearing on said page.

Ans. I did.

Int. 59. Can you state who wrote the original letter from which said last mentioned impression copy was made?

[*Counsel for defendants objects to this question unless the witness can testify of his own knowledge as to the particular original letter, from which this impression was made, otherwise than by inference from the impression itself, as the impression is but secondary evidence, and it is not competent to prove from it by inference the existence and authenticity of the original.*]

Ans. I can.

Int. 60. Who wrote said original letter?

[*Counsel for defendants makes the same objection to this question as he made to the last.*]

Ans. Robert G. Ingersoll.

Int. 61. Who subscribed the name R. G. Ingersoll subscribed thereto?

[*Same objection.*]

Ans. R. G. Ingersoll.

Int. 62. Is all of said letter in his handwriting?

[*Same objection.*]

Ans. It is.

Int. 63. What did you do with said original after making the last mentioned letter-press copy therefrom?

Ans. Addressed it in a prepaid envelope to Henry A. Root and deposited it in the United States mail box.

Int. 64. I show you another letter-press copy-book marked "Complainant's Exhibit Letter-Press Copy-Book No. 1", for identification, by the special examiner herein, and ask you to examine the same, especially pages 29, 30, 31 and 32 thereof, and also page 122 thereof, and state whether or not you have heretofore seen and used said last mentioned letter-press copy-book.

Ans. I have.

Int. 65. Do you know who made the impression copy of the writing appearing on pages 29, 30, 31 and 32 thereof, which has been marked by the examiner herein "Complainant's Exhibit XXXV.", for identification for use in evidence in this case?

Ans. I do.

Int. 66. State who made the same.

Ans. I did.

Int. 67. State, if you know, who wrote the original from which said last mentioned impression copy was made?

Counsel for defendants objects to the question unless the witness can recall the original and knows in whose handwriting the original was, and who subscribed it, or who wrote it, otherwise than by inference from the letter-press copy, as the copy is but secondary evidence, and it is not proper to prove the existence and authenticity of the original from the copy.

Ans. R. G. Ingersoll wrote the original.

Int. 68. State, if you recall, what you did with the original letter from which said last mentioned impression copy was made.

Ans. Addressed it, in a prepaid envelope, to Henry A. Root and deposited it in the United States mail-box.

Int. 69. Who made the impression copy appearing on page 122 of said last mentioned letter-press copy-book?

Ans. I made the copy.

Int. 70. Who wrote the original from which said last mentioned letter-press copy was made?

Counsel for defendants objects to the witness answering this question, unless he can recall the original letter and the handwriting of the original, otherwise than by inference from the letter-press copy, as the copy is but secondary evidence, and it is not proper to prove the existence and authenticity of the original from the copy, or the handwriting of the original from the copy.

Ans. R. G. Ingersoll.

Int. 71. State, if you remember, what you did with the original letter, from which the impression copy, appearing on page 122 of the last mentioned letter-press copy-book, marked "Complainant's Exhibit XXXVI.", was made, after having made said impression copy therefrom.

Ans. It was addressed to Mr. Root and put in a sealed envelope, postage prepaid, and deposited in the United States mail-box.

Int. 72. Please examine another letter-press copy-book, which I now lay before you, marked by the special examiner herein, "Com-

plainant's Exhibit Letter-Press Copy-Book No. 5," for identification, especially page 47 thereof, and state whether or not you have seen and used said letter-press copy-book heretofore?

Ans. I have.

Int. 73. Do you know who made the letter-press impression copy appearing on page 47 thereof?

Ans. I do.

Int. 74. State who made it.

Ans. I made it.

Int. 75. State, if you know, who wrote the original letter from which said last mentioned letter-press copy was made.

[*Counsel for defendants objects to the witness answering this question unless he can recall the original letter from which this impression was made, and can recall in whose handwriting the original was, otherwise than by inference from the copy, as the copy is but secondary evidence, and it is not proper to prove the handwriting of the original or the existence and authenticity of the original from the copy.*]

Ans. R. G. Ingersoll.

Int. 76. State, if you remember, what was done with the original letter from which said last mentioned letter-press copy, appearing on page 47, of said last mentioned letter-press copy-book, which page is marked by the special examiner herein, "Complainant's Exhibit LIV.", for use in evidence in this case, after said letter-press impression copy was made therefrom.

Ans. It was sent to Mr. John B. Clayburg in a sealed envelope, postage prepaid, and deposited in the United States mail-box.

Int. 77. Were you acquainted with said John B. Clayburg?

Ans. I was.

Int. 78. Do you know whether or not he was associated with Colonel Ingersoll in any litigation?

Ans. He was.

Int. 79. To what case do you refer?

Ans. The Davis will case.

Int. 80. I will ask you to state who owned each and all of the letter-press copy-books you have mentioned in your testimony at the time

you made the impression copies therein, which you have mentioned, and where said letter-press copy-books were kept at that time.

Ans. They were owned by Robert G. Ingersoll and were kept in his law office in New York City.

Int. 81. Please state whether or not each and all of the letters, which you have mentioned by reference to letter-press copies thereof, were written with pen and ink.

[*Counsel for defendants objects to the witness answering this question, as he has not been qualified as an expert in handwriting, and is not shown to be competent to testify on this point, which requires opinion evidence.*]

Ans. They were.

Int. 82. State in whose handwriting each and all of said letters, from which you say you made the letter-press impression copies which you have mentioned, were written?

[*Counsel for defendants objects to the witness answering this question unless he can recall each letter, from which each letter-press copy was made, and the handwriting in which it was written, and can testify of his own knowledge, and otherwise than from inference from the letter-press copy, as they are but secondary evidence, and it is not proper to prove the existence and authenticity of the originals, or the handwriting of the originals by inference from the copies.*]

Ans. R. G. Ingersoll.

Int. 83. Who wrote the same?

[*Same objection as to the last question, and further objection that the question has been answered four or five times.*]

Ans. R. G. Ingersoll's.

Int. 84. I show you exhibits heretofore marked by the special examiner herein "Complainant's Exhibit XLIII.", "Complainant's Exhibit XLIV.", "Complainant's Exhibit XLV.", for identification for use in evidence in this case, and ask you to examine the signatures subscribed thereto to each of said exhibits, and state whether or not you recognize the same.

Ans. I do.

Int. 85. State whose signatures is subscribed to each of said exhibits.

Ans. Henry A. Root's.

Cross Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 86. How old are you?

Ans. Thirty-five.

Cross-Int. 87. Where was Colonel Ingersoll's law office when you went with him?

Ans. 40 Wall Street, New York City.

Cross-Int. 88. How many offices did he have while you remained in his employ?

Ans. 40 Wall Street, 45 Wall Street, 20 Nassau Street, 40 Wall Street, 53 William Street: all in New York City.

Cross-Int. 89. Where was his office May 1st, 1891?

Ans. 45 Wall Street, New York City.

Cross-Int. 90. When did he open his office 45 Wall Street?

Ans. I don't believe that I can give you the year.

Cross-Int. 91. In what year did he open his office at 53 William Street?

Ans. The last year that I was with him.

Cross-Int. 92. What year was that?

Ans. I can't give you the year.

Cross-Int. 93. What did you do immediately after leaving Colonel Ingersoll's office?

Ans. Came to Boston.

Cross-Int. 94. How long did you remain in Boston, and what did you do in Boston while you remained there?

Ans. I remained some months in Boston and worked for the New England Anti-vivisection Society.

Cross-Int. 95. When did you leave them?

Ans. When I went back to New York.

Cross-Int. 96. When was that?

Ans. About two months after I went with them.

Cross-Int. 97. When did Colonel Ingersoll open his office at No. 20 Nassau Street, New York City?

Ans. As near as I can remember about two years after he opened an office at 45 Wall Street.

Cross-Int. 98. In what year?

Ans. I couldn't be positive of the year.

Cross-Int. 99. When did Colonel Ingersoll open his office for the first time at 40 Wall Street, New York City.

Ans. I think it was sometime in April, 1887.

Cross-Int. 100. That was the first office he ever had in New York City, was it not?

Ans. No, sir.

Cross-Int. 101. What other office did he ever have?

Ans. Prior to opening the office at 40 Wall Street he made his headquarters at 187 Broadway, New York City.

Cross-Int. 102. Did he have an office there of his own?

Ans. He occupied a room there with Dwight Townsend.

Cross-Int. 103. When did you come from New York this time to Boston?

Ans. This morning.

Cross-Int. 104. At whose request did you come?

Ans. Mr. Hazelton's.

Cross-Int 105. You have been examined before, have you not, with reference to these letter-press copies?

Ans. Yes, sir.

Cross-Int. 106. When and where were you examined and in what State?

Ans. I can't tell you when.— I can tell you where: it was 212 Broadway: I do not remember the name of the suit. I am sure that it was the Colonial Trust Building.

Cross-Int. 107. You were examined, were you not, in the office of John H. Hazelton, the attorney for Eva A. Ingersoll, administratrix of the estate of Robert G. Ingersoll, deceased?

Ans. I didn't understand that he was the attorney for her.

Cross-Int. 108. It was at his office that you were examined?

Ans. Yes, sir.

Cross-Int. 109. At whose request did you go there for examination?

Ans. I think I went there at Mr. Hazelton's requests.

Cross-Int. 110. Have you been paid for coming to Boston this time to testify?

Ans. My expense have been paid, but I haven't received anything personally.

Cross-Int. 111. Do you expect to receive anything personally?

Ans. No, sir.

Cross-Int. 112. Who paid your expense?

Ans. Mr. Harwood.

Cross-Int. 113. Counsel for complainant?

Ans. I don't know, — he signed himself attorney. I don't know who he is counsel for.

Cross-Int. 114. Which of the Complainant's Exhibits XXXII., XXXIII., XXXIV., XXXV. and XXXVI., did you yourself make impressions of?

Ans. Let me look at them and I can tell you.

Cross-Int. 115. I ask you to testify without looking at them. I am asking you about letter-press copies with reference to which complainant's counsel has already questioned you.

Ans. I can't identify them by numbers, I can only identify them by looking at them.

Cross-Int. 116. Did you see Colonel Ingersoll write the original letter, from which any one of the impressions, or letter-press copies, to which complainant's counsel has called your attention, was made?

Ans. Yes, sir. I can name some of them. The Clayburg letter, the letter to Mr. Root about the fee, and the first letter that he wrote to Mr. Root in 1891.

Cross-Int. 117. Where was his office when he wrote the letter to Mr. Root with regard to his fee?

Ans. I can't get the dates straight.

Cross-Int. 118. And yet you saw him write the original letter did you?

Ans. Yes, sir.

Cross-Int. 119. Did he write it with a quill?

Ans. No, sir, he wrote it with a ball-pointed pen.

Cross-Int. 120. What make of pen?

Ans. He could buy it at H. K. Brewer & Company. The pen was a foreign make: it was Italian.

Cross-Int. 121. Where were you when he wrote this letter?

Ans. In his office?

Cross-Int. 122. Where was his office?

Ans. I can't specifically state the street and number.

Cross-Int. 123. Was it at 53 William Street?

Ans. No, sir, it was not: that I am positive about.

Cross-Int. 124. Were you the only employee of Colonel Ingersoll's in 1887, when you first entered his office until you left?

Ans. No, sir.

Cross-Int. 125. Were you the only person in the office who during those years made letter-press copies of letters?

Ans. No, sir.

Cross-Int. 126. Who else made letter-press copies of letters during those years?

Ans. A boy named John Prendergast.

Cross-Int. 127. How long was he in Colonel Ingersoll's employ, and during what years?

Ans. He was never in Colonel Ingersoll's employ.

Cross-Int. 128. In whose employ was he?

Ans. R. F. Griffin.

Cross-Int. 129. Who was Mr. Griffin and what was his relation to Colonel Ingersoll in a business way?

Ans. He was employed by Mr. Ingersoll at a salary.

Cross-Int. 130. Did he pay this boy John out of his salary?

Ans. Yes, sir.

Cross-Int. 131. Did anybody else than you and this boy John ever copy letters in this letter-press book?

Ans. Not to my knowledge.

Cross-Int. 132. During what years was John in Mr. Griffin's employ?

Ans. While we were at 40 Wall Street the last time and a short while at 20 Nassau Street.

Cross-Int. 133. During what years?

Ans. I can't remember the years.

Cross-Int. 134. Did this boy John ever mail letters?

Ans. For Mr. Griffin and his friends,—yes.

Cross-Int. 135. Did he ever mail letters written by Colonel Ingersoll?

Ans. To my knowledge he had nothing to do with Colonel Ingersoll's business.

Cross-Int. 136. Did Mr. Griffin ever mail letters written by Colonel Ingersoll?

Ans. Not to my knowledge.

Cross-Int. 137. Did you ever know Mr. Root as a client of Colonel Ingersoll's except in the Davis will case?

Ans. Yes, sir.

Cross-Int. 138. In what other matter or case?

Ans. It was a case of Sheffield.

Cross-Int. 139. That was just an outcome of the Davis will case, was it not?

Ans. I don't know what it was.

Cross-Int. 140. It was a proceeding in the Surrogate's Court, was it not?

Ans. It may have been, but I think it was a demurrer, or a case where a demurrer had been entered.

Cross-Int. 141. The business of copying letters in a law office is usually that of the office boy, is it not?

Ans. Yes, sir.

Cross-Int. 142. Were you and Mr Griffin the only employees that Colonel Ingersoll ever had during the years that you were with Colonel Ingersoll?

Ans. No, sir.

Cross-Int. 143. What other employees had he?

Ans. Isaac N. Baker, Frederick T. Hill, Norman S. Mussey, William S. Lawton and Richard H. Gatlin, son of the gunmaker.

Cross-Int. 144. Where was Colonel Ingersoll's office when Mr. Lawton was with him?

Ans. 10 Wall Street the first time.

Cross-Int. 145. Where was his office when Mr. Gatlin was with him?

Ans. 15 Wall Street.

Cross-Int. 146. Did either of these gentlemen ever make letter-press copies of letters written by Colonel Ingersoll?

Ans. They were too much above that; they were law students.

Cross-Int. 147. You are not a lawyer?

Ans. No, sir.

Cross-Int. 148. And have never been a law student?

Ans. No, sir.

Cross-Int. 149. And you were Colonel Ingersoll's office boy for how long?

Ans. About twelve years.

Cross-Int. 150. Where was Colonel Ingersoll's office at the time you saw him write the letter to Mr. Clayburg?

Ans. 10 Wall Street.

Cross-Int. 151. First or the last time?

Ans. The last time.

Cross-Int. 152. In what year and what month?

Ans. I can't remember.

Cross-Int. 153. Have you a distinct and clear recollection of every original letter, the letter-press copies of which your attention has been called today, and which you said you copied?

Ans. A fairly distinct recollection — yes, sir.

Cross-Int. 154. Can you tell us what letters in these letter-books, to which your attention has been called by complainant's counsel, were copied by the boy John, and what were copied by you?

Ans. I can.

Cross-Int. 155. Take one of those books and select one of the letter-press copies that was copied by the boy John?

Ans. There were none copied by him.

Cross-Int. 156. Then you have no method of distinguishing?

Ans. There is no need of having any method, as long as he never copied any in the books.

Cross-Int. 157. Do you wish to be understood as saying that every letter, of which there is a letter-press copy in the letter-press books, to which your attention has been called today by complainant's counsel, was copied by you?

Ans. I do.

Cross-Int. 158. Have you not today in testifying that the original letters, from which Exhibits XXXII. to XXXVI. are copies, were in the handwriting of Colonel Ingersoll, been assisted by inferring that fact from the copies themselves?

Ans. Of course I have.

Cross-Int. 159. Your testimony is not then based upon an independent recollection of the original letters?

Ans. It has been based on an independent recollection.

Cross-Int. 160. In every instance?

Ans. Those I did not see Colonel Ingersoll write I could have no independent recollection.

Direct Examination resumed.

Int. 161. When you were making the impression copies of letters mentioned by you, in your testimony here, the original of which you did not see Colonel Ingersoll actually write, did you know from acquaintance with his handwriting, whether or not it was a letter actually written by Colonel Ingersoll and subscribed by his genuine signature?

Ans. I did.

Int. 162. And what do you say as to whether or not each and all of those letters, which you did not see Colonel Ingersoll actually write, which have been referred to by you in your testimony, were in his handwriting and subscribed by his genuine signature?

Ans. I can say that they were in his handwriting.

Cross Examination resumed.

Cross-Int. 163. You mean by that that you know that the letter-press copies of the letters, which you did not see Colonel Ingersoll write, appear to be in his handwriting, and that you infer from the impression of the letter-press copies that the originals must have been in his handwriting and must have been signed by him; is that not what you mean?

Ans. No, sir. I have no inference about it,—he handed me the letters to copy, and I mailed them after copying them.

Cross-Int. 164. Can you recall every single letter that Colonel Ingersoll ever wrote, and which you did not see him write, but which he gave you to copy, and which you did copy?

Ans. I wouldn't attempt it.

Direct Examination resumed.

Int. 165. State briefly what kind of occupation you are engaged in now, and have been heretofore, since you became grown-up, so that it may be understood whether you had, or had not, been handling writing and reading written documents.

Ans. I am in the foreign postal money order business in the International Exchange Office, which is a department in the United States Post Office in New York City.

Int. 166. How long have you been engaged in that place?

Ans. Six or seven years.

Int. 167. And before that you were engaged about twelve years in Colonel Ingersoll's law office, were you?

Ans. Yes, sir.

Int. 168. Does that embrace about all the years in which you have been employed since you finished your education?

Ans. It does.

ROBERT J. WILSON.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

Boston, Mass., May 26, 1904.

DEPOSITION OF JOHN H. HAZELTON.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name and what profession you are engaged in.

Ans. John H. Hazelton; attorney, practicing law at 220 Broadway, New York City.

Int. 2. Are you over the age of twenty-one years?

Ans. I am.

Int. 3. Are you acquainted with Eva A. Ingersoll, administratrix of the estate of Robert G. Ingersoll, deceased, and complainant in this action?

Ans. I am, and have been acquainted with her personally for a number of years.

Int. 4. State whether or not you are attorney for said Eva A. Ingersoll as such administratrix.

Ans. I am the attorney of record in the matter of the estate of Robert G. Ingersoll, deceased, of which she is administratrix, in the surrogate's court for the County of Westchester, New York State; but I do not understand that I am her general attorney as to all matters.

Int. 5. State how long you have been such attorney with reference to the deceased Robert G. Ingersoll.

Ans. I filed the petition for her appointment as administratrix in the said surrogate's court and am still her attorney in that matter.

Int. 6. Were you acquainted with Robert G. Ingersoll?

Ans. I was for a number of years before his death.

Int. 7. State whether or not he was generally known and addressed by some other title than his given and surname.

Ans. He was almost always addressed, I believe, as Colonel Ingersoll; certainly almost constantly whenever he was addressed in my presence, or spoken of in my presence.

Int. 8. If in this examination the title "Colonel Ingersoll" is used in questions, to whom do you understand reference is made?

Ans. I would understand, unless you state to the contrary, that you mean Robert G. Ingersoll, deceased, of whose estate Eva A. Ingersoll was appointed administratrix in said surrogate's court, and who appeared as an attorney in the Davis will contest.

Int. 9. If in your testimony here you use the expression "Colonel Ingersoll", to whom do you wish the court and parties and their counsel to understand you refer?

Ans. The person described in my answer to the last question.

Int. 10. Had you any business associations with Colonel Ingersoll during his lifetime?

Ans. Yes.

Int. 11. Please state the character of that association.

Ans. I was associated with him in the practice of the law in New York City.

Int. 12. Are you acquainted with Clinton P. Farrell? If so, state how long you have been acquainted with him and where he resided during such acquaintance.

Ans. I am, and have been for a number of years. I knew him first in Washington, D. C., and he and his family then lived with Colonel Ingersoll and his family. Since I came to New York in 1898, he and his family have lived with Colonel Ingersoll and his family, excepting since the death of Colonel Ingersoll, from which time Mr. Farrell and his family have lived with Colonel Ingersoll's family.

Int. 13. Are you one of the attorneys of record in this suit entitled Eva A. Ingersoll, as administratrix, etc., against Joseph A. Coram, Henry A. Root, *et al.*, pending in the Circuit Court of the United States for the District of Massachusetts?

Ans. I am one of the solicitors for the complainant in this suit.

Int. 14. Do you know generally the contents of complainant's bill of complaint in said suit and the alleged contract on which the same is predicated?

Ans. I do.

Int. 15. Are you acquainted with Joseph A. Coram, one of the defendants mentioned in this action?

Ans. I am not very well acquainted with him; I have met him, and he is now present here in the room where the testimony is being taken.

Int. 16. Are you acquainted with Henry A. Root, one of the defendants in this suit?

Ans. I am not very well acquainted with him, but I have met him a number of times, and he is now present in the room where this testimony is being taken.

Int. 17. State whether or not, since the death of Colonel Ingersoll and the appointment of complainant as administratrix of his estate, she directed or requested you to undertake to obtain payment of the indebtedness mentioned in her bill of complaint in this

action from said Henry A. Root, Joseph A. Coram or either of them.

Ans. She did, but never with any authority —

[*Counsel for defendant objects to witness answering with any qualification.*

Counsel for complainant requests the witness to go on and finish his attempted answer of the last preceding question, of course, subject to the objection which has been interposed.

Counsel for defendants objects to the witness stating his conclusion as to the authority, and asks that he confine himself stating the conversations, in which such directions were given to him, or if they were given in writing he produce the writing giving the directions or instructions.

Counsel for complainant now requests the witness to finish his answer to the last preceding question.]

[*Answer continued:*] She either personally, or through Mr. Farrell. I do not remember which did request me to undertake to secure the payment of the claim mentioned. She never gave me any authority in writing. I was never her attorney in fact. She asked me to investigate the situation of the Davis will matter, so far as I was able, and to give her my advice as to what, if anything, she ought to do in it.

Int. 18. State whether or not you had any interview, or interviews, with said defendants Henry A. Root and Joseph A. Coram, or either of them, on the subject of the claim of indebtedness mentioned.

Ans. I did.

Int. 19. State where and when you had the first of said interviews and who were present thereat?

Ans. I had an interview with Mr. Root and Mr. Coram in the Waldorf Astoria Hotel on March 18, 1901; no one was present at the interview excepting these two gentlemen and myself. I believe, however, that some gentleman came up and spoke to Mr. Coram during the interview — someone I did not know.

Int. 20. State what, if anything, said defendants, Coram and

Root, or either of them, stated to you at said interview on the subject of said claim of indebtedness.

Ans. Mr. Root said that he was very kindly disposed towards Mrs. Ingersoll, and that he could not speak too highly of Colonel Ingersoll's services in the Davis will contest, and that he would like to have me tell Mrs. Ingersoll, and assure her from him, that he would do everything in his power to protect her rights in that matter. Mr. Coram stated that he wanted Mrs. Ingersoll to understand that he felt the same way towards her, and he also said that he did not for a moment question the value of Colonel Ingersoll's services in the Davis will contest. He said, however, that, since the written contract, — I believe the date is August 17, 1891, — was made, the Davis estate had shrunken a great deal in value, and that all the attorneys, other than Colonel Ingersoll, had been compelled to and had scaled down the fees which had been originally agreed upon for them. He said that he himself had put into the litigation a great many thousands of dollars, and that he thought it was only fair and just that he should, and he wanted to, be repaid first what he had actually expended, and that he hoped to secure most, if not all, of the balance so due him out of the next distribution; but that aside from that, he wanted to see Mrs. Ingersoll paid out of the estate, and would do what he could to that end. He said that Mrs. Ingersoll must look at the situation as it was, and not as they all wished it were. Mr. Root said further that it was not a question of what they would like to do for Mrs. Ingersoll, but of what they could do on account of the depletion of the estate.

Int. 21. State where and when, as near as you can recall, the second of said interviews occurred, and who were present thereat.

Ans. Following this, I had an interview with Mr. Root alone in my offices in the St. Paul Building, in New York City, I think about the twentieth of April, 1901.

Int. 22. State what, if anything, Mr. Root said to you on that occasion, as to his intentions respecting the payment of said indebtedness.

Counsel for defendants objects to this as against all of the defendants as immaterial, irrelevant and incompetent, and as against all

except Mr. Root, upon the ground that what he said, in their absence, did not bind them.

Ans. I do not think he stated anything at that interview in specific terms about the payment of this indebtedness, but he did repeat a number of times his general statement that he would do everything he could to protect Mrs. Ingersoll's interests in the matter.

Int. 23. Please state what further he said on the subject of said claim of indebtedness, or relating to the Davis estate.

Counsel for defendants makes the same objection to this question as to the last question to which he objected.

Ans. I think Mr. Root said that he had been to Montana since I had last seen him. I asked him if he could not furnish us with some definite statement, or statements, showing just what the condition of the Davis estate was: of what it consisted, what claims had been filed against it, what attorneys claimed or had liens, just what had been paid out on the last distribution (which I understood was the first distribution), and anything else that might put us in possession of the condition of affairs, and he said he would be very glad to do so, and would do so.

Int. 24. State whether or not you had any further interview with either defendant Henry A. Root or Joseph A. Coram on the subject of said indebtedness.

Ans. I never saw Mr. Coram, so far as I remember, after the interview which I have described with him and Mr. Root, until I saw him here at the taking of the depositions that have preceded mine. I had an interview with Mr. Root alone in the Waldorf Astoria Hotel, in New York City, sometime, I think, in the early part of May, 1901.

Int. 25. State what, if anything, said defendant Henry A. Root said to you on the last mentioned occasion on the subject of Colonel Ingersoll's services in the so-called Davis will contest, and the said claim of indebtedness mentioned.

Counsel for defendants objects as against all the defendants upon the ground that it is incompetent, irrelevant and immaterial and as

against all, except Mr. Root, upon the ground that his statements in their absence do not bind them.

Ans. Mr. Root again promised to furnish us, as soon as possible, with the information mentioned and referred to in the interview which I have described as taking place in my offices. Also I had never, as I remember, asked Mr. Root personally as to what had been paid, if anything, upon the written contract, to which I have already referred, and, as I wanted to know what he would say about it, I asked him on this occasion, and he replied that $5,000 on account of this contract had been paid to Colonel Ingersoll following the first distribution of the Davis estate.

Counsel for complainant will submit the witness now for cross-examination, but will hereafter propound to the witness the closing question mentioned in the rules in equity.

Counsel for defendants asks that all questions shall be put to the witness by complainant's counsel and answered before the cross-examination of the witness is begun.

Counsel for complainant has no further questions to ask of this witness-in-chief; he may desire to ask the witness some further question hereafter which does not occur to him now, and he wishes the privilege so to do, and also considered that it might be proper to ask said witness finally the closing question mentioned in the equity rules, and with these explanations, complainant's counsel again submits the witness to defendants and their counsel and solicitors to cross-examine.

Cross-Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 26. How long had you known Colonel Ingersoll before his death?

Ans. I do not recall when I first met him, but it was in Washington, D. C., I should imagine somewhere about 1880.

Cross-Int. 27. Are you an attorney at law admitted to practice in the State of New York?

Ans. I am.

Cross-Int. 28. When were you so admitted?

Ans. Sometime in the early part of 1899, I think in February.

I had been admitted previously, in 1896, in the District of Columbia.

Cross-Int. 29. When did you become associated with Colonel Ingersoll in the practice of the law?

Ans. I think I might say immediately following my admission in the State of New York. I do not wish, however, to be understood to mean that I was his partner, or that we had any partnership. I understand that Colonel Ingersoll had no partner after the death of his brother in the technical meaning of that term.

Cross-Int. 30. Did you have a partner in the law business at the time of Colonel Ingersoll's death?

Ans. None whatever. Mr. Clarence S. Brown and I were, however, associated with Colonel Ingersoll in the practice of law.

Cross-Int. 31. Were you and Clarence S. Brown associated in the practice of the law at the time of Colonel Ingersoll's death?

[*To which question complainant's counsel objects on the ground that the same is irrelevant and immaterial to the questions involved in this suit.*]

Ans. I think that perhaps I might answer that we were all associated together in the practice of the law. Following my admission in the State of New York we had some common letterheads printed for all three of us.

Cross-Int. 32. How long have you known Mrs. Ingersoll?

Ans. As I have stated, I do not recall just when I first met Colonel Ingersoll, but I have no doubt that I met Mrs. Ingersoll about the same time, if not the same time.

Cross-Int. 33. Where were the offices which Colonel Ingersoll, Clarence S. Brown and yourself occupied?

Ans. 253 Broadway, in the city of New York.

Cross-Int. 34. How long did you three together occupy those offices before Colonel Ingersoll's death?

Ans. I do not know how long Mr. Clarence S. Brown was there before I came to New York, but I think about a year before. As I have stated, I was admitted in New York State I think in February, 1899, and Colonel Ingersoll died on July 21, 1899. We were there together, of course, practically from following my admission

in New York State up to the time of Colonel Ingersoll's death, which, I believe, is what your question calls for.

Cross-Int. 35. Was Colonel Ingersoll's office at 253 Broadway when you came to New York City?

Ans. It was.

Cross-Int. 36. When, after Colonel Ingersoll's death, did you first see Mrs. Ingersoll?

Ans. I think at the time of the funeral at the house.

Cross-Int. 37. When did she first ask you to act for her in procuring letters of administration upon the estate of Colonel Ingersoll?

Ans. I do not now recall the exact date, but either she or Mr. Farrell spoke to me about it I should say a few days before the petition was filed, which, I think, was in August, 1899.

Cross-Int. 38. Did Colonel Ingersoll have a residence in the city at his death; if so, where?

Ans. I understand that Colonel Ingersoll's residence was at Dobbs' Ferry at the time of his death, but I believe they usually came to the city in the winter time for a portion of the winter, and the house where he lived in New York during a portion of the winter previous to his death was known as 117 East 21st Street.

Cross-Int. 39. How long prior to Colonel Ingersoll's death had you known, if at all, Clinton P. Farrell?

Ans. I do not recall the exact date when I first met him, but it must have been about the same time that I first met Colonel and Mrs. Ingersoll.

Cross-Int. 40. You knew at Colonel Ingersoll's death that he was the brother-in-law of Mrs. Ingersoll, did you not?

Ans. Certainly.

Cross-Int. 41. Has Mr. Farrell acted for Mrs. Ingersoll since Colonel Ingersoll's death in winding up the estate?

Ans. I do not understand that the estate has been wound up, and to just what extent Mr. Farrell has acted for Mrs. Ingersoll, I do not know, except as it related to something that he has communicated to me. I have never attempted to pry into their matters.

Cross-Int. 42. Have you yourself received instructions from Mr.

Farrell understanding that they came from him as the agent of Mrs. Ingersoll as administratrix of Colonel Ingersoll's estate?

[*Counsel for complainant objects to the foregoing question on the ground that it calls for inference or understanding and not for fact or knowledge.*]

Ans. If you mean by your question, have I received instructions at any time from Mr. Farrell understanding that he was her agent to do with her affairs as he pleased, I have not; but if you mean, have I upon different occasions received instructions from Mr. Farrell as her agent, so far as the transmission of those instructions to me was concerned, I have.

Cross-Int. 13. When was Mrs. Ingersoll appointed administratrix of the estate of Colonel Ingersoll, if you know?

Ans. I do not now recall the exact date, but my impression is that it was some time during August, 1899, if you are referring to her appointment in the surrogate's court in Westchester County, New York.

Cross-Int. 14. Who acted for Mrs. Ingersoll in procuring letters of administration upon the estate of Colonel Ingersoll in the Commonwealth of Massachusetts?

Ans. I do not now recall who was the attorney of record in those proceedings, if there was one. I do not know who acted in procuring said letters, but I do know that I prepared a draft of a petition, or whatever it is called here in Massachusetts, but whether or not the one I prepared was the one that was filed, I could not tell you without going over the records.

Cross-Int. 15. Where did you prepare the paper you have spoken of?

Ans. In my offices in New York City.

Cross-Int. 16. What did you do with it after you had prepared it?

[*To which question counsel for complainant objects on the ground that it is immaterial and irrelevant to any issue or controversy in this suit.*]

Ans. I could not give any accurate testimony in answer to that

question, and do not care to give you any other kind of testimony without first examining the records and papers in my offices.

Cross-Int. 47. Did you receive instructions to prepare this paper, and if so, from whom?

To which question counsel for complainant objects on the ground that the testimony called for thereby is irrelevant and immaterial to the issues in this action, and also on the ground that it calls for communications received by an attorney from, or on behalf of, his client, which is in effect from his client, and such communications are privileged.

Ans. My best recollection is, without anything before me to aid me, that I prepared a petition of this kind for Massachusetts of my own motion.

Cross-Int. 48. Did Mr. Farrell give you any instructions to prepare the paper?

Same objection as the last foregoing objection.

Ans. I have already given you my best recollection on that subject.

Cross-Int. 49. Did Mrs. Ingersoll give you any directions to prepare the petition?

To which question counsel for complainant objects on the ground that it calls for communications between client and attorney, and is, therefore, privileged.

Ans. As I have already stated, I cannot state without the records whether or not I did prepare the petition that was filed. I prepared a petition of my own motion for the appointment of an administrator in Massachusetts some time before any such petition was filed, as I understand, and my impression is that a new petition was prepared and, I understand, filed; and I do not know whether or not the petition that was filed was prepared by me, and that is the reason that I cannot give you any more accurate information on this subject without first going over my books and papers and the records.

Cross-Int. 50. When was the first one prepared by you?

To which question counsel for complainant objects on the ground

that it is not cross-examination; that it is irrelevant and immaterial.]

Ans. I do not now recall the date, excepting that it was some time before a petition was actually filed, as I understand. My impression is that it was following a trip to Boston. This petition, however, was not presented at that time, nor do I know that it was ever presented to Mrs. Ingersoll for her signature, and was prepared by me because I had time to do so, and because I thought that it might, perhaps, be advisable to have such a paper ready

[*Adjourned.*]

BOSTON, MASS., May 27, 1904.

Cross-Int. 51. Did you yourself present to the Probate Court of Suffolk County, Massachusetts, the petition that was actually filed, asking that letters of administration be granted the complainant in this action?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination, nor relevant to any issues in this case.*]

Ans. I did not.

Cross-Int. 52. Do you know who did?

Ans. I do not.

Cross-Int. 53. Do you know when it was presented?

Ans. No, I do not.

Cross-Int. 54. Before you drew the petition, which you have testified you once drew for the purpose of requesting letters of administration to be issued, did you consult with Judge Harwood?

[*To which question counsel for complainant objects on the ground that the same is not cross-examination, and the testimony called for is irrelevant and immaterial to any issue in this suit, and on the further ground that it is an inquiry as to consultations between attorneys of record in this suit in relation to the affairs of the same client, and is, therefore, privileged.*]

Ans. I do not think I have testified that I drew any petition "for the purpose of requesting letters of administration to be issued".

Cross-Int. 55. When did you first learn that a petition had been presented to the Probate Court of Suffolk County, asking that

letters of administration be granted in Massachusetts to Mrs. Ingersoll?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and the testimony called for is not relevant or material to any issue in this suit.*]

Ans. I do not know when the petition was filed, and know only from information that it was filed, and do not know, therefore, when I heard that it was filed, but my impression is that I heard shortly after it was filed, as I understand.

Cross-Int. 56. Did you hear that it was filed before you heard that letters of administration had been granted?

[*Same objection as the last foregoing.*]

Ans. I have no recollection as to when I heard, but I should imagine that letters could not be issued until the petition had been filed, although I do not know very much about the probate practice in the State of Massachusetts.

Cross-Int. 57. From whom did you first hear that such petition had been filed?

[*Same objection.*]

Ans. I could not tell you without looking over the letters or other papers in my office.

Cross-Int. 58. What is your best recollection?

Ans. I have no recollection at all as to the person who so informed me. I have a recollection that I was so informed, but how, I do not know.

Cross-Int. 59. Do you know whether Mrs. Ingersoll verified the petition before it was filed?

[*To which question counsel for complainant objects on the ground that the testimony called for is irrelevant and immaterial to the issues in this case, on the further ground that the petition itself would be the proper and better evidence on the subject mentioned, and on the further ground that the question is not cross-examination.*]

Ans. Of my own knowledge or recollection, I do not know. Do you want my impression?

Cross-Int. 60. Yes.

[*Same objection.*]

Ans. I am inclined to think that she verified it before me as a notary public, but I have no recollection without anything before me to aid me as to whether or not she so verified that particular paper.

Cross-Int. 61. Do you know where she verified it?

[*Same objection.*]

Ans. I do not.

Cross-Int. 62. Did you, acting for Mrs. Ingersoll, employ any attorney, or anyone not an attorney, in Boston, or in Massachusetts, to make the application for letters of administration?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, nor material nor relevant to any issue in this suit, and on the further ground that it asks for matters and things relating to the action of counsel in reference to other counsel for the same client.*]

Ans. As I understand your question, it seems to me that you have now reached the border-line of privileged communications beyond which I ought not to step without the direct instructions of the court so to do, and I therefore feel that I ought to refuse to answer the question until so instructed.

Cross-Int. 63. At the time, then, that the application for letters of administration was made in Massachusetts, you were acting for Mrs. Ingersoll in causing them to be procured, were you?

[*To which question counsel for complainant objects on the ground that the witness has answered heretofore that he did not cause the application to be made.*]

Ans. I felt that that I could not answer cross-question 62, which states that I was acting for Mrs. Ingersoll, without going into the realm of privileged communications, assuming that I was so acting for her: and the moment I state that I was so acting for her, I go into the realm of privileged communications providing I was so acting for her, and I therefore decline to answer your last cross-interrogatory for the same reason until instructed by the court so to answer it.

Cross-Int. 64. Upon what, then, do you base your claim of privilege and your refusal to answer these questions?

Ans. I think you will find my answer to this in my answers to the last two cross-interrogatories. Personally I have no objection to giving you any information which you may desire about this matter, so far as I have any, if any, but I do not want my acts to be subject even to any criticism from anybody.

Cross-Int. 65. Was Mr. Clinton P. Farrell present at either of the interviews which you had with Mr. Root, and about which you have testified in your examination-in-chief?

Ans. He was not present at any of the interviews about which I have testified here, but he was present at an interview following these at my offices in New York City, when Mr. Root was the only other person present.

Cross-Int. 66. When was this?

Ans. This last mentioned interview was some time about the last of August, 1901.

Cross-Int. 67. Was this after Mrs. Ingersoll had begun her suit against Henry A. Root, Joseph A. Coram and others in the State of Montana?

Ans. This was, I think, after a suit had been begun in Montana, but, of course, I have no personal knowledge of what was done out there.

Cross-Int. 68. Did you, acting for Mrs. Ingersoll, communicate with anybody with reference to the beginning of that suit in Montana before it was begun?

To which question counsel for complainant objects on the ground that it is not cross-examination, and is not relevant to any issues in this case, and on the further ground that it calls for matters which, if done by the witness while he was attorney for Eva A. Ingersoll as administratrix, or even as a private individual, or an heir, concerned in the subject mentioned, the same is privileged matter, and, therefore, ought not to be testified to by the witness if he were acting in the capacity of her attorney, unless the court should rule, after submission of such question to the court or judge, that the witness ought to answer the question.

Ans. I feel that I ought to refuse to answer, except under the

instructions of the court so to do, for the same reasons as those found in my answers to cross-interrogatories 62, 63 and 64.

Cross-Int. 69. Does the witness understand that I have not asked about the contents of the communication, or what the communication was, but simply for the fact as to whether he did communicate with anybody with reference to the beginning of the suit referred to?

Ans. I think that I understand the question.

Cross-Int. 70. Does the witness still decline to answer the question as so limited?

Ans. I do not understand what counsel for defendants means by "so limited", but I have re-read Cross-Int. 68 and I am very willing to reply to it, if the court so directs me, but not otherwise.

Cross-Int. 71. Do you place your refusal to answer upon the ground of professional privilege and that alone?

Ans. I can answer this only, and do answer it, as I have answered Cross-Ints. 62, 63 and 64.

Cross-Int. 72. Do you place your refusal to answer this question upon the ground that it would tend to degrade, or incriminate, you?

Ans. I am very gratified to note that counsel for the defendants smiles when he asks this question. I answer that I do not.

Cross-Int. 73. When, first, after Col. Ingersoll's death, did you see the defendant Henry A. Root?

Ans. The first time that I have any recollection of now was March 18, 1901.

Cross-Int. 74. Had you written him prior to that date?

Ans. I really could not say positively from memory.

Cross-Int. 75. Have you any means, at present, of refreshing your recollection?

Ans. I have a press copy-book here. I do not know whether there is anything in it that would refresh my memory as to this or not.

Cross-Int. 76. Is the book you referred to indexed?

Ans. I would not be positive. It should be.

Cross-Int. 77. Have you ever received from Henry A. Root, since the death of Colonel Ingersoll, any letters written by him?

Ans. I think I have received at least one letter from him since

Colonel Ingersoll's death, and, perhaps, more. I could not answer this accurately at this time, because it may be that most all, if not all, of the letters which I have had in my possession at times from him, as I understand, were addressed to someone other than myself.

Cross-Int. 78. Have you ever received from Henry A. Root, since the death of Colonel Ingersoll, any letters written by him and addressed to you?

Ans. I so understood your last question, and my answer to that is my answer to this one. I think that there was at least one letter addressed to me, and, perhaps, more, but I cannot answer this more accurately at this time.

Cross-Int. 79. Have you preserved any such letters or letter?

Ans. If there were any such letter or letters they should have been, and I presume are, preserved, but I have no recollection on this point. All I can say is that it is our custom to preserve in the office all letters or papers that come there, excepting those that are clearly of no importance.

Cross-Int. 80. Have you, since Colonel Ingersoll's death, ever written to the defendant Henry A. Root?

Ans. I have.

Cross-Int. 81. Can you tell me how many times?

Ans. I can not.

Cross-Int. 82. More than once?

Ans. I should say so, but I could not tell you how many times.

Cross-Int. 83. Do you know the defendant Joseph A. Coram?

Ans. Only as I met him at the interview in the Waldorf Astoria, about which I have spoken, and as I have met him here during this week during the taking of the testimony in this case.

Cross-Int. 84. Has Mr. Coram, since Colonel Ingersoll's death, ever written letters addressed to you which have been received by you?

Ans. My impression is that he has not, but it is barely possible that I may have received some communication from him in writing, which would be refreshed, no doubt, if so, by seeing the letter.

Cross-Int. 85. If you have ever received such a letter, or letters, from Mr. Coram, have you preserved it, or them?

Ans. If I have ever received any such letter, or letters, I presume they were preserved, according to our general custom already stated, but I have no personal recollection on this point at this time.

Cross-Int. 86. Have you, yourself, since Colonel Ingersoll's death, ever written to the defendant Joseph A. Coram?

Ans. I have written to him once, and perhaps more than once.

Cross-Int. 87. When was it that you wrote him the letter which you now recall you did write him?

Ans. I do not recall the exact date, but I think that it was some time during the summer of 1901.

Cross-Int. 88. Did you not write Mr. Coram before March 18th, 1901, when you say you saw him at the Waldorf Astoria Hotel, New York City?

Ans. I could not tell you, but if I did so write him, my recollection would, no doubt, be refreshed by seeing the letter.

Cross-Int. 89. If you so wrote him, did you keep a letter-press copy of your letter?

Ans. I could not tell you, — all I can say is, that it is our custom to take press copies of almost every letter that we write and send.

Cross-Int. 90. Have you now with you the letter-press copy-book containing letter-press copies of letters written by you in the course of business for the year 1900?

Ans. I have.

Cross-Int. 91. Do you recall upon what subject you wrote him in the year 1901?

Ans. I recall upon what subject I wrote him the letter which I have stated I recollect to have written to him in 1901.

Cross-Int. 92. Will you state what that subject was?

To which question counsel for complainant objects on the ground that it is improper to cross-examine the witness about the contents of a writing which he may have been the author of, such as the letter mentioned, without showing the same to the witness, in case defendants or their counsel have the letter mentioned now in his possession, so that the witness may refresh his memory thereby.

Ans. I will state what the general subject of the letter was, if asked.

Cross-Int. 93. What was it?

Ans. The letter bore upon the Andrew J. Davis estate.

Cross-Int. 94. When did you first meet, or become acquainted with, Judge Harwood, counsel for complainant in this case?

Ans. It was in my offices in New York City the first time Judge Harwood came to New York, so far as I know, after a suit had been instituted in Montana, as I understand, respecting the indebtedness of Henry A. Root and Joseph A. Coram on the contract here in suit.

Cross-Int. 95. That was the suit, was it not, which was begun by Mrs. Ingersoll, as administratrix, appointed in the State of New York?

Ans. I have no knowledge as to how that suit was begun.

Cross-Int. 96. Have you any information?

Ans. I have.

Cross-Int. 97. According to your information, was not the suit you have referred to a suit begun in the State of Montana by Mrs. Ingersoll as administratrix of the estate of Robert G. Ingersoll, appointed in the State of New York?

Before answering this question witness refreshes his recollection by consulting the bill of complaint in this action.

Ans. It was, but I did not refer to the bill of complaint in this action to refresh my memory as to my information upon this point, but to see whether or not the bill of complaint in this action so alleged, as counsel had stated without its going on the record that it did so allege, and I looked at the bill of complaint in this action for that purpose only.

Cross-Int. 98. That is the suit, is it not, in which John S. Harris, as administrator of the estate of Robert G. Ingersoll, appointed in the State of Montana, was afterwards substituted as plaintiff in place of Mrs. Ingersoll as administratrix of the estate of Robert G. Ingersoll, appointed in the State of New York, and the suit referred to in paragraph 25 of the bill of complaint in this action?

Ans. All I can give you is my information upon the subject. I understand that Mr. Harris was appointed ancillary administrator in Montana, and was then substituted as stated.

Cross-Int. 99. Were not you examined as a witness in that action?

[*To which question counsel for complainant objects on the ground that it is alleged and admitted in the pleadings in this case that said action in Montana was non-suited on objection to the introduction of any evidence therein, and that no witness' testimony was given in said action, or any other evidence permitted to be introduced therein.*]

Ans. Certain questions were propounded to me, and I answered them before a notary public in the city of New York, but what was done with those questions and answers after I signed and swore to them, I do not know.

Cross-Int. 100. Was the occasion on which you met Judge Harwood in New York for the first time, the occasion of your examination in this suit in Montana?

[*To which question counsel for complainant objects on the ground that the question assumes what has not been shown in any way whatever, that is, that the examination mentioned was in said suit in Montana, and on the further ground that aside from such correct assumption the question is immaterial and irrelevant.*]

Ans. I have already answered in my answer to Cross-Int. 99 that all I know upon that subject is that certain questions were propounded to me, and that I answered them as stated, but the occasion when I did so was not the occasion when I first met Judge Harwood.

Cross-Int. 101. Had you met Judge Harwood before this occasion just referred to?

Ans. I could not have very well answered your last question as I did, truthfully, if I had met him for the first time upon that occasion. As that occasion, as stated, was not the first occasion when I met him, I must have met him first before that occasion.

Cross-Int. 102. Then Judge Harwood, on the occasion when you were asked these questions and gave these answers to which you have referred, was present and examined you, did he not?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and is irrelevant and immaterial to any issues in this case.*]

Ans. Judge Harwood asked me the questions which were asked me on the occasion mentioned.

Cross-Int. 103. And you understood, did you not, that your deposition was then being taken for use in the action in Montana, referred to in paragraph 25 of the bill of complaint in this action?

To which question counsel for complainant objects on the same ground as stated in the last foregoing objection.

Ans. I understood that the questions and answers which were then asked me and given by me might be used in that action.

Cross-Int. 104. Do you know the defendant, in this action, C. H. Palmer?

Ans. I do not think so.

Cross-Int. 105. You know of him, do you not?

Ans. I have heard his name.

Cross-Int. 106. You know he is a defendant in the present action, do you not?

Ans. I so understand.

Cross-Int. 107. You did not draw the bill of complaint in this action yourself, did you?

To which question counsel for complainant objects on the ground that it is not cross-examination, and that the evidence called for thereby is irrelevant and immaterial.

Ans. I did not.

Cross-Int. 108. Have you ever written to the defendant C. H. Palmer?

Ans. I have.

Cross-Int. 109. When did you so write, if you can recall?

Ans. I cannot tell you the exact date from memory, but I think it was sometime during the summer of 1901.

Cross-Int. 110. Can you state the month?

To which question counsel for complainant objects on the ground that if counsel for defendants, who is interrogating the witness, has in his hand, or present with him, the letter mentioned, the same ought to be, in all fairness, exhibited to the witness to enable him to refresh his memory.

Ans. My impression is that it was July 13, 1901.

Cross-Int. 111. Did you see the original of that letter yesterd

Ans. I saw a letter yesterday, which I think was the original that letter, but, as I did not read it through, I would not swear t

Cross-Int. 112. In writing that letter to Mr. Palmer, were acting for Mrs. Ingersoll as administratrix of the estate of Rob G. Ingersoll?

To which question counsel for complainant objects on the grou that it is improper to cross-examine this witness as to the contents, subject-matter of a letter, without permitting the witness to exam such letter, the same having been mentioned as a letter which w here at this hearing on yesterday.

Ans. If you mean by "that letter" the letter which I saw yest day here, and if the letter which I saw yesterday here is the lett which I remember to have written to Mr. Palmer in 1901, then feel that I ought to refuse to answer the question until the court instructs me to do for reasons similar to those given in my answe to Cross-Ints. 62, 63 and 64.

Cross-Int. 113. I show you Defendants' Exhibit No. 2, for iden tification, and ask you to examine the same, and tell me whethe that is the letter you wrote to the defendant C. H. Palmer.

Ans. It is.

Cross-Int. 114. Had you conferred with Mrs. Ingersoll beto writing that letter?

To which question counsel for complainant objects on the groun that it is not cross-examination, and on the further ground that calls for privileged communications between attorney and client, an on the further ground that it is ambiguous and uncertain in that neither mentions any subject whatever, or any time whatever.

Counsel for defendants withdraws the question and asks thi question.

Cross-Int. 115. Had you conferred with Mrs. Ingersoll beto writing the letter Defendants' Exhibit No. 2, for identification, a to writing that letter and the contents of that letter?

To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that i apparently calls for privileged communications between attorney and

clear, except that said question is still ambiguous and uncertain, if it relates to Mrs. Ingersoll as administratrix, or to any subject touching her duties, or office, as administratrix, which counsel for complainant is now unable to know because counsel for defendants has constantly withheld the said alleged letter, which he says is marked "Defendants' Exhibit No. 2", for identification, from inspection by counsel for complainant who is conducting this examination.

Ans. Personally, I have no objection to answering the question, but I feel that I ought to be first directed so to do by the court for reasons similar to those set forth in my answers to Cross-Int's. 62, 63 and 64.

Cross-Int. 116. Do you decline to answer the question for the reason just stated, and for that, alone?

Ans. I refuse to answer only until directed by the court so to do, and only for reasons similar to those set forth as stated in my answers to Cross-Int's. 62, 63 and 64.

Cross-Int. 117. By "similar" do you mean the same?

Ans. I used the word "similar" because there were three questions there and three answers, and I could not, therefore, use the word "same" because that would mean the exact same wording, and I am answering but one question here; but I will give you my answer in direct phraseology if you prefer to have it so.

Cross-Int. 118. Counsel for defendants would prefer to have it so.

Ans. As I understand your question, it seems to me that this touches the border-line of privileged communications beyond which I ought not to go, without the instructions of the court so to do, because, as I understand Cross-Int. 115, I cannot answer the same without going into the realm of privileged communications, assuming that I had so conferred with her, and the moment that I state that I had so conferred with her, I go into the realm of privileged communications, providing I had so conferred. If the court desires it and will so direct me, I have no objection personally to giving you any information, if any, that I may have upon this subject.

Cross-Int. 119. Does the witness place his refusal to answer this question upon the ground that at the time the letter, Defendants'

Exhibit No. 2, for identification, was written by him, and conference which he may have had with Mrs. Ingersoll, before writing the same, and about its contents, the relation of attorney and client existed between him and Mrs. Ingersoll, and that the same question calls for privileged communications between attorney and client?

Ans. I think I have answered this as fully as I care to do, without the direction of the court, in my answer to the last preceding cross-interrogatory.

Cross-Int. 120. I show the witness Defendants' Exhibit No. 3, for identification, and ask him to examine the same and tell me whether that is the written promise referred to in Defendants' Exhibit No. 2, for identification.

[*Complainant's counsel now requests of defendants' counsel the privilege of examining the two alleged exhibits which he has mentioned in the foregoing questions, now that he has interrogated this witness as to the contents and subject-matter of said papers marked, as he says, "for identification" in the matter mentioned in the foregoing questions, and asks counsel for defendants to state upon the record whether he will permit such inspection by the counsel for complainant.*

Counsel for defendants respectfully declines the request of counsel for complainants, but will gladly allow him an inspection of the same when, if ever, he offers them in evidence.

Counsel for complainant demands of defendants' counsel the privilege of inspecting said last mentioned papers, inasmuch as he has questioned the witness as to the contents and subject-matter thereof, so that complainant's counsel may intelligently examine this witness touching the questions asked by defendants' counsel regarding the subject-matter of said papers, all of said matter being new matter brought into this examination by defendants.

Counsel for defendants thinks that the request of counsel for complainant is based upon an erroneous notion and repeats, with regret, his refusal for inspection until offered in evidence.]

Ans. Defendants' Exhibit No. 3, for identification, I notice is a carbon copy. I do not know whether it is the "written promise" referred to in Defendants' Exhibit No. 2, for identification, or not.

Cross-Int. 121. Does the witness wish to be understood as sug-

gesting that the written promise enclosed in Defendants' Exhibit No. 2, for identification, was an original and not a carbon copy?

Ans. I answered as I did because, ordinarily, so far as my experience goes, an original is usually executed and not a carbon copy. I do not now recollect whether the "written promise", referred to in Defendants' Exhibit No. 2, for identification, was an original or carbon, nor will I swear positively, from recollection merely, that a "written promise", reading as does Defendants' Exhibit No. 3, for identification, was the "written promise" referred to in Defendants' Exhibit No. 2, for identification, although my impression is that it was.

Cross-Int. 122. Do you know the signature of Henry A. Root?

Ans. I never saw him sign. I have seen letters which others told me had been signed by him.

Cross-Int. 123. And which are in evidence in this case as Complainant's Exhibits I. to XXXI.?

Ans. I do not remember anyone telling me specifically that the exhibits mentioned had been signed by Mr. Root, the defendant here, but the exhibits mentioned, I believe, were all once read by me, and I understood that they had been severally signed by Mr. Root, the defendant. I have no recollection as to anyone telling me so in particular, or as to being so told, but these are letters such as I have intended to describe in the latter portion of my answer to Cross-Int. 122.

Cross-Int. 124. Was there more than one enclosure in Defendants' Exhibit No. 2, for identification?

Ans. I think not.

Cross-Int. 125. Defendants' Exhibit No. 3, for identification, has the signature, has it not, of C. H. Palmer, or what purports to be the signature of C. H. Palmer subscribed to it?

Ans. It has what purports to be the signature of C. H. Palmer subscribed to it; I do not know the defendant Palmer's signature.

Cross-Int. 126. It also has what purports to be the signature of H. A. Root subscribed to it, has it not?

Ans. It has, and my impression is that this is the signature of the defendant Root, but I would not swear to it. Mr. Root, who

is sitting beside me, could, of course, state whether it is his signature or not better than I can.

Cross-Int. 127. Defendants' Exhibit No. 3, for identification, contains the words quoted in Defendants' Exhibit No. 2, for identification, does it not?

Counsel for complainant now renews his request and demand for inspection of the writings concerning the contents of which defendants counsel is examining the witness, the same not being, however, cross-examination, but upon new matter, and complainant's counsel bases his demand upon the same reasons and grounds heretofore stated when he requested an inspection of said writing.

Counsel for defendants regrets that he must still decline the request of counsel for complainant.

Ans. The words quoted in Defendants' Exhibit No. 2, for identification, are found in Defendants' Exhibit No. 3, for identification, excepting the brackets and the words within the same, namely, "of the estate of Andrew J. Davis", and excepting that the word "portion" in Defendants' Exhibit No. 3, for identification, is mis-spelled in Defendants' Exhibit No. 2, for identification.

It is agreed before the special examiner by the counsel for the respective parties that the complainant's time for taking her prima facie evidence shall be extended fifteen days from the time fixed by the order of the court, if she so elects. It is also agreed by counsel that the defendants' time for taking their evidence shall not begin to run until the expiration of such extended time if the complainant shall elect to take such extension of time, provided that in case complainant elects to use said additional time, notice thereof shall be given to counsel for defendants within the sixty days now allotted to complainant for taking her testimony by order of the court.

Adjourned.

BOSTON, MASS., May 28, 1901.

Cross-Int. 128. Did you prepare, or have prepared, and at one of the interviews with Mr. Root, which you have testified, give him a paper-writing containing the words and figures, with the exception of the signatures, contained in Defendants' Exhibit No. 3, for identification?

[*Counsel for complainant objects to the question on the ground that it is immaterial.*]

Ans. I did not.

Cross-Int. 129. At one of the interviews with Mr. Root, which you have already testified, did you hand him a paper-writing containing, with the exception of the signatures, the words and figures contained in Defendants' Exhibit No. 3, for identification?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and is not relevant or material to any issues in this case.*

Counsel for complainant now demands of counsel for defendants the privilege of examining the paper-writing about which he is questioning the witness.

Counsel for complainant asks the counsel for defendants to please state upon the record whether or not he will permit counsel for complainant to examine the paper-writing in regard to the substance of which he is now questioning the witness.

Counsel for defendants does not understand that he is asking witness about the contents of this instrument, and declines to allow complainant's counsel to inspect the paper-writing until he shall offer it in evidence.

The witness is one of the solicitors for the complainant, has had repeated opportunity to read Defendants' Exhibit No. 3, for identification, and counsel for complainant, through the witness, has had ample opportunity to know the contents of this paper-writing.]

Ans. I did not.

Cross-Int. 130. Did you ever hand Mr. Root a paper-writing similar in its contents to Defendants' Exhibit No. 3, for identification?

To which question counsel for complainant objects on the same ground as last above stated to a similar question, and states that he shall insist that in the examination of this witness respecting matters not touched in the direct examination, counsel makes the witness his own as a witness for defendants, and will be bound by his testimony accordingly.

Ans. I never did.

Cross-Int. 131. What was the written promise bearing the signature of C. H. Palmer and that of H. A. Root, to which you refer in Defendants' Exhibit No. 3, for identification?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, nor relevant or material to any issue in this case, and on the further ground that the so-called exhibit, referred to in the foregoing question, being a writing, speaks for itself.*]

Ans. My best recollection is that the "written promise" referred to in Defendants' Exhibit No. 2, for identification, as I think I have already stated, was either Defendants' Exhibit No. 3, for identification, or an original (rather than a carbon) containing the same wording; but I would not want to swear positively to that merely from recollection. I have no doubt, so far as my recollection goes, however, that said "written promise", referred to, was either Defendants' Exhibit No. 3, for identification, or an original (and not a carbon) thereof.

Cross-Int. 132. Did the written promise, referred to in Defendants' Exhibit No. 2, for identification, contain the words and figures contained in Defendants' Exhibit No. 3, for identification?

[*To which question counsel for complainant objects on the same ground stated in the last foregoing objection, and on the further ground that the letter, of which counsel is examining the witness, speaks for itself as to the matter inquired of.*]

Ans. Defendants' Exhibit No. 2, for identification, as I think I have already stated, contains, between quotation marks, some of the words and figures contained in Defendants' Exhibit No. 3, for identification, but by no means all of the words and figures contained in Defendants' Exhibit No. 3, for identification.

Cross-Int. 133. Defendants' counsel repeats the last question as witness has failed to answer same.

[*Same objection as stated in the last foregoing objection.*]

Ans. I evidently misunderstood your question. I think, however, I have already answered the present question as accurately as I can answer it from recollection. My best recollection is that the "written promise" referred to was either Defendants' Exhibit No.

3, for identification, or an original (and not a carbon), but, as I have stated, I do not wish to swear to this positively, merely from my recollection.

Cross-Int. 134. From whom did you receive the written promise, referred to in Defendants' Exhibit No. 2, for identification, after it had been signed by C. H. Palmer, Trustee, and H. A. Root, and before you enclosed it in Defendants' Exhibit No. 2, for identification, and sent the same to C. H. Palmer?

Ans. Personally I do not know whether or not the "written promise", referred to in Defendants' Exhibit No. 2, for identification, had been signed by the defendants C. H. Palmer and H. A. Root, though I evidently assumed that it had been when I wrote Defendants' Exhibit No. 2, for identification, from the facts that said "written promise" bore, as I remember it, what purported to be their signatures. I received said written promise from Mr. Farrell to my best recollection.

Cross-Int. 135. When did you receive said written promise from Mr. Farrell?

Ans. I could not tell you the exact date, but, of course, before I wrote Defendants' Exhibit No. 2, for identification.

Cross-Int. 136. How long before?

Ans. I could not tell you from recollection merely. If, however, you have any written matter, which you think would refresh my recollection on this point, and you will hand it to me, perhaps it will so refresh my recollection; and if so, I will give you my best recollection so refreshed.

Cross-Int. 137. Had you seen the written promise, to which you refer in Defendants' Exhibit No. 2, for identification, before it bore the signatures of C. H. Palmer, Trustee, and H. A. Root?

Ans. As I understand Defendants' Exhibit No. 3, for identification, it did not become a promise, as contemplated therein, until signed by Mr. Palmer, Mr. Root and Mr. Coram, and acknowledged by Mr. Coram and Mr. Root; and Defendants' Exhibit No. 3, for identification, is not signed by Mr. Coram and is not acknowledged by either Mr. Coram or Mr. Root. To the best of my recollection, I had, however, seen Defendants' Exhibit No. 3, for identification

(although I do not care to swear positively about this merely from recollection), without what purports to be the signatures of C. H. Palmer and H. A. Root on it.

Cross-Int. 138. Do you know who prepared the so-called written promise spoken of by you in Defendants' Exhibit No. 2, for identification?

To which question counsel for complainant objects on the ground that it is not cross-examination, and that the testimony called for thereby is irrelevant and immaterial, and counsel for complainant desires to have it understood that all similar questions heretofore and hereafter asked, about said so-called exhibit of defendants, shall be understood to come into the record subject to this objection to save repetition.

Counsel for defendants cannot consent that objections not already taken to questions previously asked shall be considered as now taken, and what course counsel for complainant shall pursue in the future, in taking objection is a matter for him to determine and must be left to his decision.

Ans. I do.

Cross-Int. 139. Who was it?

Ans. To the best of my recollection the substance of a considerable portion thereof was handed me by the defendant, Henry A. Root, with the assurance that, from his personal knowledge of the situation and condition of the Davis estate, such a paper would, in his opinion, be the best protection that he and Mr. Coram could furnish Mrs. Ingersoll, so far as the personalty of the Davis estate was concerned, and was all they could afford to do out of the personalty, and would show their good faith in the matter more conclusively than their repeated oral promises to see her rights protected as far as they were able, and with the assurance that the most valuable part of the Davis estate consisted of realty, which was of such value, in his opinion, as to more than fully protect her rights in the end, but that she must be patient, like all the rest of them. The "written promise" itself (without any signatures) referred to in Defendants' Exhibit No. 2, for identification, was prepared by myself.

Cross-Int. 140. After it was so prepared by you, what did you do with it?

To which question counsel for complainant objects on the same grounds stated in the last foregoing objection, and states to defendants counsel that he shall insist upon the hearing of this case that defendants' counsel having taken this witness, on pretended cross-examination, and in abuse of his privileges before the special examiner, and questioned him about entirely new matter not touched in the direct examination, and about papers and writings, and extensively as to the substance thereof, the which he has repeatedly refused to submit to complainant's counsel for inspection, the defendants are bound by the testimony of this witness as their own witness. Counsel for complainant objects to said question on the further ground that it carries the assumption that the witness prepared said paper, whereas he has just testified that defendant Henry A. Root delivered to the witness the substance set forth in said paper.]

Ans. I would not care to state positively what I did with it after preparing it, from recollection merely.

Cross-Int. 141. Do you know how it got to Mr. Root or to Mr. Palmer?

Ans. To my own knowledge, I do not, to the best of my recollection.

Cross-Int. 142. Have you any information as to how it got to either of them?

To which question counsel for complainant objects on the same grounds as stated in the last foregoing objection.

Ans. It may be that I have such information somewhere, but I do not now recall what it is, if I have any.

Defendants' counsel shows to counsel for complainant Defendants' Exhibit No. 2, for identification, and offers and puts the same in evidence, and requests the special examiner to mark the same "Defendants' Exhibit No. 2", for use in this case.

To the admission or reception in evidence of said last mentioned exhibit, counsel for complainant objects on the ground that the same is an improper cross-examination, and on the further ground that the

matter contained therein is irrelevant and immaterial to any issues in this case, and that it is also incompetent.

Defendants' counsel objects to counsel for complainant talking to the witness, while on the stand, and objects to the privilege asserted by him of consulting with witness, because he is a brother solicitor for the complainant in this action.

Let the record show that upon the protest of the learned counsel for defendants no consultation was had, referring to the last foregoing objection.]

Cross-Int. 143. Do you know when the action in Montana, referred to in paragraph 25 of the bill of complaint in this action, in which Mrs. Ingersoll as administratrix of the estate of Colonel Ingersoll, appointed in the State of New York, was originally the plaintiff, and in which John S. Harris as administrator of the estate of Robert G. Ingersoll, appointed in the State of Montana, was afterwards substituted as plaintiff, was begun?

[*To which question counsel for complainant objects on the ground that it is not cross-examination; that it is irrelevant and immaterial to the issues in this case, and that better evidence could be produced of the fact inquired of if counsel for defendants, or any party, wished to show the same.*]

Ans. I have no personal knowledge whatever upon the subject; so far as my information goes, if that is competent and you want it, I will say that I understand it was not long before an interview about which I have spoken in my offices in New York City, about the latter part of August, 1901, at which Mr. Root, Mr. Farrell and myself were present.

Cross-Int. 144. Is the bill of complaint in error in stating that that suit was begun in July, 1901?

Ans. I would not swear that the bill of complaint so states, and if it does so state, I do not know whether it is an error or not?

Cross-Int. 145. Who drew the bill of complaint in this action?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and the testimony called for thereby is immaterial.*]

Ans. I do not know.

Cross-Int. 146. Did you sign the bill of complaint in this action as solicitor?

Ans. Without having the bill of complaint before me, and speaking only from recollection, I should say that I did not sign it personally.

Cross-Int. 147. Have you been informed who drew the bill of complainant in this action?

Same objection.

Ans. I do not recall any specific information upon that subject, but, of course, I have a belief in the matter.

Cross-Int. 148. What is that belief?

Ans. I understand that Judge Harwood drew it.

Cross-Int. 149. Do you know John S. Harris?

To which question counsel for complainant objects on the ground that the same is not cross-examination, and the testimony called for is irrelevant to any issue in this suit.

Ans. I understand that Mr. Harris was formerly an United States Senator, and it is barely possible that I may have met him at that time in Washington, D. C., but, if so, I do not recall it, and I have never met him, so far as I know, at all.

Cross-Int. 150. Do you know whether the written promise spoken of in Defendants' Exhibit No. 2 by you was sent to John S. Harris in Montana in order that he might secure the signature thereto of Joseph A. Coram?

To which question counsel for complainant objects on the same ground as stated in the last foregoing objection.

Ans. According to my best recollection, I do know that the said written promise was sent to Mr. Harris, but according to my best recollection, I do not know that it was sent to Mr. Harris "in order that he might secure the signature thereto of Joseph A. Coram", as I understand what these words mean.

Cross-Int. 151. Who sent it to Mr. Harris?

Counsel for complainant objects to the foregoing question on the same ground as stated in his last foregoing objection.

Ans. According to my best recollection, I did.

Cross-Int. 152. For what purpose did you send it?

[*To which question counsel for complainant objects on the same ground as stated in his last foregoing objection.*]

Ans. Personally I have no objection to answering the question if so directed to do by the court, but as I do not care to have my actions here even questionable, I feel that I ought to refuse to answer until directed by the court so to do.

Cross-Int. 153. Does the witness refuse to answer upon the ground of professional privilege or upon the ground that it would incriminate or degrade him?

Ans. I am pleased to note again a smile upon the face of counsel for defendants when he asks that portion of the question containing the words "incriminate or degrade", and I will, therefore, answer this portion of the question first. I answer this portion, I do not. I think I should refuse to answer the other portion of the question without the direction of the court first so to do, because the moment I state the purpose it would be necessary for me to go into the realm of privileged communications, assuming that I had any communications respecting said purpose, and the moment I state that I refuse because I would go into the realm of privileged communications, I admit that I had instructions as to the purpose, assuming that I had any such instructions. I repeat again, however, my perfect willingness, personally, to give counsel any information, if any, that I may have upon this subject if the court so directs me to do.

Cross-Int. 154. Had the written promise, spoken of by you in Defendants' Exhibit No. 2, when you sent it to John S. Harris, subscribed thereto what purported to be the signatures of C. H. Palmer and H. A. Root?

Ans. I have stated only from my best recollection that I sent it to Mr. Harris. I do not recall whether it had or not.

Cross-Int. 155. Did you send the same to him by mail?

Ans. I feel sure that I must have, if I sent it.

Cross-Int. 156. Did you keep a letter-press copy of the letter, if any, which accompanied it?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that the*

testimony called for thereby is irrelevant and immaterial to any issues in this suit, and on the further ground that it calls for matter, or communications, of which the witness was the author, if there were any such communications, while he was attorney for Eva A. Ingersoll as administratrix, etc., and at any rate the testimony called for is of the privileged character.]

Ans. I could not tell you whether a press copy of that particular letter was kept or not. It should have been, according to our office customs, if I wrote the letter.

Cross-Int. 157. Did John S. Harris subsequently return to you the written promise spoken of by you in Defendants' Exhibit No. 2?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.*]

Ans. I am not sure from recollection whether he did or not.

Cross-Int. 158. Did he return it to anybody other than yourself, so far as you are informed, or know?

[*To which question counsel for complainant objects on each and all grounds stated in the last foregoing objection.*]

Ans. From recollection merely I could not now state when the so-called written promise was signed by Mr. Palmer or Mr. Root, it so signed, and I could not from recollection merely state when, or to whom, said so-called promise was returned by Mr. Harris, if returned following the signing by Mr. Palmer and Mr. Root. If counsel for defendants has any written data upon the subject and will show it to me perhaps my recollection would be refreshed, and, if so, I will then be pleased to give him my recollection so refreshed.

Cross-Int. 159. The written promise spoken of by you in Defendants' Exhibit No. 2 had been returned by John S. Harris before you wrote Defendants' Exhibit No. 2, had it not?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that the testimony called for thereby is irrelevant and immaterial to any issues in this case, and on the further ground that the witness has heretofore answered that he did not know whether any such matter was sent to Mr. Harris, or returned*

by him, the utmost that the witness stated, upon which any such conclusion could be based, was mere supposition, or understanding, of the witness.]

Ans. I could not state from recollection whether it had or had not. All I can say from recollection is that the "written promise", referred to in Defendants' Exhibit No. 2, was in my possession when I signed Defendants' Exhibit No. 2 and was enclosed in an envelope with Defendants' Exhibit No. 2, to the best of my belief.

Cross-Int. 160. Is that the envelope in which Defendants' Exhibit No. 2 was sent to Mr. C. H. Palmer by you?

Ans. I could not tell you — that appears, however, to be an envelope such as I used at that time, and the words "Boston, Massachusetts" are in my handwriting.

Cross-Int. 161. Was the letter Defendants' Exhibit No. 2 registered at the New York post office?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that it is immaterial and irrelevant.*]

Ans. My best belief is that it was, and Defendants' Exhibit No. 2 so states, but whether or not I personally had it registered or sent someone over with it, if it was so registered, I do not remember. I remember distinctly that I intended to have it registered.

Cross-Int 162. The envelope now shown you has this stamp upon it "New York, N.Y. Jul 13 1901 Reg. No.", and in pencil after Reg. No. "62576"; do you know, or are you informed, how that stamp came upon the envelope?

Ans. I do not know, and am not informed. Personally, however, I have no doubt that it was put on by someone in the post office in New York City. This answer, however, is subject to a doubt in my mind as to whether the number referred to is "62576" or "62516". Also, if my testimony upon this subject is to be in any way considered, I would request that the envelope shown me be marked for identification.

[*Counsel for complainant moves the court to strike out the last foregoing question and answer thereto as being entirely immaterial, and if it were material in any way entirely improper to attempt to prove*

the matter, to which the question relates, in the manner shown by that question and answer, and counsel for complainant warns the counsel for defendants that for this abuse of his privileges before the special examiner in this respect, and in many others, and the wrongful accumulation of costs by waste of time, and otherwise, counsel for complainant will ask the court to impose the costs so wrongfully made upon defendants, as provided by the rules in equity.

Defendants' counsel asks the special examiner to mark the envelope just shown the witness, "Defendants' Exhibit No. 4", for identification. The special examiner marks the same accordingly.

Cross-Int. 163. Have you any doubt that Defendants' Exhibit No. 2 was enclosed in Defendants' Exhibit No. 4, for identification, when it was mailed?

Same objection and same warning as the last foregoing.

Ans. If I wrote Mr. Palmer two letters on July 13, 1901, I would have doubt. My impression, however, is that I wrote him but one letter on that day, and, therefore, I have practically no doubt that Defendants' Exhibit No. 2 was enclosed in Defendants' Exhibit No. 4, for identification.

Defendants' counsel offers and puts in evidence Defendants' Exhibit No. 4, for identification, and asks the special examiner to admit the same in evidence "Defendants' Exhibit No. 4".

To the introduction or reception in evidence of said last mentioned envelope, counsel for complainant objects on the ground that it is immaterial and irrelevant to any issues in this case, that it is not cross-examination, nor relating, even remotely, to anything touched upon in cross-examination, and that it is an improper and unnecessary encumbrance of the record.

Thereupon the special examiner marks said last mentioned envelope as requested in the offer thereof.

Defendants' counsel, in offering in evidence Defendants' Exhibit No. 2, did not intend to offer as a part thereof the words written in ink on the face thereof, namely, "Port Huron Aug 16th", and did not understand, in so offering it, the witness admitted writing those words.

Cross-Int. 164. Have you with you your letter-press copy-book

containing copies of letters written by you in the month of July, 1901?

Ans. I have with me a press copy-book containing letters written during a portion of said month.

Cross-Int. 165. Does it contain the letter-press copy of Defendants' Exhibit No. 2?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, not relevant or material to any issue in this case, and even if it were answered in the affirmative, is merely cumulative of irrelevant matter, the witness having shown that he wrote and signed and mailed defendants' so-called Exhibit No. 2, the original of which the learned counsel for defendants now holds in his hand. Complainant's counsel insists that this is further incumbrance of the record.*]

Ans. It does.

Cross-Int. 166. In Defendants' Exhibit No. 2, you say, "I am writing today to Mr. Root and to Mr. J. A. Coram also, likewise on Mrs. Ingersoll's behalf, that I have returned this to you"; did you so write to Mr. Root and to Mr. Coram?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and is not relevant or material to any issues in this case.*]

Ans. I think that I ought to refuse to answer this question also, until directed by the court so to do.

Cross-Int. 167. Do I understand the witness to decline to answer the question?

Ans. Subject to the qualification in my last answer. I will be very glad to answer it if the court so directs me, but think that I ought to have its direction, in order that my conduct may not be even questionable.

Cross-Int. 168. Does the letter-book, which you have with you, contain letter-press copies of a letter written to Mr. Root or to Mr. Coram, about July 13th, 1901, the date of Defendants' Exhibit No. 2?

[*To which question counsel for complainant objects on the grounds stated in the last foregoing objection, and on the further ground that*

it calls for privileged communications, or privileged matter relating to the acts of an attorney for, or in behalf, of his client.

Ans. If I wrote such letters, the press copy-book which I have with me, should, according to our office custom, contain copies thereof. As to whether or not it does contain such copies, it seems to me that I ought to refuse to answer, until directed by the court so to do, in order that my conduct here may not be even questionable.

Cross-Int. 169. About the time that you sent to John S. Harris in Montana the written promise, spoken of by you in Defendants' Exhibit No. 2, did you not write a letter to Mr. Henry A. Root, one of the defendants, informing him that you had sent the same to Mr. Harris and asking Mr. Root to let Mr. Harris know when Mr. Coram would be in Butte, Montana?

To such question counsel for complainant objects on the ground that it is not cross-examination, and that the testimony called for thereby is irrelevant and immaterial to any issue in this case, and on the further ground that it is improper for the interrogator to pretend to relate or narrate what may have been written in such letter, and ask the witness to affirm, in respect thereto, without exhibiting the same to him, if counsel for defendants has the same in his possession.

Ans. According to my best recollection, I wrote Mr. Root a letter substantially as stated, but I do not recall when I wrote it, and I do not understand that I have testified that I sent the so-called written promise to Mr. Harris, as I cannot swear positively from recollection whether I did or not.

Cross-Int. 170. Does the letter book which you have with you contain a letter-press copy of this letter to Mr. Root?

Same objection as the last four pages.

Ans. I could not tell you. It should, according to our office custom, contain a copy of every letter written to Mr. Root during the period which the book I have here covers.

Cross-Int. 171. Would an inspection of that copy, assuming it to exist, refresh your recollection as to the time of writing and sending the letter to Mr. Root?

[*Same objection as stated in the last foregoing.*]

Ans. If there is a copy of the letter referred to in the book which I have here, I presume an inspection thereof would refresh my memory on this point.

Cross-Int. 172. Will the witness kindly examine the letter-press copy-book and see whether there is a copy of the letter?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that the testimony called for thereby is irrelevant and immaterial to any issue in this case, and said testimony, being entirely new matter called for by defendants' counsel, counsel for complainant insists that the defendants should subpœna, or otherwise obtain the attendance of this witness on their own with such papers and documents as they see fit to ask him to bring, but counsel for complainant insists that the witness do not examine said letter-press copy-book for the purpose of answering the foregoing question, and counsel for complainant further objects to the witness questioned into the matter inquired of and required on the ground that the witness was the attorney for complainant in this action at the time he acted in the behalf inquired of in the foregoing question, and the matter sought to be inquired of and of which the witness is required to make search, is privileged matter between the witness and his said client.*

Defendants' counsel asks counsel for complainant whether he will stipulate upon the record that the witness, John H. Hinsdale, was the attorney for Mrs. Iverson and was in fact for her as such in the various matters touched upon which counsel for defendants has, on cross-examination, interrogated the witness.

In response to the foregoing inquiry, counsel for complainant says that the witness has been questioned extensively upon that subject, and has replied fully to the questions propounded to him thereon, and counsel for complainant believes the record has been sufficiently covered by reiterations of questions by the learned counsel for defendants in respect to the subject that he has mentioned in his last foregoing question, and counsel for complainant will, therefore, leave the record to speak for itself as to the relation of said witness to the complainant

in this case throughout the whole period of which inquiry has been made and testimony given by the witness.]

Cross-Int. 173. Defendants' counsel will ask the witness whether he will produce on Thursday next the originals of any letters received by him from Henry A. Root and Joseph A. Coram.

[*Adjourned.*]

BOSTON, MASS., June 2, 1904.

Present: T. D. KENNESON, Esq., *of Counsel for Defendants.*

Ans. to Cross-Int. 172. I would say that I have examined the press-copy book which I have with me, and that it contains a press-copy, I believe, of the letter to which I referred in my answer to Cross-Int. 169.

Cross-Int. 173 *withdrawn.*

Cross-Int. 174. In that letter did you inform Mr. Root that you had sent the written promise, spoken of by you in Defendants' Exhibit No. 2, to Mr. Harris, and did you therein ask Mr. Root to let Mr. Harris know when Mr. Coram would be in Butte, Montana?

Ans. In the absence of counsel, and as the original letter should be in the possession of the defendant Root, whose counsel is cross-examining me, and as I believe this to be improper cross-examination, and as, in my opinion, an entire correspondence must be offered, if any of it is offered, and as I believe it to be immaterial anyway, I think that I ought to refuse to give the contents of this letter from the press-copy, at least, until the return of counsel to advise me.

Cross-Int. 175. At what page, or pages, of the letter-press copy-book does the copy of the letter to Mr. Root, referred to by you, appear?

Ans. The press copy of this letter appears on page 871.

[*Counsel for defendants asks the special examiner to mark the letter-book in question "Defendants' Exhibit No. 3", for identification, and page 871 thereof as "Defendants' Exhibit No. 4", for identification.*]

JUDGE HAZELWOOD *present.*

The special examiner marks the same accordingly.

Cross-Int. 176. After the written promise, spoken of by you in Defendants' Exhibit No. 2, had been prepared, as testified to by you, from the suggestions made by Mr. Root, how did the same get to Mr. Root or Mr. Palmer, and when?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, nor relevant to any issues in this case, and is immaterial, if it did relate to any issues in this case.*]

Ans. To the best of my recollection I never knew, but if I ever did, I do not now recall, without anything before me to refresh my recollection.

Cross-Int. 177. Was it not handed by you to Mr. Root at the last interview with him in the Waldorf Astoria, to which you have already testified?

[*To which question counsel for complainant objects on the same ground stated in the last preceding objection.*]

Ans. To the best of my recollection it was not.

Cross-Int. 178. When was it that Mr. Root made to you the suggestions on which you acted in preparing the written promise in question?

Ans. As I have already stated, I do not think that the paper enclosed in Defendants' Exhibit No. 2, and therein referred to as "the written promise", ever became a promise as contemplated, because never executed in full; but understanding you to mean the paper itself without any signatures, to the best of my recollection without anything before me to refresh it, these suggestions were made to me by him at the interview which I had with him alone at the Waldorf Astoria, in New York City.

Cross-Int. 179. What date?

Ans. I cannot give you the exact date; but I think it was about the tenth or twelfth of May, 1901.

Cross-Int. 180. Have you seen and read the letter dated May 21st, 1900, and signed "Henry A. Root", which is marked "Complainant's Exhibit XLIV.", for identification, a part of which has already been introduced in evidence by the complainant, and the remainder of which has been introduced in evidence by the defendants?

Ans. I have.

Cross-Int. 181. When did you first see and read the same, as near as you can recall?

Ans. Probably not long after it was received. I do not recall the exact date.

Cross-Int. 182. It was before the interviews with Mr. Root, to which you have already testified, that you saw and read this letter, was it not?

Ans. I feel quite sure that it was.

Cross-Int. 183. By "the original agreement", spoken of in this letter of May 21st, 1900, what did you understand Mr. Root to mean?

To which question counsel for complainant objects on the ground that the testimony called for thereby is irrelevant and immaterial, and on the further ground that the question is one for the court and the rights of complainant could not be prejudiced, or affected, by any understanding which the witness might have on the matter referred to.

Ans. I understood him to refer to the writing purporting to be signed, and signed, as I understand, by Mr. Root and Mr. Coram, and dated, I believe, August 17, 1891, referred to in the bill of complaint in this action; and if you want my understanding, it was that this was the only contract made with Colonel Ingersoll on that subject.

Cross-Int. 184. A copy of which is annexed to the bill of complaint and marked "Exhibit B"?

Ans. Yes.

Defendants' counsel moves to strike out the latter part of the answer to Cross-Int. 183, viz: if you want my understanding, it was that this was the only contract made with Colonel Ingersoll on that subject", on the ground that the same is not responsive and is incompetent and impertinent.

Cross-Int. 185. You understood, did you not, that Mr. Root claimed that this original agreement had been abandoned, and that a new agreement had been made in its place?

To which question counsel for complainant objects on the ground that it is not cross-examination, nor relevant to any issues in this

case, and is immaterial, and on the further ground that the understanding of the witness could not prejudice the rights of complainant in this action; and on the further ground that evidence thereof would be incompetent under the provisions of the Statutes of the United States in such cases as the one at bar.]

Ans. Does your question relate to what I understood only from Complainant's Exhibit XLIV., namely, Mr. Root's letter of May 21, 1900?

Cross-Int. 186. I think the question is plain.

Ans. As counsel for defendants refuses to answer my last question, in making this answer I will assume that he does mean what I understood from said letter of May 21, 1900, only —

[*Thereupon counsel for complainant interposed an objection to the witness proceeding to interpret the meaning of the author of said letter, as set forth in the contents thereof, as being improper testimony, and renews the objections stated in the last preceding objection.*]

[*Ans. to Cross-Int. 186 continued*]: I understood only what Mr. Root said in his letter; and it you mean by "abandoned" and by "new agreement" that the said Exhibit B, attached to the bill of complaint, had been abandoned by Colonel Ingersoll, and a new agreement made by him, relating to the same matter; and it I understand the meaning of the word "abandoned", and the meaning of the word "agreement", I did not understand from Mr. Root's said letter of May 21, 1900, that Mr. Root meant that Colonel Ingersoll had abandoned the contract known as said Exhibit B, and had made a new agreement, relating to said matter. I did understand, however, from said letter of May 21, 1900, that, as Colonel Ingersoll was dead, and could not speak for himself, if the subject-matter of the contract known as said Exhibit B ever came into court, Mr. Root would doubtless make, or try to make, the claim of an adjustment verbally of the contract mentioned during the lifetime of Colonel Ingersoll, because there would be no record of this in writing, and notwithstanding the fact that testimony as to verbal conversations with deceased persons is prohibited by the Revised Statutes.

[*Counsel for complainant moves the court to strike out the foregoing answer of the witness and disregard the same on the ground that the statements therein are not cross-examination, nor relevant to any issues in this case, and on the further ground that the same is incompetent.*]

Cross-Int. 187. Have you in court a letter-book containing a copy of the letter written by you to John S. Harris, accompanying the written promise, spoken of by you in Defendants' Exhibit No. 2?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, nor relevant to any issues in this case, and on the further ground that it is immaterial, and the testimony called for thereby relates to privileged communications by counsel for complainant in this action, while the relation of himself, as attorney for Eva A. Ingersoll as administratrix of the said Robert G. Ingersoll, deceased, existed.*]

Ans. I am not sure from recollection merely that I wrote such a letter, but if so, having read the first two lines of Defendants' Exhibit No. 2, which, of course, are impliedly embodied in your cross-question, I feel that I ought not to answer the question, although I have no personal objection to doing so, until directed by the court so to do, as I do not care to have my conduct even questionable.

[*Defendants' counsel asks the special examiner to mark in evidence Defendants' Exhibit No. 3, for identification, as "Defendants Exhibit No. 3", and offers and introduces the same in evidence.*

Counsel for complainant objects to the introduction or reception in evidence of the paper last mentioned by counsel for defendants on the ground that the same has no relation to any matter inquired of said witness on direct examination, and is, therefore, in no manner cross-examination; and on the further ground that the contents of said paper is not material or relevant to any issues in this case, and on the further ground that it is thrust in by defendant's counsel improperly and inquisitorially during the introduction of testimony by complainant, without even having verified, or shown, that the same was signed by any of the parties mentioned therein, and after showing by

testimony of the witness, outside of cross-examination, that said paper was never even signed by the parties, who had been mentioned as proposing to sign the same, and on the further ground that as shown by pretended evidence offered by defendants improperly at this time in the case, the said paper was never accepted, or even allowed to remain in the possession of complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, but was repudiated, refused and returned in an unsigned condition to the parties who attempted to palm the same off on the administratrix, and thereby, if possible, in some way to prejudice and embarrass the attempt of a representative of Colonel Ingersoll's to obtain payment of the amount justly due for his services mentioned in complainant's bill of complaint in this action.

Thereupon the special examiner marks the paper last mentioned by defendants' counsel accordingly as requested by him.]

Direct Examination resumed.

Int. 188. How long did you say you were with Colonel Ingersoll in his law office?

Ans. I came to New York in July, 1898. I was admitted to practice in New York State in February, I think, 1899, and was associated with Colonel Ingersoll in the practice of the law from practically that time to the time of his death on July 21, 1899.

Int. 189. Are you a member of the New York Bar Association?

Ans. I am.

Int. 190. Are you acquainted with Colonel Ingersoll's handwriting and signature?

Ans. I think I am. I have seen him write and sign his name a number of times, and have received letters from him.

Int. 191. State whether or not you have had experience in examining and reading Colonel Ingersoll's handwriting?

[*Defendants' counsel objects to this line of questioning at this time inasmuch as the testimony should have been brought out from this witness, if at all, before the cross-examination.*]

Ans. I have seen a great number of manuscripts in his handwriting, as I believe, at the house at Dobbs' Ferry, New York, where he

died, and at the house in New York City in which he lived for a portion of the winter, for the winter previous to his death, and also in the former office at 253 Broadway, in the city of New York.

Int. 192. I show you complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-book No. 1", for identification, and pages 129 and 130 thereof marked "Complainant's Exhibit XXXII."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 2", for identification, and page 140 thereof marked "Complainant's Exhibit XXXIII."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 3", for identification, and page 143 thereof marked "Complainant's Exhibit XXXIV."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 4", for identification, and pages 29, 30, 31 and 32 thereof marked "Complainant's Exhibit XXXV.", also page 122 thereof marked "Complainant's Exhibit XXXVI."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 5", for identification, and page 47 thereof marked "Complainant's Exhibit LIV.", and ask you to examine each and all said pages, and state whether or not you recognize the handwriting and signature shown thereon.

Ans. With the proviso that the letters of more than one page are marked only on the last page of the letter, and assuming that the writing and signatures from which these press copies seem to have been taken were as they appear in these press-copies, which I assume they would have to be, I answer the question that I do.

Int. 193. Whose handwriting is shown on said pages and whose signature is shown at the close of each of the letters set forth in said pages?

Defendants' counsel objects that these letter-press copies are but secondary evidence, and that this is not a proper method of proving the contents, or authenticity, of the original, or the handwriting of the original, and upon the further ground that no foundation whatever has been laid for the introduction of secondary evidence, as it has not been shown that any original of any of these letters was ever in existence, or, if in existence, was ever received by the persons to whom

they are addressed, or that they were ever mailed to such persons properly addressed.]

Ans. In my opinion, without question, all of these are press-copies of the handwriting of Colonel Ingersoll, both the body parts of the letters and the signatures.

Int. 194. You spoke of having had an interview with Henry A. Root at the Waldorf Astoria Hotel in New York City in which he stated, as you say, the amount he claimed to have paid Colonel Ingersoll on the contract for services mentioned in the bill of complaint in this action: do you recall anything further that he said on that particular subject of payment?

[*Defendants' counsel objects on the ground that the testimony called for is not redirect.*]

Ans. I have not my former answer before me, but he stated that he had paid Colonel Ingersoll only $5,000 on account of the contract, a copy of which is known as Exhibit B, and that he had paid that following the first distribution of the Davis estate. I think that was all that was said upon this subject, except that I asked the question or questions that brought out this reply.

Int. 195. Do you recall anything further than you have already stated that was said by defendant Henry A. Root to you at any interview as to what complainant Mrs. Eva A. Ingersoll, as administratrix, might expect to realize out of the real estate or mining property acquired for said Henry A. Root and others from the estate of Andrew J. Davis, deceased?

[*Defendants' counsel objects that the testimony called for is not redirect, and that the same is immaterial, incompetent and irrelevant, and that the question is leading.*]

Ans. After my direct testimony as to that interview which I had with Mr. Root alone, I recalled that I had neglected to speak of his remarks as to the real estate, and spoke to you to that effect; but since that time, on cross-examination, I have given what he said upon that subject at that time.

Int. 196. Did you state in your cross-examination that Colonel Ingersoll owned a house at Dobbs' Ferry, New York?

Ans. I did not.

Int. 197. Did you intend to be so understood?

Ans. I feel quite positive that I used no language which could be so understood, but if you so understood it you misunderstood it. Mr. Kenneson asked me, as I remember it, whether or not Colonel Ingersoll had a house in New York City. It may be that my language in relation to that house might be understood to mean that he owned that house. If so, however, I did not intend so to be understood, and while I have no knowledge upon the subject, my best information and belief is that he did not own a house either in New York City or at Dobbs' Ferry.

Int. 198. Do you remember of making, or having made, a letter-press copy in a book belonging to you kept in your law office of a letter dated March 3d, 1900, addressed at the top "Mr. Henry A. Root, Butte, Montana" for C. P. Farrell?

Ans. I do; and I remember seeing the original at No. 117 East 21st Street, in the city of New York, in Mr. Farrell's possession before he signed it, if he signed it. I do not remember to have been present when he signed and sent the letter, if so signed and sent, and that is the reason I answer this question as I do.

Int. 199. Have you the letter-press copy of the letter just mentioned now in your hand?

Ans. I have, but I cannot state whether or not the comma or first "0" after the "81," was erased by Mr. Farrell before sending it sent, or not. I remember distinctly that I noticed when I re-read this letter in Mr. Farrell's presence at No. 117 East 21st Street on that occasion that this sum had been incorrectly typewritten, and spoke to Mr. Farrell about it, but he may have forgotten to correct it before it was sent, if sent.

Int. 200. Have you any objection to said page in your letter-press copy-book being marked by the special examiner herein as "Complainant's Exhibit XXXVIII.", for identification, for use in evidence in this case in the event that said page should be required for further inspection or use in the adjudication of this case, the purpose of counsel for complainant being to introduce and put in evidence in this case a copy of said letter if shown by the testimony of Mr. Farrell to have been sent to defendant Henry A. Root?

Ans. I have no objection to its being marked for identification.

[*Counsel for complainant requests the special examiner herein to mark the page of the letter-press copy-book last mentioned by the witness, the same being 172 thereof, "Complainant's Exhibit XXXVIII.", for identification, and the special examiner marks the same accordingly.*]

Cross Examination resumed.

Cross-Int. 201. Will you look at Defendants' Exhibit No. 5, for identification, and see whether there is not under date of April 18th, 1900, a letter-press copy of a letter signed by you and directed to Mr. J. A. Coram?

[*To which question counsel for complainant objects on the ground that it is not cross-examination nor relevant to any issues in this case. If the inquiry touching said letter should become pertinent in any manner upon an orderly presentation of evidence by the respective parties in this action; or if defendants should conceive that that, or any other letter, or copy of a letter within the possession or power of complainant, or any of the witnesses of complainant, the defendants have the usual means available to procure and introduce the same in evidence in this case, and when brought in at the proper time and in the proper manner complainant may not have any objection to the introduction of such correspondence, but complainant's counsel objects to the thrusting in of matter that has no relation to the direct examination under a pretended cross-examination at this time.*

Defendants' counsel claims that as the book is in court he has a right to make at this time every proper use of the same, and that any notice is unnecessary. He requests the witness to answer the question.

Counsel for complainant calls attention to the fact that complainant has not introduced said book in evidence on direct examination, nor has complainant introduced any part of said book, but has merely called attention of the witness to one page of said book, to wit, page 172 thereof, and has no objection whatever to cross-examination touching that page.]

Ans. I will.

Cross-Int. 202. Is there such copy?

Ans. I feel that I ought to refuse to answer the question, though personally willing to do so, until instructed by the court so to do, in order that my actions may not be even questionable.

Cross-Int. 203. At what page of the letter-press copy-book, marked "Defendants' Exhibit No. 5", for identification, were you looking at when you answered the last question but one?

Ans. I was not looking at any page in the book at that time.

Cross-Int. 204. At what page of said book had you been looking just prior to answering the question?

Ans. To which question do you refer by "the question"?

Cross-Int. 205. The question to which you answered "I will".

Ans. I do not think I had been looking at any page just prior to answering the question.

JOHN H. HAZELTON.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

BOSTON, MASS., June 3, 1904.

DEPOSITION OF MAUD R. INGERSOLL.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name and where you reside.

Ans. Maud R. Ingersoll; I reside at Dobbs' Ferry, New York.

Int. 2. Were you acquainted with Robert G. Ingersoll, late of Dobbs' Ferry, State of New York, in his lifetime?

Ans. Yes.

Int. 3. Was he usually addressed as Colonel Ingersoll?

Ans. Yes.

Int. 4. Are you his daughter?

Ans. Yes.

Int. 5. Are you over the age of twenty-one years?

Ans. Yes.

Int. 6. Did you accompany Colonel Ingersoll to Montana on

certain occasions during the period from the commencement of 1891 to 1897?

Ans. Yes.

Int. 7. Do you recall how many different times you went there with Colonel Ingersoll?

Ans. Yes, three times.

Int. 8. Can you state on what business, or engagement, he went to Montana at the times that you have mentioned?

Ans. Yes, on the Davis will case.

Int. 9. Were you there with Colonel Ingersoll during the trial of the contest of Henry A. Root against the probate of the alleged will of Andrew J. Davis, deceased, which took place in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in Butte, Montana, during a portion of July and all of August, and a part of September, 1891?

Ans. Yes.

Int. 10. Were you there during all of said trial until the same closed and the case was committed to the jury?

Ans. Yes.

Int. 11. State whether or not you were present, and heard Colonel Ingersoll deliver an argument addressed to the court and jury sitting in that trial on or about the third of September, 1891, in opposition to the admission of said will to probate on behalf of Henry A. Root, and others associated with him, in the contest of said alleged will.

Ans. Yes.

Int. 12. Did you hear all of said argument from the commencement to the close thereof?

Ans. Yes.

Int. 13. I show you a typewritten document consisting of forty-eight pages, excluding the affidavits annexed thereto, which purports to be a report of the said argument delivered by Colonel Ingersoll, and which has been marked by the special examiner herein "Complainant's Exhibit Argument of Col. Ingersoll in Will-Contest", for identification, and ask you to state whether or not you have carefully read and examined the same.

Ans. Yes.

Int. 14. Were you with Colonel Ingersoll when he prepared said argument, in case you have knowledge of his making any preparation thereof before the delivery thereof?

[*Defendants' counsel objects to the question on the ground that it calls for testimony that is immaterial, incompetent and irrelevant, and that it is unintelligible.*]

Ans. Yes, I was with him when he prepared it.

Int. 15. And did Colonel Ingersoll, to your knowledge, make some preparation of said argument prior to the delivery thereof?

Ans. Yes.

Int. 16. Now I will ask you to state from your knowledge of said argument, in reference to the preparation thereof before the delivery of it, and also from the hearing of Colonel Ingersoll's delivery of said argument, as he delivered it before the court and jury in said trial, at the time mentioned, on or about September 3d, 1891, and your examination of the contents of this document marked "Complainant's Exhibit Argument of Col. Ingersoll in Will-Contest", for identification, whether or not the contents of said document is a report, or record, of said argument substantially as delivered by Colonel Ingersoll on the occasion mentioned.

Defendants' counsel objects to the witness answering this question upon the ground that it is an improper method or attempt to prove what it was that Colonel Ingersoll said in his address to the jury on the occasion in question. The only proper method is by asking the witness to testify of her own recollection as to what Colonel Ingersoll said to the jury; it is not shown that the witness cannot testify to the substance of what Colonel Ingersoll said of his own recollection, and no occasion has been shown for using any memorandum or for using the typewritten pages to which her attention has been called. There is nothing to show by whom these typewritten pages were made, or when they were made, or by whom they were made, and the method of using these typewritten pages attempted to be applied here is not justified by any rule of evidence. The typewritten pages are without law to prove evidence at most, and no rule of evidence, exceptions to

the hearsay rule, permits the use of these typewritten pages now sought to be made of them.

Counsel for complainant moves the court to strike out the learned argument of counsel for defendants inserted in the record last preceding this motion, or impose the costs on the defendants incident to the wrongful and superfluous insertion thereof in the record.]

Ans. Yes, it is a very good report.

Int. 17. Would you be able to recall and restate said argument substantially as delivered by Colonel Ingersoll to the jury and court on the occasion mentioned without the aid of some written report thereof?

Ans. I am quite familiar with it, but I would not be able to recall and restate said argument as delivered by Colonel Ingersoll without the aid of some report thereof.

Int. 18. Did you aid in the publication of said argument in an edition of the works of Colonel Ingersoll, published by Clinton P. Farrell, since the decease of Colonel Ingersoll?

[*Counsel for defendants objects to the question on the ground that it is immaterial, irrelevant and incompetent.*]

Ans. Yes, I did.

[*Adjourned.*]

BOSTON, MASS., June 4, 1904.

Int. 19. Did you, in aiding Clinton P. Farrell in preparing for publication the said argument, use what purported to be a verbatim report thereof?

[*Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent.*]

Ans. Yes.

Int. 20. Did you read and examine said last mentioned report of said argument carefully in aiding in the preparation thereof for publication in the works of Colonel Ingersoll?

[*Same objection.*]

Ans. Yes.

Int. 21. From your acquaintance with that copy of said argument last mentioned, would you be able to state whether or not it was substantially the same as this copy of what purports to be a report

of said argument, which you have examined here, as you say, and which has been marked by the special examiner "Complainant's Exhibit Argument of Colonel Ingersoll in Will-Contest", for identification"?

[Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent; that both copies referred to in the question are but secondary evidence, and that the method attempted to prove what Colonel Ingersoll said to the jury is an improper method.

Ans. Yes, it is substantially the same.

Cross-Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 22. I call your attention to Complainant's Exhibit Argument of Colonel Ingersoll in Will-Contest, for identification, and ask you if you made the same.

Ans. No.

Cross-Int. 23. Do you know who did make it?

Ans. No.

Cross-Int. 24. You have testified on direct examination that in aiding Clinton P. Farrell in preparing for publication the said argument you used what purported to be a verbatim report thereof; did you make that verbatim report yourself?

Ans. No.

Cross-Int. 25. Do you know who did make it?

Ans. Yes, I knew the man who made it.

Cross-Int. 26. The whole or a part of it?

Ans. Part of it.

Direct Examination resumed.

Int. 27. In the first interrogatory asked you your attention was called to the argument set forth in Complainant's Exhibit Argument of Colonel Ingersoll in Will-Contest, for identification, and you were asked if you knew who made it; did you mean in your answer to that inquiry that you did not know who made the argument set forth in the last mentioned exhibit, or that you did not

know who transcribed the typewritten report thereof set forth in said exhibit?

Ans. Of course I knew who made the argument, but I did not know who transcribed that particular copy.

MAUD R. INGERSOLL.

Attest: BENJAMIN H. BEADLEE, *Special Examiner.*

BOSTON, MASS., June 2, 1904.

DEPOSITION OF CLINTON P. FARRELL.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. State your name, age and place of residence.

Ans. Clinton P. Farrell: age, fifty-four next January: I reside in New York City.

Int. 2. What are you engaged in as an occupation?

Ans. Publishing and book-selling.

Int. 3. Were you acquainted with Robert G. Ingersoll, late of Dobb's Ferry, in the State of New York?

Ans. I was.

Int. 4. State about how long.

Ans. About thirty-three years.

Int. 5. State what relation you, or your family, bore to Robert G. Ingersoll.

Ans. My wife and Mrs. Robert G. Ingersoll are sisters.

Int. 6. State what association you had with Colonel Ingersoll and his family in respect to your family residence.

Ans. I have been a member of the family during my married life.

Int. 7. State whether or not, during said period, your family and that of Colonel Ingersoll occupied the same residence.

Ans. We did.

Int. 8. How long?

Ans. Nearly twenty-seven years, up to the time of Colonel Ingersoll's death.

Int. 9. Did you, during any part of said period, act for Colonel Ingersoll in any business relation?

Ans. For a great number of years I attended to his lecture business, publishing his books, and some private matters.

Int. 10. Do you remember the date of Colonel Ingersoll's decease; if so, state.

Ans. I do; it was Friday, July the twenty-first, 1899.

Int. 11. State whether or not said Robert G. Ingersoll was addressed in correspondence, and otherwise, by a title other than his given and surname.

Ans. He was.

Int. 12. State what that title was.

Ans. Colonel Ingersoll.

Int. 13. State whether or not you were in the company of Colonel Ingersoll about his home and at his law-office, during the period you have mentioned.

Ans. I was.

Int. 14. Much or little?

Ans. Much.

Int. 15. I will ask you to state whether or not you, personally, attended to confidential business for Colonel Ingersoll, during the period you have mentioned.

Ans. I did.

Int. 16. Are you acquainted with the handwriting of Robert G. Ingersoll?

Ans. I am.

Int. 17. State whether or not you have had experience in handling, examining and reading Robert G. Ingersoll's handwriting.

Ans. I have.

Int. 18. Much or little?

Ans. Much.

Int. 19. Have you seen Colonel Ingersoll write?

Ans. I have.

Int. 20. Have you seen him sign his name?

Ans. I have.

Int. 21. Have you seen him write and sign his name much or little?

Ans. Very much.

Int. 22. State whether or not you have published the works of Colonel Ingersoll.

Ans. I have.

Int. 23. In how many volumes?

Ans. Twelve.

Int. 24. I show you complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 1", for identification, and pages 129 and 130 thereof marked "Complainant's Exhibit XXXII."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 2", for identification, and page 110 thereof marked "Complainant's Exhibit XXXIII."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 3", for identification, and page 113 thereof marked "Complainant's Exhibit XXXIV."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 4", for identification, and pages 29, 30, 31 and 32 thereof marked "Complainant's Exhibit XXXV.", and page 122 thereof marked "Complainant's Exhibit XXXVI."; also complainant's exhibit marked "Complainant's Exhibit Letter-Press Copy-Book No. 5", for identification, and page 17 thereof marked "Complainant's Exhibit LIV.", and ask you to examine the same, and each and all of said pages to which your attention has been called, and state whether or not you recognize the handwriting and signatures shown thereon.

Ans. I do recognize them.

Int. 25. Whose handwriting is shown in said pages, and whose signature is shown at the close of each of the letters set forth on said pages?

Defendants' counsel objects to this question on the ground that each and all of the letter-press copies, to which the attention of the witness is called, are secondary evidence; that it is not competent to prove the existence and authenticity of originals from the copies, or the handwriting of the originals from the copies; that no foundation for the introduction of secondary evidence has been laid, inasmuch as it

has not been shown that the originals, from which these copies were made, were ever received by the persons to whom they appear to be addressed, nor were ever properly mailed to such persons.

Ans. They are all in R. G. Ingersoll's handwriting and bear his signature.

Int. 26. When, in this examination, I use the expression "Colonel Ingersoll", to whom do you understand I refer?

Ans. Robert G. Ingersoll.

Int. 27. And if you use the same expression in your testimony, to whom do you wish the court, and others concerned, to understand you refer?

Ans. Robert G. Ingersoll.

Int. 28. Are you acquainted with John H. Hazelton, of New York City and State?

Ans. I am.

Int. 29. How long have you known him?

Ans. I have known him since the early eighties.

Int. 30. Do you know whether or not said John H. Hazelton has acted as attorney and counsellor for Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased?

Ans. I do know that he has.

Int. 31. How long?

Ans. Since the death of Colonel Ingersoll.

Int. 32. Are you acquainted with Henry A. Root, one of the defendants in this action, pending in the Circuit Court of the United States for the District of Massachusetts, entitled Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, against Joseph A. Comm, Henry A. Root and others?

Ans. I am.

Int. 33. State about how long you have known him?

Ans. About twelve years, I should think.

Int. 34. State whether you met him frequently or otherwise during said period.

Ans. I never met him very often before Colonel Ingersoll's death.

Int. 35. Have you seen, handled, examined and read Henry A. Root's handwriting?

Ans. I have seen and read his handwriting.

Int. 36. Much or little?

Ans. Well, I have seen his writing a great many times, but I have not seen a great variety of letters or communications, but I have seen the same letters frequently.

Int. 37. Have you seen him write?

Ans. I don't remember ever seeing Mr. Root write until I saw him here during this examination.

Int. 38. Did you see him writing here during this examination?

Ans. It looked like writing.

Int. 39. Have you carried on written correspondence with said Henry A. Root?

Ans. I have.

Int. 40. Have you written to him and received a reply referring to your letter, to which reply the name of Henry A. Root, or H. A. Root, was subscribed?

Ans. I have.

Int. 41. Has your business required that you examine and read handwriting of different persons?

Ans. It does.

Int. 42. Much or little?

Ans. A great deal.

Int. 43. From your examination of letters of Henry A. Root and your correspondence with him, and of the signature thereto, I will ask you to state whether or not you know the signature of said Henry A. Root, or recognize it when you see it.

Ans. I think I do know it and I would recognize it.

Int. 44. State whether or not you know or are acquainted with his handwriting.

Ans. Yes, I know Mr. Root's handwriting.

Int. 45. I show you certain letters introduced in evidence in this case marked "Complainants Exhibits I. to XXXI.", inclusive, with the exception of the number "H.", and ask you to examine the signatures subscribed to each of said exhibits, and state whether or not you recognize the same.

Ans. I do.

Int. 46. Whose signature is it?

Ans. Henry A. Root's.

Int. 47. Have you examined the first signature written underneath the typewriting on the paper marked "Complainant's Exhibit B & H."?

Ans. I have.

Int. 48. Whose signature is that?

Ans. Henry A. Root's.

Int. 49. Have you examined the writing and signature set forth in Complainant's Exhibit XLIII., put in evidence in this case?

Ans. I have.

Int. 50. Please state whose writing the signature appears written upon and subscribed in said last mentioned exhibit.

Ans. Henry A. Root's.

Int. 51. Please examine and state, if you know, whose signature is subscribed to the letter dated May 21st, 1900, and marked "Complainant's Exhibit XLIV.", for identification, in this case.

Ans. Henry A. Root's.

Int. 52. Please examine and state, if you know, whose writing is set forth in and signature subscribed to the paper introduced in evidence in this action by plaintiff and marked by the special examiner "Complainant's Exhibit XLV."

Ans. Henry A. Root's writing.

Int. 53. State whether or not you had knowledge during the lifetime of Colonel Ingersoll of this paper, introduced in evidence by complainant and marked "Complainant's Exhibit B & H."

Ans. I don't think I ever saw that paper before Colonel Ingersoll died; I knew there was some such paper in existence, but I had never seen it myself before he died.

Int. 54. State whether or not you had knowledge of Colonel Ingersoll rendering services for Henry A. Root and others in a will contest known as the Davis will contest.

Ans. I had such knowledge as anyone would have being around his home and his office.

Int. 55. Did you see this paper, introduced in evidence by plain-

titt in this action, marked "Complainant's Exhibit B & H.", after the death of Colonel Ingersoll?

Ans. I did,—shortly after his death.

Int. 56. Did you during the life of Colonel Ingersoll have knowledge of a payment of $5,000 made by Henry A. Root to Colonel Ingersoll?

Ans. I did. I wasn't present when the payment was made.

Int. 57. How did you become possessed of knowledge of said payment?

Ans. When Colonel Ingersoll gave me the draft, or bank-paper, or whatever it might be, to deposit for him.

Int. 58. State whether or not you, at the time you speak of, made a memoranda of said payment and of what you did with it.

Ans. I did.

Int. 59. In what did you make such memoranda?

Ans. In the check book when the deposit was made.

Int. 60. Have you the memoranda mentioned now in your hand?

Ans. I have.

Int. 61. State the words and figures of the memoranda to which you refer.

Defendants' counsel objects upon the ground that the memoranda itself has not been offered in evidence, and the witness has no right to state its contents, and that the same is immaterial, incompetent and irrelevant, and the witness is not shown to have any authority from Colonel Ingersoll to make the entry.

Ans. "1897 Deposit Oct. 1st H. A. Root's draft $5,000."

Defendants' counsel takes an exception to the special examiner's ruling, and insists that proper method was for complainant's counsel to have the memorandum marked for identification before reading it into the record, and thereby necessarily making it evidence.

Counsel for complainant offers, and puts in evidence the written memoranda last mentioned by the witness, as evidence in this case on behalf of complainant, and requests the special examiner herein to mark the page of said book, on which said memoranda appears, "Complainant's Exhibit Check Book of Bank Deposit", for identi-

fication, for use in evidence of the entry on said page mentioned by the witness.

Defendants' counsel objects to the admission in evidence of the entry upon the same grounds that were taken when the witness was asked to state the contents of the memorandum.]

Int. 62. State whether or not all of the memoranda, which you last mentioned, is in your own handwriting.

Ans. It is.

Int. 63. What do the figures "1897 Oct. 1st" in that memoranda represent or signify?

Ans. It signifies the date that Colonel Ingersoll gave me that dratt and the date that I deposited it.

Int. 64. What do the words and figures "H. A. Root's dft. $5000.00" in said memoranda represent or signify?

Ans. They signify the dratt or bank paper that Colonel Ingersoll gave to me as coming from Henry A. Root to him for the sum of $5000.

Int. 65. What did you do with said dratt?

Ans. Deposited it in the bank.

Int. 66. In what bank?

Ans. I think it was the New Amsterdam Bank, since then I think it has been changed.

Int. 67. To whose credit did you deposit said dratt?

Ans. It was deposited to the credit of R. G. Ingersoll and Eva A. Ingersoll.

Int. 68. State whether or not you deposited along with said dratt another sum.

Ans. I couldn't state from memory.

Int. 69. Please examine the memoranda which you have mentioned, and the memoranda written immediately below it, and also the pass-book of the bank wherein you made said deposit, if you have said pass-book, and state whether or not, after examining the same, you deposited said dratt for $5000 alone, or deposited the same with any other sum.

Defendants' counsel objects to the testimony called for as immaterial, irrelevant and incompetent.

Ans. I find that I did deposit on that same date another draft making one deposit of Mr. Root's draft and this other draft.

Int. 70. Whose other draft was enumerated in said deposit?

Defendants' counsel objects upon the ground that it is incompetent, irrelevant and immaterial.

Ans. The draft was from the Anthony Loan and Trust Company for the sum of $618.50.

Int. 71. On what date did you make the deposit mentioned?

Ans. October 1st, 1897.

Int. 72. Have you the pass-book in which said bank, or its agents, made such memoranda of said deposit?

Ans. I have.

Int. 73. Are there something over a dozen entries on the page of the pass-book upon which the entry is made to which you refer?

Defendants' counsel objects as immaterial, incompetent and irrelevant.

Ans. There are more than a dozen entries.

Counsel for complainant offers and puts in evidence the page of the bank pass-book last mentioned by the witness, and requests the special examiner to mark the same "Complainant's Exhibit Root Pass-Book Entry" for identification of said page for use at the same in evidence, in order to introduce and show the entry therein embracing the said $5,000 payment made by defendant Henry A. Root, referred to in the testimony of this witness.

Defendants' counsel objects to the introduction in evidence of any entry in the pass-book, except the entry including the $5,000 draft of Mr. Root's, referred to in the witness' testimony, and as to that entry he objects to it as immaterial, irrelevant and incompetent, it being a self-serving entry.

The said page of the bank pass-book was by the special examiner marked accordingly as requested.

Int. 74. Please state the entry on the page of said pass-book just marked for identification for use in evidence in this case by the special examiner, as aforesaid, which you say embraces said $5,000 made by defendant Henry A. Root, as heretofore stated in your testimony.

Same objection as the last objection taken.

Ans. "Oct. 1st G 5,618.50."

Counsel for complainant offers and puts in evidence the entry in said pass-book last mentioned by the witness appearing upon the page of the same heretofore marked for identification by the special examiner as requested.

Int. 75. Do you know of the claim made by complainant in this action upon which the action is founded?

Ans. I do.

Int. 76. On what contract do you understand this action is founded?

Ans. The contract contained in the paper known as Complainant's Exhibit B & H.

Int. 77. Have you knowledge from other sources of the amount paid on said contract for services therein mentioned?

Ans. I had knowledge from Colonel Ingersoll.

Int. 78. Have you knowledge from other sources than Colonel Ingersoll as to the amount which had been paid on the indebtedness mentioned in said writing marked "Complainant's Exhibit B & H," for the services therein mentioned?

Ans. Yes.

Int. 79. From what other sources have you gained such knowledge?

Ans. From l ers written by Mr. Root.

Int. 80. State whether or not since the decease of Colonel Ingersoll Mrs. Eva A. Ingersoll, administratrix of his estate, requested you to communicate with said Henry A. Root in respect to obtaining payment of said indebtedness.

Ans. She did.

Int. 81. Did you communicate with said Henry A. Root on that subject?

Ans. I did.

Int. 82. How did you first communicate with him in reference thereto?

Ans. I wrote him a letter.

Int. 83. Can you state about when?

Ans. It was the latter part of September, 1899.

Int. 84. Have you the first letter you wrote him on the subject mentioned, or a copy of it?

Ans. I have not.

Int. 85. What did you do with the first letter you mention?

Ans. Sent it by mail to Mr. Henry A. Root.

Int. 86. Did you receive a reply to that letter?

Ans. I did.

Int. 87. How was that reply brought to you?

Ans. By letter through the United States mail.

Int. 88. Of what date is the reply?

Ans. It bears the date September 26, 1899.

Int. 89. State when, or about when, you received it.

Ans. It was about two days later than that,—about the twenty-eighth.

Int. 90. Is the letter last mentioned written with pen and ink?

Ans. Yes, sir.

Int. 91. Do you recognize the writing contained therein?

Ans. Yes.

Int. 92. Do you recognize the signature subscribed thereto?

Ans. I do.

Int. 93. Whose writing and signature is it?

Ans. Henry A. Root's.

Counsel for complainant offers and puts in evidence the letter last mentioned by the witness, and requests the special examiner herein to mark the same "Complainant's Exhibit XXXVII", for identification for use in evidence in this case, and the special examiner marks the same accordingly.

Int. 94. In the last mentioned letter the writer of it says "The Colonel's speech in the closing of the trial was taken down & published by all the Butte papers — I have sent for a copy for you"; please state whether or not you received the copy of said speech, or what purported to be a copy thereof, from Mr. Henry A. Root.

[*Defendants' counsel objects upon the ground that it is immaterial, incompetent and irrelevant.*]

Ans. I did.

Counsel for complainant asks counsel for defendants and defendant Henry A. Root, who is now present before the special examiner at this hearing, whether or not they will admit upon the record that the verified copy of the speech and argument delivered by Colonel Robert G. Ingersoll to the jury and court on or about September 3, 1901, near the close of the trial of the contest of Henry A. Root in opposition to the admission of the alleged will of Andrew J. Davis, deceased, to probate in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which copy of said argument verified by the affidavit of George H. Macdougall and Frank E. McGovern, stenographers, who say in their affidavits attached to said copy, that they took down and recorded stenographically the said speech and argument as delivered by Colonel Ingersoll, and reported said speech and argument is a substantial copy of said speech and argument as delivered by Colonel Robert G. Ingersoll at said trial as aforesaid, the copy referred to herein being the verified copy of said speech and argument herein filed by complainant in support of her motion for interlocutory injunction in this cause and printed in the record at pages 62 to 109.

Counsel for defendants feels that he is unable to comply with the request for the admission.

Adjourned.

BOSTON, MASS., June 3, 1904.

Counsel for complainant asks counsel for defendants and Henry A. Root, one of the defendants who is now present before the special examiner, whether or not they will stipulate upon the record that the said argument and certificates thereof by said stenographers, as filed with the clerk of this court and printed in the record in this action as aforesaid, may be taken by the special examiner herein and made part of his record of the evidence offered and introduced by complainant for final hearing of this action, to the same effect as if said stenographers above mentioned had appeared before the special examiner herein and testified as set forth in their respective affidavits attached to said copy of said argument of Colonel Ingersoll's, filed in this court by complainant in support of her motion for interlocutory injunction in this action, subject to such objections to the admission of said evi-

fied copy of said argument delivered by Colonel Ingersoll to the court and jury in the trial of said will contest as the defendants and their counsel and solicitors see fit to make upon the record herein.

Counsel for defendants feels that he cannot comply with the request made by complainant's counsel.]

Int. 95. Have you a copy of said speech or argument delivered by Colonel Ingersoll in said Davis will contest which you say you received from defendant Henry A. Root?

[*Counsel for defendants objects that the question assumes a fact not proved, namely, that he received a copy of the speech or argument from the defendant Root.*]

Ans. I have not.

Int. 96. What disposition was made of said copy of said argument sent you by said defendant Henry A. Root?

[*Defendants' counsel objects on the ground that the testimony called for is immaterial, irrelevant and incompetent.*]

Ans. It was destroyed.

Int. 97. Did you publish said argument made by Colonel Ingersoll in the Davis will case in the permanent edition of Colonel Ingersoll's works which you have mentioned as having been published by you?

[*Defendants' counsel objects to the testimony called for as immaterial, irrelevant and incompetent.*]

Ans. I did.

Int. 98. Did you use the copy of said argument which you say defendant Henry A. Root sent you in publishing the same in the edition of Colonel Ingersoll's works which has been mentioned?

[*Defendants' counsel objects to this question upon the same grounds as he did to the last question.*]

Ans. I did.

Int. 99. Did you read said copy of said argument made by Colonel Ingersoll in the Davis will case, which you say defendant Henry A. Root furnished you?

[*Same objection.*]

Ans. I did.

Int. 100. Have you read and carefully examined this document

which is marked "United States Circuit Court, Mass. Dist.", filed in Clerk's Office, July 1, 1903, and which purports to be a report of the argument delivered by Colonel Ingersoll in said Davis will contest, which I now put into your hands?

Defendants' counsel objects on the same grounds as to the preceding question.

Ans. I have.

Int. 101. From your acquaintance with the copy of said argument, which you say defendant Henry A. Root furnished you, and was used by you in publishing the argument of Colonel Ingersoll, in said Davis will case, and your examination of the verified copy, which I have just put into your hands, purporting to be a copy of said argument, filed in this action by complainant in support of her motion for interlocutory injunction, and printed in the record in this action at pages 62 to 109 thereof, can you state whether or not the copy of said argument so filed, and now in your hands, is substantially the same as the copy of said argument furnished you by said defendant Henry A. Root?

Defendants' counsel objects on the ground that it is immaterial and incompetent and irrelevant, and that this is not the proper way of proving what Colonel Ingersoll said in argument to the jury, or what his argument to the jury was; that the only proper way of proving that is by the testimony of the stenographer or stenographers who heard and reported the same, or by the testimony of those in court who heard the same. The testimony now offered is hearsay testimony, and there is nothing to show that the copy contained in the paper, which the witness says was furnished him by Mr. Root, or that the copy which he now holds in his hand, correctly represent the argument as delivered, and it is improper to ask whether this copy or alleged copy is substantially a copy of another copy, the correctness of which is not itself proved.

Counsel for complainant states on the record, for the enlightenment of the learned counsel for defendants, that he is attempting to prove that said defendant Henry A. Root admitted that the speech or argument of Colonel Ingersoll, which was delivered in said Davis will case on behalf of said Henry A. Root and his associates, in

opposition to said will to produce, is the speech set forth in the pamphlet which the witness now has in his hand.

Defendants' counsel entirely comprehends the claim of complainant's counsel, but cannot conceive that in furnishing a newspaper report, or a newspaper containing a report, of Colonel Ingersoll's argument, that he thereby admitted its correctness, either in substance or otherwise, or that such an admission is such an admission as can be availed of in this action, as against Mr. Root, or as against any other defendant in the action. He would add, in view of the claim of complainant's counsel, to his objection that even if it is an admission as against Mr. Root, it is not competent as against the other defendants, as there is nothing to show that Mr. Root, in making any such alleged admission, was acting for any one, or all, of the other defendants.]

Ans. Yes, substantially the same.

[Defendants' counsel objects to complainant's counsel touching this witness.]

Int. 102. State whether or not you carefully read and examined the copy of said argument which defendant Henry A. Root delivered to you.

[Defendants' counsel objects on the ground that the same is immaterial, irrelevant and incompetent.]

Ans. I did.

Int. 103. State whether or not you carefully examined and read this document which purports to be a copy of the argument of Colonel Ingersoll in said will contest, which I now ask the special examiner to mark for identification "Complainant's Exhibit Argument of Colonel Ingersoll in Will-Contest", and again put into your hand.

[Defendants' counsel makes the same objection as to the last question.]

Ans. I have.

Int. 104. I will now ask you to state whether or not the last mentioned report of said argument is substantially the same as the argument of Colonel Ingersoll's in said will contest, which you say defendant Henry A. Root sent to you.

Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent; that this is not the proper way of proving the argument of Colonel Ingersoll; that the only proper way of proving the same is by the testimony of the stenographer or stenographers who heard and reported the same, or by the testimony of those who heard the argument; the testimony now offered is hearsay testimony. There is nothing to show that the copy of the argument, or alleged copy of the argument, contained in the newspaper, which the witness says was furnished him by Mr. Root, or that the copy now marked "Complainant's Exhibit Argument of Colonel Ingersoll in Will-Contest", for identification, correctly represents the argument made by Colonel Ingersoll, and it is improper to ask whether this alleged copy is substantially the same as another copy, the correctness of which is not proved.

Ans. It is.

Int. 105. Referring to your communication with defendant Henry A. Root, in reference to the claim of indebtedness mentioned in complainant's bill of complaint in this action, and in the contract heretofore introduced in this case marked "Complainant's Exhibit B & H.", I will ask you to state whether you wrote to Henry A. Root on that subject a communication in the form of a letter dated March 3d, 1900?

Ans. I did write such letter.

Int. 106. Have you the original of the letter last mentioned?

Ans. I have not.

Int. 107. What did you do with the original of said letter?

Ans. I sent it through the United States mail to Henry A. Root.

Int. 108. Did you save a copy of that letter.

Ans. I did.

Int. 109. How was the copy of the last mentioned letter made and preserved?

Ans. A letter-press copy.

Int. 110. In whose letter-press copy-book?

Ans. John H. Hazelton's.

Int. 111. I show you a letter-press copy-book and page 172 thereof marked by the special examiner herein "Complainant's

Exhibit XXXVIII.", for identification, and ask you to state whether or not that is the letter-press copy of said letter which you last mentioned as having been sent through the mail to Henry A. Root.

Ans. It is.

Int. 112. The letter-press impression copy of the letter last mentioned appears to have a pencil correction therein apparently striking out one of the ciphers appearing after the dollar-sign in said letter: please state whether or not the original letter, of which this you say is an impression copy, was corrected likewise before you mailed the same to Henry A. Root.

Ans. I do not recall the fact of making that correction in the letter sent to Mr. Root.

Int. 113. If that correction were not made in the original the combination of dollar sign and figures and the three words following the same in said letter would appear to read "$1,000,000 as his fee", would it not?

Ans. It would.

Int. 114. If Mr. Hazelton called your attention to that combination of figures in said letter just before said letter was sealed up and mailed to Henry A. Root, what have you to say as to whether or not you noted a correction making said figures read "$100,000" instead of one million.

Defendants' counsel objects to this question as based upon an assumed fact not proved.

Counsel for complainant calls attention of counsel for defendants and defendant Henry A. Root, who is now present before the special examiner, to the demand for the production of the original of said last mentioned letter at this hearing, which demand was served on defendants' counsel on May 11, 1904, and ask if defendant, or counsel for defendants, will produce the original of said letter last mentioned.

Defendants' counsel answers that he will not produce the same because he cannot produce the same.

Counsel for complainant asks defendant Henry A. Root, who is now present before the special examiner, whether or not he will produce the original of the letter last mentioned in compliance with the demand last referred to, which has heretofore been marked by the

special examiner herein, "Complainant's Exhibit Demand to Produce Certain Letters"?

Defendants' counsel thinks that his client, Mr. Root, should not be inquired of by counsel. He is represented by counsel, and counsel has answered the question for his clients under full professional responsibility, and he submits that it is not proper practice, after counsel has given an answer, to interrogate his client, who is not a witness, and who has the right to be in court, or before the special examiner, for the purpose of assisting counsel, and counsel advises Mr. Root not to answer the question.

Counsel for complainant states upon the record that if the learned counsel for defendants had answered the inquiry as to whether said letter would be produced in response to said demand, on behalf of himself and defendant, no further inquiry would have been made on that subject, but he put the answer in the singular, saying, "Defendants' counsel answers that he will not produce the same because he cannot produce the same".

Defendants' counsel wishes to add that in giving the answer he did he was not quibbling; that in giving the answer he was answering for himself and his client and sees no reason why his answer should not have been understood.

Counsel for complainant offers, and puts in evidence the demand last referred to marked "Complainant's Exhibit Demand to Produce Certain Letters".]

Ans. I have no recollection of making any correction in that letter.

Int. 115. The letter-press impression copy of the last mentioned letter bears no signature subscribed thereto, in so far as the impression copy shows: I will ask you to state whether or not you signed any name, or whether or not any name was signed to the original of said letter, before the same was enclosed in an envelope and sent through the United States mail, as you have said, to defendant Henry A. Root.

Ans. I remember signing that letter before sending it to Mr. Root.

Int. 116. Please state what the signature was.

Ans. C. P. Farrell.

Int. 117. State whether or not the letter-press copy thereof referred to was made before you signed your name to the original thereof.

Ans. It was.

Int. 118. State whether or not you have in your hand a substantial copy of said original letter as enclosed in the envelope and mailed to defendant Henry A. Root, as heretofore stated by you.

Ans. I have.

[*Complainant's counsel offers and puts in evidence the copy of said letter last mentioned by the witness and requests the special examiner herein to mark the same "Complainant's Exhibit XXXVIII.", for identification for use in evidence in this case.*

Defendants' counsel objects to the introduction in evidence of a copy that is proved to be merely "substantially" a copy, and insists that if a copy is to be marked in evidence, it should be an exact copy, and not simply a "substantial" copy. The witness has already testified that there is in the book now shown him, a letter-press copy-book of John H. Hazelton, a letter-press copy of the original letter with the exception of the signature, and it is, therefore, possible for counsel to have marked in evidence, for the purpose of proving the contents of this letter, an exact copy of the letter minus the signature.]

Int. 119. Have you compared the copy of said last mentioned letter, which you had in your hand a moment ago before it was passed to the special examiner to be marked, as aforesaid, with the letter-press of the original of said letter in so far as the letter-press copy represents the original, which was preserved in the letter-press copy-book as heretofore described.

Ans. I have compared them.

Int. 120. What have you to say as to whether or not the copy marked and put in evidence, as heretofore described, is an exact copy of the letter-press impression copy of said letter, except the signature, and except, possibly, a correction in the figures following the dollar sign set forth in said original letter?

Ans. It is exactly the same with those two exceptions.

[*Counsel for complainant states on the record that the letter-press*

copy of said last mentioned letter, being in a book and at page 172 thereof belonging to John H. Hazelton, and kept by him in his law-office in New York, counsel for complainant cannot at this time introduce the page of said letter-press copy-book last mentioned, and remove it from said book and place it among the exhibits in this case. But that complainant's counsel has requested the special examiner herein to mark said page in said letter-press copy-book, showing said impression copy "Complainant's Exhibit XXXVIII.", for identification, and the same has been marked accordingly by the special examiner with the initials of his name, "B. H. B., Special Examiner," on said page, and the said letter-press copy shall be available for examination of counsel for defendants at this hearing, and at any reasonable time he desires to examine the same, and the same shall also be available at the final hearing of this case, if desired by any party or their counsel.

Defendants' counsel asks that it be noted that the book referred to by complainant's counsel belongs to Mr. John H. Hazelton, one of the solicitors for the complainant in this action, and that it is not in current use, as he is informed, for the purpose of making letter-press copies, as the entire book has already been used.

Counsel for complainant requests that it be stated on the record that said John H. Hazelton is not now present before the examiner, and being absent, counsel for complainant does not feel at liberty to remove said page from said letter-press copy-book, or to introduce the entire book in which said page is, in such a way as to require that it be kept among the exhibits in this case. Even if it is not in use for making impression copies therein at the present time, it contains some nine hundred and fifty pages apparently of letter-press copies, and might be very necessary to the use of Mr. Hazelton at his office.]

Int. 121. Can you state from having written, and had copied and signed, as you say with your own hand, and having read and considered the contents of said last mentioned original letter, whether or not the copy thereof offered and put in evidence in this case, marked "Complainant's Exhibit XXXVIII.", sets forth, substantially, the very same words and figures, statements and sentences as were set forth in the said original letter dated March 3d, 1900,

which you say you sent to said defendant Henry A. Root through the United States mail?

Ans. Yes, it does.

Int. 122. State whether or not between March 3d, 1900, and May 7, 1900, you had a personal interview with said Henry A. Root on the subject of the indebtedness mentioned in complainant's bill of complaint in this action, for the services of Colonel Ingersoll rendered, as mentioned in Complainant's Exhibit B & H.

Ans. I did.

Int. 123. State what, if anything, said Henry A. Root on that occasion stated to you in respect to said claim of indebtedness, or in respect to what he would do in relation thereto.

[Defendants' counsel objects in behalf of all the defendants represented by him, except Mr. Root, on the ground that any statement by him is hearsay, as he is not shown to have had authority to represent them, or any of them, and counsel for defendants also further objects as to all the defendants represented by him, including Mr. Root, on the ground that it is immaterial, irrelevant and incompetent.]

Ans. He said that he wanted Mrs. Ingersoll to know that he would do all he could to aid her in getting what was due her,—the larger the sum she got, the better it would please him. He was sorry that it had been so long delayed, but that he hoped it would all soon be settled.

Int. 124. State whether or not said defendant Henry A. Root on that occasion stated anything to you about what he would do in respect to putting you in possession of facts and information concerning the estate of Andrew J. Davis, deceased, or concerning the interest therein acquired for said Henry A. Root and others associated with him, in the contest of the alleged will of said Davis, for whom Colonel Ingersoll rendered services.

Ans. He promised to send either to me or Mrs. Ingersoll a detailed statement of the condition of the Davis estate so that we would know all about it.

Int. 125. State whether or not you received another letter from

defendant Henry A. Root in which he referred to having received a letter from you dated March 3d, 1900.

Ans. I did.

Int. 126. State whether or not you wrote the defendant Henry A. Root any other letter dated March 3d, 1900, besides the letter of that date, a copy of which has been put in evidence here marked "Complainant's Exhibit XXXVIII."

Ans. I did not.

Int. 127. What is the date of the letter you received from defendant Henry A. Root in which he refers to your letter of March 3d, 1900?

Ans. May 7th, 1900.

Int. 128. Have you examined the signature to the last mentioned letter?

Ans. I have.

Int. 129. Whose signature is subscribed thereto?

Ans. Henry A. Root's.

Int. 130. Have you in your hand the letter dated May 7th, 1900, which you last mentioned?

Ans. I have.

Int. 131. Please pass the same to the special examiner to be marked in evidence in this case.

Ans. I will.

Counsel for complainant offers and puts in evidence said last mentioned letter, and requests the special examiner herein to mark the same "Complainant's Exhibit XXXIX.", for identification for use of the contents thereof in evidence in this case on behalf of complainant.

Defendants' counsel objects to the admission of the same in evidence as against all the defendants represented by him, except Mr. Root, on the ground that the same is hearsay, and not being shown that Mr. Root had authority to speak for them; that it is also objected to as against all the defendants represented by counsel on the ground that it is immaterial, irrelevant and incompetent.

Int. 132. Did you call on defendant Henry A. Root at some law office in the city of New York and speak to him at that place in

reference to said claim of indebtedness mentioned in complainant's bill of complaint in this action?

Ans. I did.

Int. 133. Who were present at that interview?

Ans. Mr. Root and myself.

Int. 134. State whether or not you suggested to Mr. Root on that occasion that he do something in reference to said claim or in reference to the making provision for the payment thereof.

Ans. I did.

Int. 135. What did you suggest to him on that occasion?

Ans. I suggested that he make some assignment to Mrs. Ingersoll against the interest of himself and those he represented for the purpose of protecting her interests in case anything should happen either to him or Mr. Coram, that she might present her claim and have it paid. Whereupon Mr. Root leaned back in his chair, and, putting his hands behind his head, said: "My God, Farrell, what do you want me to do — what can I do — I have already assigned and signed everything that I have — I haven't done anything but sign, but if you will tell me anything that I can do to help Mrs. Ingersoll get her money, and the more she gets the better I will like it, I will be only too glad to do it." I think then that the telephone called him and he answered it, and he turned to me and said, "This is my busy day", whereupon I said, "Then you refuse to sign any papers for Mrs. Ingersoll"? He says, "Farrell, it wouldn't do a bit of good for me to sign any". There we parted.

Int. 136. Where did the last mentioned interview occur?

Ans. I think it was in Stern & Rushmore's office, 10 Wall Street, New York City, State of New York.

Int. 137. Was anyone else present in the room with you and Mr. Root at any time during the last mentioned interview?

Ans. When we went into the rooms in this office there was a gentleman sitting at a desk, and Mr. Root asked him if we might have the room alone for a few moments. The gentleman immediately retired.

Int. 138. After the last mentioned interview did you receive a letter from defendant Henry A. Root bearing date "June 8th, 1900"?

Ans. I did.

Int. 139. How was the last mentioned letter brought to you?

Ans. Through the United States mail.

Int. 140. Have you the last mentioned letter in your hand; if so, please examine the signature subscribed thereto and state whether or not you recognize that signature.

Ans. I do.

Int. 141. State whose signature is subscribed to said last mentioned letter.

Ans. Henry A. Root's.

Int. 142. Please deliver said letter to counsel for defendants for examination.

Ans. I will.

[Counsel for complainant offers and puts in evidence the letter last mentioned by the witness, and requests the special examiner here in to mark the same "Complainant's Exhibit NL", for use of the contents thereof in evidence in this case.

Defendants' counsel objects to the admission of the same in evidence as against the defendants represented by him, other than Mr. Root, upon the ground that the same is hearsay, there being no proof that Mr. Root had any authority from them to write the same. He further objects to its admission as against all the defendants represented by him upon the ground that it is immaterial, irrelevant and incompetent.

The special examiner marks said last mentioned letter accordingly as requested by counsel for complainant.]

Int. 143. Did you receive another letter from said defendant Henry A. Root dated "September 25th, 1900", which touches upon the claim of said indebtedness?

Ans. I did.

Int. 144. Have you said last mentioned letter now in your hand?

Ans. I have.

Int. 145. Please examine the signature subscribed thereto, and state whether not you recognize the same.

Ans. I do recognize it.

Int. 146. Whose signature is subscribed thereto?

Ans. Henry A. Root's.

Int. 147. How was said last mentioned letter brought to you?

Ans. By the United States mail.

[*Counsel for complainant now hands the last mentioned letter to counsel for defendants for examination, and counsel for complainant offers and puts in evidence said last mentioned letter, and requests the special examiner herein to mark the same "Complainant's Exhibit XLI.", for use of the contents thereof in this case on behalf of complainant.*

Counsel for defendants objects to the admission of the letter in evidence as against the defendants represented by him, other than Mr. Root, upon the ground that the same is hearsay, it not being shown that Mr. Root had authority from them to write said letter, and its admission as to all the defendants represented by him is objected to on the ground that it is immaterial, irrelevant and incompetent.

Thereupon the special examiner marks said last mentioned letter accordingly as requested by counsel for complainant.]

Int. 148. Did you meet defendant Henry A. Root sometime about the latter part of August, 1901?

Ans. I did.

Int. 149. State at what place, and who were present.

Ans. At Mr. John H. Hazelton's law office, 220 Broadway, New York City, New York; Mr. John H. Hazelton, Mr. Henry A. Root and myself were present.

Int. 150. Did Mr. Root on that occasion say anything about what he would do, or would not do, in respect to Mrs. Eva A. Ingersoll's effort to obtain payment for the services rendered by Colonel Ingersoll on behalf of Mr. Root and others in the prosecution of the contest of the will of Andrew J. Davis, deceased?

Ans. He did.

Int. 151. State what he said on that subject at the time last mentioned.

[*Defendants' counsel objects on the ground that what Mr. Root may have said cannot bind the defendants represented by counsel, other than Mr. Root himself, as the same is hearsay, it not being*

shown that he had authority to represent them, and he objects to it as against all the defendants represented by him on the ground that it is irrelevant, immaterial and incompetent.]

Ans. Well, it was a very short interview; he repeated about the same thing that he had at his previous interviews, but added that Mrs. Ingersoll could depend upon him to do all that he could to help her get as much as possible; that he would never place any stone in her way toward preventing her getting all she possibly could.

Int. 152. I believe you stated in the course of your testimony given yesterday that you had not seen, or had in your possession, or did not remember having seen, the paper-writing introduced in this case marked "Complainant's Exhibit B & H.", prior to the decease of Colonel Ingersoll; have you anything further to state in reference to that matter?

Ans. Yes; reflecting on my testimony last night in my room the thought came into my mind that I had seen that paper before Colonel Ingersoll died.

Int. 153. Please state what you did in respect to the paper mentioned which recalled the fact, or from which you recalled the fact, which you just stated.

Ans. I first saw that paper when Colonel Ingersoll was breaking up his office on William Street about three years before he died. Colonel Ingersoll and I were in the office going through the private papers in his safe, he handed me a parcel of papers and asked me to put that in the tin box in the safe at the house, and the uppermost paper in the parcel I remember had this writing on it "Contract Henry A. Root and Joseph A. Coram", and the initials "R. G. I.", all in the colonel's handwriting.

Int. 154. Was that endorsement that you mention on an envelope or on the paper marked "Complainant's Exhibit B & H."?

Ans. It was on an envelope.

Int. 155. State what you did with the paper then.

Ans. I took it home and put it in the safe at the house.

BOSTON, MASS., June 4, 1903.

Int. 156. You remember the year and about the season of the year when Judge Harwood first called at the residence of Mrs. Eva A. Ingersoll in the city of New York after the decease of Colonel Ingersoll, do you not?

Ans. I do.

Int. 157. Please state.

Ans. It was in the fall of 1902.

Int. 158. Please state, if you know, whether or not Mrs. Eva A. Ingersoll ever had any opportunity to consult or talk with Judge Harwood, after the decease of Colonel Ingersoll up to the time you have last mentioned, in the fall of 1902.

Ans. I do know that she never did have any such opportunity.

Int. 159. State whether or not Maud R. Ingersoll, who testified here before the special examiner, aided you in the publication of the argument delivered by Colonel Ingersoll to the court and jury in the Davis will contest when you published the same in the permanent edition of Colonel Ingersoll's works, as you have mentioned in your testimony.

[*Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent.*]

Ans. She did render such aid.

Int. 160. State whether or not in assisting you about the publication of that argument Maud R. Ingersoll used the same report of said argument which defendant Henry A. Root had delivered to you as a report of said argument.

[*Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent, and that this is an improper method of attempting to prove what Colonel Ingersoll said to the jury.*]

Ans. She did.

[*Counsel for complainant states that he has finished the direct examination of the witness Clinton P. Farrell.*]

Cross-Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 161. Were you living in Colonel Ingersoll's family at the time he died?

Ans. I was.

Cross-Int. 162. After Colonel Ingersoll's death did you make an examination of the letters and other papers left by him?

Ans. I did.

Cross-Int. 163. Did you find among those papers any letters from Henry A. Root, defendant in this action, other than those which have been offered in evidence by complainant's counsel and which are marked "Complainant's Exhibits I. to XXXI.", with the exception of H., and also Complainant's Exhibit B & H.?

Ans. I may have found other letters.

Cross-Int. 164. If there were other letters, do you know where they are now?

Ans. If there were any, I don't think I could state where they are now.

Cross-Int. 165. Do you now know of the existence of any other letters or papers, from the defendant Henry A. Root, in the possession of Colonel Ingersoll at his death?

Ans. Well, if there were any found, they would be in the possession of Mrs. Ingersoll's attorney, Mr. Hazelton, I think.

Cross-Int. 166. You mean John H. Hazelton, who has already testified here before the special examiner?

Ans. I do.

Cross-Int. 167. Do you know whether the $5,000 draft from Mr. Root, which you have testified you deposited in the bank of New Amsterdam on October 1st, 1897, came to Colonel Ingersoll through the United States mail or not?

Ans. I do not know.

Cross-Int. 168. Have you ever seen any letter from Mr. Root to Colonel Ingersoll referring to that draft?

Ans. I have no recollection of ever seeing any letter from Mr. Root referring to that draft.

Cross-Int. 169. You have testified on your direct examination to three different interviews had with defendant Root, have you not?

Ans. I have.

Cross-Int. 170. Where was the first interview had?

Ans. 117 East 21st Street, New York City, New York.

Cross-Int. 171. Fix as nearly as possible the date of that interview.

Ans. I think it was in the spring of 1900 as near as I can recollect.

Cross-Int. 172. Can you fix the month?

Ans. I wouldn't be sure, but I think in March or April.

Cross-Int. 173. How long was this interview at 117 East 21st Street, New York City, as near as you can recall?

Ans. I should say less than one hour.

Cross-Int. 174. Did you or Mr. Root fix the place for the interview?

Ans. I think the interview was in reply to a letter written to him by me asking him to call.

Cross-Int. 175. When was the next interview you had with Mr. Root, if you had any, and where was it?

Ans. It was at the office of Stern & Rushmore, lawyers, 10 Wall Street, New York City, New York. As near as I can recollect it was in the fall of 1901,—I think in September.

Cross-Int. 176. Do you mean 1900 or 1901?

Ans. Well, it may have been 1900; in my mind it didn't seem so close to the first interview, but it may have been.

Cross-Int. 177. When and where was the next interview you had with the defendant Root?

Ans. I think I had a short interview with Mr. Root at the Waldorf Astoria. I don't remember when it was,—I couldn't fix the exact date.

Cross-Int. 178. Did you have any other interview than these three with defendant Root?

Ans. I did.

Cross-Int. 179. When and where was the next interview?

Ans. The next interview was at John H. Hazelton's office, 220 Broadway, New York City, New York.

Cross-Int. 180. When was that interview as near as you can fix it?

Ans. I think that it was some time in August, 1902,— 1901 or 1902. No, it was 1901.

Cross-Int. 181. At the interview which you had at the Waldorf Astoria, was it arranged that you should have Mr. Hazelton call upon Mr. Root at the Waldorf Astoria?

Ans. I don't recall any such arrangement.

Cross-Int. 182. I call your attention to Complainant's Exhibit XLV., and ask you when you first saw it?

Ans. I must have seen it very soon after it was received.

Cross-Int. 183. Was it not after you had seen that letter that you had the interview with Mr. Root at Mr. Hazelton's office, to which you have testified?

Ans. Yes, it was.

Cross-Int. 184. You understood, did you not, that before this last interview, Mrs. Ingersoll, as administratrix of the estate of Colonel Ingersoll, appointed in the State of New York, had begun in Montana an action against Henry A. Root, Joseph A. Coram and others?

Ans. I had no personal knowledge of that fact.

Cross-Int. 185. [*Cross-Int. 184 repeated.*]

Ans. I presume I did.

Cross-Int. 186. During the interview, was not that action spoken of by Mr. Root, and surprise expressed by him that such an action had been begun?

Ans. I don't know but what it was.

Cross-Int. 187. I show you Defendants' Exhibit No. 3 and ask you if you know the last signature subscribed to the same.

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that the testimony called for thereby is irrelevant and immaterial to any issues in this case.*]

Ans. I think I do.

Cross-Int. 188. Whose signature is it?

Ans. Henry A. Root's.

Cross-Int. 189. Do you know the signature of C. H. Palmer?

Ans. I can't say that I do.

Cross-Int. 190. Will you kindly read or examine Defendants Exhibit No. 3?

To which question counsel for complainant objects on each of the grounds stated in the last foregoing objection.

Ans. I will.

Cross-Int. 191. When did you first hear of the existence of this paper or of a paper with like contents?

To which question counsel for complainant objects on each of the grounds stated in the last foregoing objection.

Ans. I don't know when I first heard: I can't recall.

Cross-Int. 192. You heard of it, did you not, in the interview had at Mr. Hazelton's office, at which you have testified Mr. Root, Mr. Hazelton and yourself were present?

Ans. I don't recall that paper at that interview.

Cross-Int. 193. I asked you whether you heard of it at that interview, not whether you saw it.

To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.

Ans. I do not remember hearing of it.

Cross-Int. 194. During that interview did not Mr. Root state in your presence that this paper, or one of like contents, had been sent to John S. Harris in Butte, Montana, that he might procure the signature thereto of Joseph A. Coram, and did he not also state in your presence that Mr. Hazelton had written to him, Mr. Root, a letter informing him that he, Mr. Hazelton, had sent such a paper to John S. Harris, requesting him, Mr. Root, to inform Mr. Harris when Mr. Coram would be in Butte, Montana, so that he could execute the same?

To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is irrelevant and immaterial to any issues in this case, and on the further ground that it appears to attempt to assume and state to this witness

supposititious facts which contradict the pretended evidence which counsel for defendants has improperly thrust into this case during the introduction of testimony on behalf of complainant in that he has introduced a letter written by John H. Hazelton, dated July 13th, 1901, marked by the special examiner herein "Defendants' Exhibit No. 2", showing that the said paper marked "Defendants' Exhibit No. 3" had been repudiated and returned to the said Palmer, Root and Curran on July 13th, 1901, and further, that it has been shown by the testimony of the witness now on the stand that the interview last mentioned did not occur until after the receipt of the letter addressed to Mrs. Eva A. Ingersoll by defendant Henry A. Root, dated August 24th, 1901, and introduced in evidence herein marked "Complainant's Exhibit XLV".

Ans. I do not recall any such conversation at all.

Cross-Int. 195. I call your attention to Defendants' Exhibit No. 2, and ask you whether you knew of the writing of that letter and its being sent to Mr. C. H. Palmer.

To which question counsel for complainant objects on the ground that it is not cross-examination, nor relevant nor material to any issue in this case.

Ans. To the best of my knowledge this is the first time I ever saw it.

Cross-Int. 196. You knew, did you not, before the action in Montana, already referred to in this cross-examination, was begun by Mrs. Ingersoll, that negotiations were proceeding with Mr. Root, through Mr. Hazelton, acting for Mrs. Ingersoll, to reach some satisfactory agreement as to what Mrs. Ingersoll should receive in payment of the services rendered by Colonel Ingersoll in the Davis will contest?

To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is irrelevant and immaterial to any issue in this case, and on the further ground that in case the witness did know any such matters or things mentioned in the foregoing question it was merely hearsay.

Ans. I knew that Mr. Hazelton was trying to get a payment of the indebtedness due the Ingersoll estate for the services rendered

by Colonel Ingersoll in the Davis will case according to the contract existing between them.

Cross-Int. 197. Were you not informed that a paper-writing had been prepared by Mr. Hazelton for signature by Mr. C. H. Palmer, trustee, and by Henry A. Root and Joseph A. Coram, which would provide for the payment by Palmer, as trustee, to Mrs. Ingersoll, as administratrix of the estate of Colonel Ingersoll, $10,000 out of such portion of the personalty belonging to the Davis estate as should come into his hands upon its receipt?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that it calls for testimony which is irrelevant and immaterial to the issues in this case, and calls for hearsay testimony at that; and on the further ground that counsel for defendants has stated into the foregoing question part of the substance set forth in defendants' so-called Exhibit No. 3 without giving the full terms of such proposition, to which counsel for defendants has referred in framing the last foregoing question.*]

Ans. I think that I knew Mr. Hazelton was having some correspondence with Henry A. Root with a view to securing payment to Mrs. Ingersoll from the distribution of the personalty about to be made in Butte, Montana, in the Davis will case, but I did not think that it was an effort on his part to obtain a settlement for the services rendered by Colonel Ingersoll in the Davis will case.

Cross-Int. 198. [*Cross-Int. 197 repeated.*]

[*To which repetition of said question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection, and on the further ground that the witness has fully and entirely answered said question.*]

Ans. If there were such writing, I probably knew of it.

Cross-Int. 199. You were present, were you not, while John H. Hazelton's deposition was being taken before the special examiner in this case?

Ans. I was.

Cross-Int. 200. Did you not hear him testify that he prepared a paper-writing in the words and figures set forth in Defendants' Exhibit No. 3?

Ans. If he so testified, and I was here, I did.

Cross-Int. 201. When did you first meet Judge Harwood?

Ans. In the fall of 1902.

Cross-Int. 202. Was that at 117 East 21st Street, New York City, New York?

Ans. It was.

Cross-Int. 203. The time to which you have testified in your direct examination?

Ans. Yes.

Cross-Int. 204. Have you ever written Judge Harwood?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that it calls for testimony which is irrelevant and immaterial to this cause.*]

Ans. I think I have written him once or twice.

Cross-Int. 205. Had you written him prior to the occasion that you first met him, and to which you have already testified?

[*To which question counsel for complainant objects on the same grounds as stated in the last foregoing objection.*]

Ans. I think not.

Cross-Int. 206. Did you act for Mrs. Ingersoll in employing Judge Harwood to begin the action which has already been referred to, and which she began in the State of Montana?

[*To which question counsel for complainant objects on the same grounds as stated in the last foregoing objection.*]

Ans. If I did so act, it was with Mrs. Ingersoll's knowledge.

Cross-Int. 207. [*Cross-Int. 206 repeated.*]

Ans. I did not.

Cross-Int. 208. Do you know who did?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is immaterial and irrelevant to either or any issue in this case.*]

Ans. I am not positive that I do.

Cross-Int. 209. Give us your best impression as to who did.

[*Same objection.*]

Ans. It was either Mr. John S. Harris or Mr. John H. Hazelton.

[*Defendants' counsel protests on the record against complainant's*

counsel prompting the witness as to the answers he shall make upon cross-examination, and declines to proceed further until the special examiner is present.

In view of the unjustified statement that complainant's counsel has prompted any witness at this hearing, as implied in the foregoing protest of the learned counsel for defendants, counsel for complainant wishes to state upon the record that the foregoing statement of counsel for defendants came in a burst of vehement passion, simply because counsel for complainant suggested to counsel for defendants that he ought not to cut the witness off without allowing him to answer fully the last foregoing question when, at the very time, the witness was stating, as part of his answer to the last foregoing question, that "That is according to my best impression", which part of the answer of the witness defendants' counsel has succeeded in keeping off the record so far, and counsel for complainant requests the special examiner to have such question repeated to the witness and allow him to answer the same in his own way, and without interruption by defendants' counsel.

Defendants' counsel would add, also without prompting from complainant's counsel.]

Cross-Int. 210. [*Cross-Int. 209 repeated.*]

Ans. My best impression is that it was either John S. Harris or John H. Hazelton.

Cross-Int. 211. Was it not John S. Harris who suggested the employment of Judge Harwood?

Ans. No, sir.

Cross-Int. 212. Did Judge Harwood offer his services?

Ans. No, sir.

Cross-Int. 213. I call your attention to Complainant's Exhibit XXXVIII., and ask you if you know when that was made?

Ans. I do not.

Cross-Int. 214. Do you know who made it?

Ans. I do not.

Cross-Int. 215. You did not make it, did you?

Ans. I did not.

Cross-Int. 216. Did you act for Mrs. Ingersoll in employing Judge Harwood as solicitor for her in this action?

Ans. I did not.

Cross-Int. 217. Then the employment of Judge Harwood to collect the indebtedness claimed by Mrs. Ingersoll, as administratrix, from the defendants H. A. Root and Joseph A. Coram is something for which you are not responsible?

Ans. I wouldn't say that.

Cross-Int. 218. Would you say you were?

Ans. I wouldn't assume all the responsibility.

Cross-Int. 219. Was Complainant's Exhibit A found among the papers of Colonel Ingersoll's after his death?

Ans. It was.

Cross-Int. 220. It belongs, then, does it not, to Henry A. Root?

Ans. I don't know.

Cross-Int. 221. When did you first see Complainant's Exhibit XLIV., for identification, a part of which has been read in evidence by complainant's counsel and the balance by defendants'?

Ans. I must have seen it very soon after it was received.

Cross-Int. 222. Did you read it at the time you first saw it?

Ans. I did.

Direct Examination resumed.

Int. 223. You were shown Complainant's Exhibit XXXVIII. during your cross-examination, and asked when it was made; did you understand the questioner to mean when this physical copy was made, or when the letter which is set forth therein was made?

Ans. I understood him to mean this physical copy.

Int. 224. Then immediately following that inquiry you were asked, "Did you make it?" or to that effect; did you understand the questioner to mean, in that inquiry, did you make this physical copy, or did you understand him to mean, did you make the composition of the letter set forth therein?

Ans. I understood him to mean did I make that physical copy.

CLINTON P. FARRELL.

Attest: BENJAMIN H. BEADLEE, *Special Examiner.*

BOSTON, MASS., June 3, 1904.

DEPOSITION OF JOHN H. LEYSON.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name and place of residence.

Ans. John H. Leyson; Butte, Montana.

Int. 2. Have you been sojourning in the Commonwealth of Massachusetts a considerable portion of the year last past?

Ans. Yes, sir.

Int. 3. Are you over the age of twenty-one years?

Ans. I am.

Int. 4. Are you administrator of the estate of Andrew J. Davis, deceased, in the State of Montana and in the Commonwealth of Massachusetts?

Ans. Yes, sir.

Int. 5. Are you a party defendant in this action pending in the Circuit Court of the United States for the District of Massachusetts, entitled Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, against Henry A. Root, Joseph A. Coram and others, defendants?

Ans. Yes, sir.

Int. 6. Are you acquainted with said defendants Joseph A. Coram and Henry A. Root?

Ans. I am.

Int. 7. State about how long you have known each of them.

Ans. I have known both of them since 1895.

Int. 8. Are you acquainted with Charles H. Palmer, also one of the defendants in this action?

Ans. Yes, sir.

Int. 9. How long have you known him?

Ans. Since about 1890.

Int. 10. Are you acquainted with the handwriting and signature of each of said defendants Joseph A. Coram, Henry A. Root and Charles H. Palmer?

Ans. Yes, sir.

Int. 11. I show you a certain writing introduced in evidence in this case marked by the special examiner "Complainant's Exhibit B & H.", and ask you to examine the same and state whether or not you recognize the signatures subscribed thereto.

Ans. Yes, sir, I do.

Int. 12. State whose signatures the same are, respectively.

Ans. Henry A. Root's, J. A. Coram's.

Int. 13. Who do you mean by J. A. Coram in your last answer?

Ans. Joseph A. Coram.

Int. 14. I show you certain letters introduced in evidence in this case marked by the special examiner, respectively, "Complainant's Exhibit I. to XXXI.", inclusive, except Exhibit H., which has already been shown you, and ask you to state whether or not you have examined the signature subscribed to each of said exhibits?

Ans. I have.

Int. 15. State whose signature it is.

Ans. Henry A. Root's.

Int. 16. Have you seen Mr. Henry A. Root write?

Ans. Yes, sir.

Int. 17. Have you seen Charles H. Palmer write?

Ans. I am not sure whether I ever saw Mr. Palmer write, but I have received correspondence from him and have handled his checks.

Int. 18. Have you transacted business in which you have had to accept the signature of Charles H. Palmer, or accept papers the validity of which depended upon the same, being subscribed by his genuine signature?

Ans. Yes, sir.

Int. 19. I show you certain letters introduced in evidence in this case marked by the special examiner, respectively, "Complainant's Exhibit XXXVII., XXXIX., XL., XLI., XLII., XLIII., XLIV., for identification, and XLV.", and ask you to examine the signature subscribed to each of them and state whether or not you recognize each of the signatures subscribed thereto.

Ans. Yes, sir, I have and do.

Int. 20. State whose signature is subscribed thereto.

Ans. The signature subscribed to all of said exhibits except the signature subscribed to the letter marked "Complainant's Exhibit XLII." is that of Henry A. Root, and the signature subscribed to said Exhibit XLII. is that of Charles H. Palmer.

Int. 21. Do you recognize the handwriting set forth in said Exhibit XLII.?

Ans. I do.

Int. 22. And do you also recognize the signature subscribed to that letter?

Ans. Yes, sir.

Int. 23. And whose signature do you say it is?

Ans. Charles H. Palmer's.

Int. 24. And whose handwriting appears in the written portion of said last mentioned exhibit?

Ans. Mr. Charles H. Palmer's.

Int. 25. Are you acquainted with the property belonging to the estate of Andrew J. Davis, deceased, at the time of his decease, which has been heretofore distributed or which is in your custody, both real and personal?

Ans. I am.

Int. 26. Are you acquainted with the character and value of said property?

Ans. Yes, sir.

Int. 27. I call your attention to a certain court record, a duly authenticated copy of which has been put in evidence in this case and marked by the special examiner "Complainant's Exhibit XLIX & C.", which decree therein shown was made and entered August 24, 1897, and ask you to state whether or not any part of the property of said estate of Andrew J. Davis, deceased, had been distributed to any heirs or distributees of said estate prior to the date of said decree.

Ans. No distribution had been made prior to that date.

Int. 28. I show you another authenticated copy of a decree and order of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, made and entered August 26, 1897, in the matter of the estate of Andrew J.

Davis, deceased, put in evidence in this case and marked by the special examiner "Complainant's Exhibit L.", directing John H. Leyson to distribute $670,000 of money belonging to said estate to persons in said order mentioned, and ask you to state whether or not you are the John H. Leyson, administrator, mentioned in said order.

Ans. I am.

Int. 29. State whether or not you made distribution of said money as in said order directed. I am referring to the last mentioned order or decree.

Ans. Yes, sir.

Int. 30. Have you knowledge of an order of said District Court of Montana made and entered on December 3d, 1901, and orders supplemental thereto directing the distribution of certain money and bank stock belonging to said estate of Andrew J. Davis, deceased?

Ans. Yes, sir.

Int. 31. State whether or not you made distribution of said money and bank stock according to the terms of said last mentioned order and orders supplemental thereto.

Ans. Yes, sir.

Int. 32. Had you knowledge of a certain order or decree of said District Court of Montana, made and entered February 8, 1898, directing the distribution and delivery of the real estate in your possession as administrator of said estate to persons mentioned in said order, a copy of which order has been put in evidence in this case marked "Complainant's Exhibit LL", which I now show you?

Ans. Yes, sir.

Int. 33. State whether or not you delivered possession of the real estate of which Andrew J. Davis died seized and possessed, which came into your possession as administrator, to the persons as mentioned and directed in said last mentioned order of said District Court of Montana.

Ans. Yes, sir.

Int. 34. You stated that you are acquainted with the character and value of the property belonging to the estate of Andrew J. Davis, deceased, which has been heretofore distributed and delivered to distributees, according to the orders of said court of Mon-

tana, and which remain to be hereafter distributed: I will ask you to state the value of the personal property of said estate in money and the equivalent of money which has been, and which remains to be, distributed to distributees of said estate.

Ans. About a million and a half.

Int. 35. Are you acquainted with the character, condition, location and value of the real estate of which Andrew J. Davis, deceased, died seized and possessed, and which came into your possession as administrator of said estate, and was by you delivered into the possession of the distributees of said estate according to the order of said District Court of Montana, as you have heretofore stated?

Ans. Yes, sir, I am.

Int. 36. State whether or not, after said order of distribution and delivery of said real estate to which reference has been made in my questions to you and your answers, the same was put into your possession again as receiver thereof.

Ans. Yes, sir.

Int. 37. About how long did you continue in possession of said real estate as receiver?

Ans. About three years and a half.

Int. 38. State whether or not said real estate continued while you were in possession thereof as receiver in about the same condition as it was when you were in possession thereof as administrator of the estate of Andrew J. Davis, deceased.

[Defendants' counsel objects to the witness answering this question upon the ground that the testimony as to the real estate while he was receiver is immaterial, irrelevant and incompetent, and inadmissible under the issues in this action.

Counsel for complainant states on the record that he is simply asking the questions of this witness, above stated, in regard to said real estate, so far to show his knowledge thereof.]

Ans. Yes, sir, it did continue about the same.

Int. 39. State briefly what is the character of said real estate, and where it is situated.

Ans. Town lots and mining property in Silver Bow County, in Madison County, and Lewis and Clark.

Int. 40. All this real property you are speaking of is situated in Montana, is it not?

Ans. Yes, sir.

Int. 41. State where the principal part of said mining property is situated.

Ans. In Silver Bow County, Montana.

Int. 42. State where the most valuable part of the other real estate which you have spoken of is situated.

Ans. In Butte, Montana, in Silver Bow County.

Int. 43. Please state what is the value of said real estate which formerly belonged to the estate of Andrew J. Davis, deceased, and came into your possession, as administrator thereof, and was by you delivered over to the possession of distributees of said estate, pursuant to the terms of the order or decree of said District Court of Montana, a duly authenticated copy of which last mentioned decree has been put in evidence in this case marked "Complainant's Exhibit LL", and heretofore shown to you in this examination.

[*Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent, and that the witness has not been shown to be competent to testify as to the value of the real property in question. The question asks for the value at this time and not for the value at the time of the distribution, and, therefore, the testimony asked for is immaterial, irrelevant and incompetent.*]

Ans. To be conservative, $5,000,000.

Int. 44. State how much property of said estate there is situated in the Commonwealth of Massachusetts in your custody as administrator, and the value and character thereof.

Ans. It is in cash and Butte and Boston bonds. The value is $500,000.

[*Counsel for complainant thereupon announced that the direct examination of Mr. Leyson is finished.*]

Cross Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 45. What is your business?

Ans. Merchant.

Cross-Int. 46. What kind of a merchant?

Ans. In the jewelry business.

Cross-Int. 47. How long have you been in that business?

Ans. Pretty close to forty years.

Cross-Int. 48. What was the real estate appraised at by the appraisers appointed by the court?

Ans. I haven't my inventory with me, and I have forgotten the amount.

Cross-Int. 49. Have you no recollection as to the appraised value?

Ans. No, sir, not of the real estate.

Cross-Int. 50. What income did you derive from this real estate while it was in your possession as administrator?

[*To which question counsel for complainant objects on the ground that the testimony called for thereby is irrelevant and immaterial as ascertaining the value of said real estate, or as relating to any other part of the direct examination.*]

Ans. The principal revenue was from the operation of a single mine, and in one year the royalty was about $60,000. After that Mr. Root objected to my leasing the mines and the principal revenue was cut off.

Cross-Int. 51. What other revenue, if any, did you receive from the real property?

Ans. Ground rents which amounted to about $6,000 a year.

Cross-Int. 52. Judge Harwood, the counsel who has been examining you here, has been one of your attorneys as administrator of the Davis estate during the last two or three years in Montana, has he not?

Ans. Yes, sir.

Direct Examination resumed.

Int. 53. Did you mean to state in your answer to the last foregoing question that Judge Harwood had been one of your regular counsellors or attorneys in the matter mentioned?

Ans. No, sir, only where my regular counsellor was too ill to give him service.

JOHN H. LEYSON.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

INTRODUCTION OF RECORDS.

Counsel for complainant offers and puts in evidence in this case a duly authenticated copy of certain records of the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, as follows, to wit:

First. A duly authenticated copy of the alleged last will and testament of Andrew J. Davis, deceased, offered for probate in said District Court in Montana, and requests the special examiner herein to mark the same "Complainant's Exhibit XLVI.", for use in evidence in this case, and the same is marked accordingly.

Second. A duly authenticated copy of a certain decree of said District Court of Montana made and entered on March 27th, 1895, in the matter of the estate of Andrew J. Davis, deceased, upon the contest of Henry A. Root and others against the probate of the proposed will of said deceased; and complainant's counsel requests the special examiner herein to mark said last mentioned record "Complainant's Exhibit XLVII.", for use in evidence in this case, and the same is marked accordingly.

Third. A duly authenticated copy of a certain order or decree of said District Court of Montana made and entered on August 24, 1897, in the matter of the estate of John A. Davis, deceased, approving the action of John E. Davis, as administrator of the estate last mentioned, in consenting and entering into certain stipulations and contracts therein mentioned; and counsel for complainant requests the special examiner herein to mark said last mentioned record "Complainant's Exhibit XLVIII.", for use in evidence in this case, and the same is marked accordingly.

Fourth. A duly authenticated copy of a certain decree of said District Court of Montana made and entered of record on August 24, 1897, in the matter of the estate of Andrew J. Davis, deceased, upon the contest of Henry A. Root and others; and complainant's counsel requests the special examiner herein to mark the same "Complainant's Exhibit XLIX. & C.", for use in evidence in this case, and the same is marked accordingly.

Fifth. A duly authenticated copy of a certain decree or order of said District Court of Montana made and entered of record on August 26, 1897, in the matter of the estate of Andrew J. Davis, deceased, directing John H. Leyson, administrator of said estate, to distribute $670,000 of the money belonging to said estate to certain persons as therein provided; and counsel for complainant requests the special examiner to mark said last mentioned record "Complainant's Exhibit L.", for use in evidence in this case, and the same is marked accordingly.

Sixth. A duly authenticated copy of a certain decree and order

of said District Court of Montana duly made and entered of record on February 8, 1898, in the matter of the estate of Andrew J. Davis, deceased, entitled "Decree of Partial Distribution and Order for Delivery of Real Estate"; and counsel for complainant requests the special examiner herein to mark said last mentioned record "Complainant's Exhibit LI.", for use in evidence in this case, and the same is marked accordingly.

Seventh. A duly authenticated copy of a certain record of said District Court of Montana, entitled "In the Matter of the Estate of Andrew J. Davis, deceased — Upon the Petition of Henry A. Root, Ellen S. Corum, Joseph A. Coram and Sarah Maria Cummings, for Partial Distribution of said Estate — Consent to Partial Distribution"; and counsel for complainant requests the special examiner herein to mark said last mentioned record "Complainant's Exhibit LII.", for use in evidence in this case, and the same is marked accordingly.

Eighth. A duly authenticated copy of a certain decree and order of said District Court of Montana made and entered of record on December 3, 1901, in the matter of the estate of Andrew J. Davis, deceased, upon the petition of Henry A. Root, Joseph A. Coram and others, directing John H. Leyson, administrator of said estate, to distribute certain bank stock and money belonging to said estate to said petitioners and others; and complainant's counsel requests the special examiner herein to mark said last mentioned record "Complainant's Exhibit LIII.", for use in evidence in this case, and the same is marked accordingly.

Complainant's counsel offers and puts in evidence along with the aforesaid copies of records the certificates authenticating the same, and attached thereto, and asks that said certificates be made part of the record herein, accompanying said court records to which said certificates are attached.

To the admission of Complainant's Exhibit XLVI. in evidence defendants' counsel objects upon the ground that it is not authenticated as required by the United States Revised Statutes; the certificates required by the United States Revised Statutes are not annexed to this exhibit, but are placed at the end of a series of exhibits, namely, XLVI., XLVII., XLVIII., XLIX. & C., L., LI. and LII., the certificate of Samuel M. Roberts, clerk of the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, contains the following words: "I do hereby certify that each and all of the foregoing written and printed, or partly written and partly printed matters, records and documents hereto annexed are true, complete and correct copies of records, files and papers on file and of record in the office of the clerk of said Court in the matters, actions and proceedings therein men-

tioned as the same appear on file and of record in the office of the clerk of said court"; but there is nothing in said certificate which identifies Exhibit XLVI. as one of the papers described in said certificate.

Defendant's counsel objects to the admission in evidence of Complainant's Exhibit XLVII. upon the same grounds as taken to the Complainant's Exhibit XLVI. He also further objects that said exhibit being an order or decree is inadmissible without the papers upon which the same was made.

To the admission in evidence of Complainant's Exhibit XLVIII. counsel for defendants objects upon the same grounds as those upon which he objected to the admission in evidence of Complainant's Exhibit XLVII.

To the admission in evidence of Complainant's Exhibit XLIX. A C. counsel for defendants objects upon the same grounds taken to the admission in evidence of Complainant's Exhibit XLVII.

To the admission in evidence of Complainant's Exhibit L. counsel for defendants objects upon the same grounds as those taken to the admission in evidence of Complainant's Exhibit XLVII.

To the admission in evidence of Complainant's Exhibit LI. counsel for defendants objects upon the same grounds as those taken to the admission in evidence of Complainant's Exhibit XLVII.

To the admission in evidence of Complainant's Exhibit LII. counsel for defendants objects upon the same grounds as those taken to the admission in evidence of Complainant's Exhibit XLVII.

To the admission in evidence of Complainant's Exhibit LIII. counsel for defendants objects upon the same grounds as those taken to the admission in evidence of Complainant's Exhibit XLVII.

The special examiner here states that he has marked each and all of the papers, documents and writings heretofore offered in evidence, or requested to be marked for identification by counsel for either party in this action, accordingly as requested, as shown in the foregoing record.

Counsel for complainant offers and puts in evidence a certain statement made by defendant Henry A. Root set forth in an affidavit filed in this Court and cause on August 11, 1903, made and verified by said Henry A. Root, namely, the statement set forth in said affidavit, or an exhibit attached thereto, which exhibit also appears to have been verified by the oath of said Henry A. Root, which statement is in the words and figures following:

"7. Admit that prior to Aug. 17, 1891, while said contests were pending the defendants Henry A. Root and Joseph A. Coram engaged and employed the said Robert G. Ingersoll to act as attorney for, and in behalf of, said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary Louise Dunbar, and Joseph A. Coram in the prosecution of said contests."

Which statement appears in the printed copy of said affidavit on the record in this action at page 181.

Defendants' counsel objects to the admission of the same in evidence as against the defendants represented by him other than Henry A. Root, on the ground that the same is hearsay and Mr. Root is not shown to have had any authority in making said statement to bind them, and he objects to it as against all the defendants represented by him on the ground that it is immaterial, irrelevant and incompetent.

Counsel for complainant asks counsel for defendants whether he will consent to the transmission of the certified copies of certain records introduced in this case before the special examiner, and by him marked "Complainant's Exhibit XLVI., XLVII., XLVIII., XLIX. & C., L., LI., LII., and LIII. to the Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, for the purpose of obtaining from said clerk an additional certificate to said records, certifying each of said records specifically by reference to the exhibit mark placed thereon by the special examiner herein. This suggestion is made in view of the objections recorded by defendants' counsel to the introduction or reception in evidence of said court records, without more specific certification thereof; and counsel for complainant further says that, if defendants' counsel will so consent, complainant's counsel will see to it that said records are again certified specifically and returned to the special examiner herein so certified; and that, in the absence of such consent, counsel for complainant shall insist that counsel for defendants, by refusing to consent as aforesaid, waives objection to any more specific certification of said record exhibits than accompanies the same now as introduced before the special examiner herein.

Defendants' counsel does not feel that he is authorized to give the consent requested.

Adjourned.

NOTICE OF FILING ORIGINAL PAPERS AND DOCUMENTS WITH SPECIAL EXAMINER FOR USE IN EVIDENCE.

The defendants and their solicitors and counsel in the above-entitled action will please take notice that pursuant to Rule 14 and other rules of the above-entitled Court, and rules of the Supreme Court for Courts of Equity of the United States, the complainant in the above-entitled action has offered and put in evidence before Benjamin H. Bradlee, special examiner appointed to take and report to the Court the evidence introduced and submitted in said action, certain original writings, documents, contracts and letters, which purport to have been signed by certain of the defendants and other persons mentioned in complainant's bill of complaint in said action, for use as evidence on the part of complainant in support of her bill of complaint in said cause, and said writings, documents, contracts and letters have been marked by said special examiner for identification, respectively, as Complainant's Exhibit A, B and II., I., III., IV., V., VI., VII., VIII., IX., X., XI., XII., XIII., XIV., XV., XVI., XVII., XVIII., XIX., XX., XXI., XXII., XXIII., XXIV., XXV., XXVI., XXVII., XXVIII., XXIX., XXX., XXXI., XXXVII., XXXIX., XL., XLI., XLII., XLIII., XLIV. and XLV.; and that the same are filed with and now in the custody of said special examiner, and are subject to your inspection in his custody.

Respectfully,

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON.

Boston, June 4th, 1904.

Service of the foregoing notice on us by delivery of a copy thereof to each of us, on this fourth day of June, 1904, is hereby acknowledged.

FREDERICK N. WIER,
Solicitor for JOSEPH A. CORAM, HENRY A. ROOT, CHARLES H. PALMER, *Trustee*, CHARLES H. LADD, *personally and as Administrator of* ELIZABETH S. LADD, MARY LOUISE DUNBAR *and* HERBERT P. CUMMINGS, *Exec'r.*

HORACE G. ALLEN,
Solicitor for JOHN H. LEYSON, *Adm'r, and* ANDREW J. DAVIS, JR., *Trustee.*

EVIDENCE FOR COMPLAINANT.

TAKEN DE BENE ESSE PURSUANT TO REVISED STATUTES UNDER SECTIONS 863, 864 AND 865, PURSUANT TO NOTICE, BEFORE ME,

RAYMOND M. PLACE,
Notary Public.

BUTTE, MONTANA, June 14, 1904.

Present: EDGAR N. HARWOOD, Esq., *of Counsel for Complainant;*
CHARLES R. LEONARD, Esq., *of Counsel for Defendants.*

DEPOSITION OF JOHN S. HARRIS.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name, age and place of residence.

Ans. My name is John S. Harris; I reside in Butte, Montana; I am over seventy years of age.

Int. 2. How long have you resided in the State of Montana?

Ans. I came here in 1881, and I have resided here since.

Int. 3. In what business or occupation have you been engaged during your residence in Montana?

Ans. In mining.

Int. 4. Have you been engaged in active mining operations?

Ans. I have been engaged in active mining operations ever since I have been here with the exception of four years, and I was doing some mining even then.

Int. 5. Please state what you were otherwise engaged in during said four years.

Ans. I was performing the duties of surveyor general.

Int. 6. Were you surveyor general for the State of Montana, or rather the Territory of Montana, by appointment under the Federal Government?

Ans. I was surveyor general for the Territory of Montana for four years by appointment by President Arthur.

Int. 7. Say about what years you served as surveyor general.

Ans. From 1881 to 1885.

Int. 8. And have you been engaged in active mining operations in the State of Montana ever since 1885?

Ans. Yes, I have.

Int. 9. Have you held other official positions under the United States government?

Ans. I have.

Int. 10. Please state what other official positions you have held.

Ans. I was United States Senator from Louisiana.

Int. 11. Were you acquainted with Robert G. Ingersoll, late of Dobbs Ferry, Westchester County, State of New York, in his lifetime?

Ans. I was.

Int. 12. How long did you know him?

Ans. Twenty-eight or twenty-nine years: I think it was 1871.

Int. 13. Was it about 1871 that you first became acquainted with him?

Ans. Yes, sir.

Int. 14. Are you acquainted with Eva A. Ingersoll, formerly the wife and now widow of said Robert G. Ingersoll?

Ans. Yes.

Int. 15. Were you acquainted with the other members of Colonel Ingersoll's family?

[*Objected to as incompetent, irrelevant and immaterial, the question of the personal intimacy of witness with said Ingersoll, his widow or any member of his family not having any relation whatever to any of the issues in this case.*]

Ans. I was.

Int. 16. How long have you known Mrs. Eva A. Ingersoll and the other members of Colonel Ingersoll's family?

Ans. I became acquainted with them about the same time I did with the Colonel.

Int. 17. Are you acquainted with Henry A. Root, one of the defendants mentioned in the above-entitled action in which you are now giving your deposition?

Ans. I am.

Int. 18. State about how long you have known him.

Ans. I think four or five years.

Int. 19. Are you acquainted with Joseph A. Coram, one of the defendants in the above-entitled action in which you are now giving your deposition?

Ans. I am.

Int. 20. State about how long you have known him.

Ans. About three or four years.

Int. 21. State whether or not you had a personal interview with said Joseph A. Coram on or about May 14th, 1902, in relation to certain indebtedness claimed by Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, to be owing said estate from Joseph A. Coram and Henry A. Root for services of Robert G. Ingersoll rendered in the prosecution of certain contests of an alleged will of Andrew J. Davis, deceased, offered for probate in the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow.

Objected to as leading.

Ans. I did.

Int. 22. Do you recall the date or about the date on which that interview occurred and where it occurred? If so, state.

Ans. It occurred on the 14th of May, 1902, in Judge Harwood's office and also in Leyson's office in the city of Butte, County of Silver Bow and State of Montana.

Int. 23. Who were present at that interview?

Ans. Mr. Coram, Judge Harwood and Mr. Leyson and myself.

Int. 24. About period of time did that interview occupy?

Ans. My recollection is there were three interviews during the day: several hours apiece to each one.

Int. 25. Did Mr. Coram on that occasion state anything to you in reference to the services rendered on behalf of Henry A. Root, Joseph A. Coram and others associated with them in the prosecution of said will contest by Robert G. Ingersoll?

Objected to as leading.

Ans. He did.

Int. 26. Please state what Joseph A. Coram said to you at that time about the services rendered by Robert G. Ingersoll in the matter mentioned.

Ans. He said they were very valuable, and that Colonel Ingersoll saved his case and he hadn't anything but praise to say of Colonel Ingersoll's services in this case.

Int. 27. Do you recall any statements of Joseph A. Coram on that occasion in reference to the argument delivered by Colonel Ingersoll to the court and jury in the contest of the will of A. J. Davis, deceased, offered for probate in said court, in opposition to the admission of said will to probate on behalf of Joseph A. Coram, Henry A. Root and others associated with them in said contest? If so, state what he said on that subject.

Ans. He spoke in very high praise of it; that it was a great argument and turned the jury in their favor and won the case for him.

Int. 28. Do you understand that the jury determined the case or disagreed?

Objected to for the reason that what the witness understands or understood about that case and the way the jury determined it is immaterial, the only proposition involved here being as to what Mr. Coram said at this interview.

Ans. I understood that the jury disagreed, but a majority of the jury were in favor of the Ingersoll side of the case.

Int. 29. Was there reference made in that interview by yourself and Joseph A. Coram to any written contract or promise made, or purporting to have been made, by said Joseph A. Coram and Henry A. Root to Colonel Robert G. Ingersoll for payment of his services rendered in the prosecution of said will contest?

Ans. Yes.

Int. 30. Was that writing examined on that occasion by Mr. Joseph A. Coram?

Ans. Mr. Coram wanted to see the original contract that was signed; Mr. Harwood got it out of his safe and showed it to him; he read it and we discussed it.

Int. 31. State whether or not Joseph A. Coram on that occasion

stated to you the amount that he claimed had been paid on said contract.

Objected to as leading; the witness should be interrogated and asked to state what was said and done at that interview without leading questions put to him which suggest the answer desired.

Ans. He did. There was no dispute about the contract or about the amount that had been paid on it.

Int. 32. What did Joseph A. Coram state to you as to the amount he claimed had been paid on said contract?

Ans. He stated $5000 had been paid on it.

Int. 33. Did Mr. Coram claim that anything more had been paid on said contract than the sum of $5000?

Objected to for the same reason as last above given.

Ans. He did not.

Int. 34. State whether or not Joseph A. Coram stated to you on the occasion of that interview anything in reference to what he would be glad to do for Mrs. Ingersoll, widow of Robert G. Ingersoll, in reference to the amount promised by said contract to be paid for the services of Colonel Robert G. Ingersoll mentioned therein.

Objected to as leading.

Ans. He stated he would like to pay her the full amount due her.

Int. 35. What amount was mentioned in said written promise for the services of Colonel Ingersoll mentioned therein?

Objected to for the reason that the contract itself is the best evidence, and should be produced and offered in evidence if its contents are sought to be elicited.

Ans. One hundred thousand dollars.

Int. 36. State what, if any, excuse Joseph A. Coram mentioned in that interview for not paying the full amount promised by the terms of said contract for the services of Colonel Ingersoll therein mentioned.

Objected to as leading.

Ans. His excuse was that there was not enough money in the estate to do it.

Int. 37. State whether or not at the time of said interview Joseph A. Coram delivered to you a letter subscribed by his signature on

the subject of said claim of indebtedness and offering to pay a portion thereof in case Mrs. Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, would accept such portion as he offered in full settlement of said claim.

[*Objected to as leading, and also as attempting to prove by the witness the contents of a letter which itself is the best evidence of its contents.*]

Ans. He did.

Int. 38. State where and when and by whom such letter was delivered to you.

Ans. It was delivered to me in my office in Butte on the fourteenth day of May, 1902, by J. A. Coram.

Int. 39. Whose signature is subscribed to said letter?

Ans. J. A. Coram.

Int. 40. Have you said letter in your hand?

Ans. I have.

Int. 41. Please pass the same to the notary public before whom you are giving your deposition, to be marked for identification.

[*Counsel for complainant requests the notary public before whom this deposition is being taken to mark said last mentioned letter with the title of this case and number thereof briefly stated, and thereafter mark said letter "Complainant's Exhibit LXIV., for identification," and subscribe his name thereunder.*]

Int. 42. Has said letter which you last mentioned been marked by the notary before whom you are giving your deposition substantially as requested in the foregoing request made by counsel for complainant?

Ans. It has.

Int. 43. Where was your office located in Butte at that time?

Ans. In the Bee Hive Block, on Broadway.

Int. 44. Had Joseph A. Coram been in your office at that place prior to the time of delivering this letter marked for identification as aforesaid?

Ans. Yes.

Int. 45. What have you to say as to your best recollection of the date on which Joseph A. Coram delivered said letter to you?

Ans. My recollection is that he brought this to my office on the morning of the 15th. My answer should have been the morning of the 15th.

Int. 46. Have you been engaged in active mining operations at and about the city of Butte, Montana?

Ans. I have.

Int. 47. How long?

Ans. About five years.

Int. 48. Have you knowledge of a certain group of patented mining claims situated at and about the city of Butte in the State of Montana formerly owned and possessed by Andrew J. Davis, now deceased, and which were a part of his estate until distributed to the distributees of said estate?

Ans. Yes.

Int. 49. Have you knowledge of the location of certain said mining claims in relation to other mining claims now being operated and producing copper?

Ans. I have a general knowledge of the location of these various claims.

Int. 50. Have you knowledge of the character and value of said mining claims known as the group of Davis mining claims situate at and about the city of Butte in Silver Bow County, Montana?

Ans. I have.

Int. 51. I will ask you to state what is the value of said mining properties?

[Objected to for the reason that this suit is based upon an alleged contract for the payment of services to be rendered by said Ingersoll, and that the value of any of the property in anywise affected by the litigation has no bearing whatever upon plaintiff's right to recover. That the suit is not instituted on a quantum meruit, but upon contract, and the question of the reasonable value of the services alleged to have been rendered by Ingersoll is not involved in this controversy. For the further reason the question is irrelevant, incompetent and immaterial.

Ans. I suppose this property would be worth five millions and upwards.

Cross Examination by CHARLES R. LEONARD, Esq., *of Counsel for Defendants.*

Cross-Int. 52. General, what was the date of your appointment in Silver Bow County, Montana, as administrator of the estate of Robert G. Ingersoll, deceased?

Ans. I don't remember. I suppose the records of the court would show.

Cross-Int. 53. Do you remember the year?

[*To which question counsel for complainant objects on the ground that it is not cross-examination; nor is it relevant or material to any issue in this cause; and on the further ground that the records of the court making such appointment are the best evidence thereof.*]

Ans. I think the records of the court will show that it was in 1901.

Cross-Int. 54. Were you the acting administrator of the estate in Montana in the year 1902?

[*To which question counsel for complainant objects on the same ground as stated in the last foregoing objection.*]

Ans. I don't know whether I was ever acting administrator or not. I was supposed to be appointed.

Cross-Int. 55. You qualified as such administrator, did you not, and took the oath of office and gave bond?

Ans. Yes.

Cross-Int. 56. You instituted an action, did you not, General, as such administrator against Root and Coram, to recover the sum of ninety-five thousand dollars, based upon the same contract or writing set forth in Exhibit B attached to the bill of complaint filed in this suit in which you are now giving your testimony?

[*To which question counsel for complainant objects upon the ground that it is not cross-examination; and on the further ground that the records of the court wherein any such action as that mentioned in the foregoing question may have been instituted is the best evidence of the matter inquired of.*]

Ans. I should not like to say what was done in my name; there was probably such a suit instituted.

Cross-Int. 57. Do you know as a matter of fact that such a suit was instituted and tried in the District Court of Silver Bow County, and from that court appealed to the Supreme Court of the State of Montana?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that the records of said proceeding embrace the best evidence as to what was done in reference to any such action; and on the further ground that the foregoing question misstates the facts of record as to said action in that the record shows that no such action was ever tried, but was non-suited by the court, and by action of the court plaintiff was prevented from introducing any evidence whatever, or having any trial of said action.*]

Ans. No.

Cross-Int. 58. Did you say that an action based on this contract was not tried in the District Court of Silver Bow County and was not appealed by you to the Supreme Court of Montana, where the same was finally disposed of?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.*]

Ans. I should say that there was an action brought here, but no trial of the case as I understand it.

Cross-Int. 59. What was it that you appealed to the Supreme Court in that case?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.*]

Ans. I suppose it was the ruling of the judge in knocking us out of court.

Cross-Int. 60. This suit which you instituted in the District Court was undetermined in May, 1902, was it not?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.*]

Ans. That would be my recollection.

Cross-Int. 61. How did it come about, General, that these interviews were held on May 14th, 1902, as you have testified?

Ans. Mr. Coram, I think, requested these interviews.

Cross-Int. 62. Judge Harwood was your attorney in the case you instituted, was he not?

Ans. He was.

Cross-Int. 63. And you say that this interview was had in Judge Harwood's office?

Ans. I think we had an interview in the forenoon and in the afternoon in Judge Harwood's office; long interviews. And in the evening we were at Leyson's office.

Cross-Int. 64. What was the object of these interviews?

Ans. I suppose Mr. Coram's object was to make a formal settlement, to create a settlement, or do something to lead to a settlement.

Cross-Int. 65. What was your object in taking part in this interview?

Ans. My object was, if I could do anything to hasten this settlement I would do it, and I wanted to accommodate Mr. Coram of course.

Cross-Int. 66. You desired also, did you not, as administrator of the Ingersoll estate to aid the estate in any way you could in bringing about a settlement or compromise of the suit which you had instituted against Coram and Root?

[*To which question counsel for complainant objects on the ground that it is not cross-examination; and on the further ground that the testimony called for is irrelevant and improper in that an administrator or an ancillary administrator in his representative capacity has no legal power to make a compromise of any claim or debt owing to an estate acting upon his own motion.*]

Ans. I never considered that I had any authority in the settlement of this suit for less than what the claim was for.

Cross-Int. 67. Were you not attempting in this interview to come to some satisfactory settlement or compromise of the suit which you had instituted?

[*To which question counsel for complainant objects on each and all the grounds stated in the last foregoing objection.*]

Ans. I would have been very glad to have had them pay the full amount of the controversy.

Cross-Int. 68. Were you not attempting in this interview to come to some satisfactory settlement or compromise of the suit which you had instituted?

To which question counsel for complainant objects on each and all the grounds stated in the last foregoing objection; and on the further ground the witness has answered said question; and on the further ground that the witness has explained that he did not bring about said interview; and on the further ground that the witness had no authority to make any compromise of the claim in question; and on the further ground that a settlement of said claim devolved upon the debtors Root and Coram.]

Ans. I never considered that I had authority to settle that suit for less than the claim. But I should have been very glad to have had the claim paid, of course.

Cross-Int. 69. If I understand you correctly, then, you took no part whatever in the interview which, as you have stated, occupied almost the entire day, but that you simply permitted Mr. Coram, in the presence of your attorney and in his office, to make admissions which you could use in evidence against him in the suit which you had instituted, and that there was no thought, desire or intention on your part to compromise the suit?

To which question counsel for complainant objects on each and all of the grounds stated in the last and foregoing objections; and on the further ground that the last foregoing question calls for testimony which is incompetent as to action of Joseph A. Coram, who is not shown to be or to have been non compos or under other disability, and was free to act for himself and free to have and employ as many attorneys and counsellors as he saw fit, and to proffer as many offers of settlement of said indebtedness to Eva A. Ingersoll for less than the amount which he owed under said contract as he saw fit to proffer.]

Ans. The attorney is all wrong in his conclusions. I was very anxious to have this suit settled, and to do anything that would lead up to a settlement, but did not consider that I was authorized to settle for less than the full claim.

Cross-Int. 70. As preliminary to a possible settlement or com-

promise, were not you and Mr. Leyson and Judge Harwood and Mr. Coram negotiating to see what disposition could be made of the matter?

[To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that the testimony called for is incompetent and is irrelevant and immaterial to any issue in this suit.]

Ans. I presume it might be considered such. That would be the consideration.

Cross-Int. 71. Do you state that Mr. Coram's letter, which has been marked as "Exhibit LXIV.", was handed to you after the interview had on the 14th of May, 1902, and on the following morning, as near as you can remember?

Ans. That is my recollection.

Cross-Int. 72. What understanding is it which Mr. Coram refers to when he uses the following words in his letter: "In compliance with our understanding after the long talk of to-day with you and Judge Harwood, I have to say that I am authorized to offer you $20,000 cash in full settlement of the claim that you have against certain of the heirs of the Davis estate and will ask you to submit this proposition to Mrs. Ingersoll or her representatives"?

[To which question counsel for complainant objects on the ground that the letter mentioned explains what understanding was referred to in the passage quoted by counsel for defendants, and on the further ground that it is incompetent for the witness to interpret the meaning of the writer of said letter, his language and the interpretation thereof being a matter for the court, and his expression that he would ask Mr. Harris to submit the proposition which he had to make to Mrs. Ingersoll or her representatives according to the understanding is plain and unambiguous.]

Ans. I don't know what Mr. Coram's ideas were, but I forwarded this proposition to the Ingersoll representatives, Mr. Hazelton, I think, at once.

Cross-Int. 73. Was there any understanding arrived at when this interview had terminated that Mr. Coram was to write you this letter?

Ans. I believe he said he would bring the communication the next morning to be forwarded at once. It was understood that he was going to furnish me with something, with some communication.

Cross-Int. 74. Was it not your understanding that this communication addressed to you was to be used with a view of bringing about a settlement or compromise of the suit?

[*To which question counsel for complainant objects on the ground that the offer set forth in said letter is an open offer and accompanied by a statement that the writer does not want you to understand that we at all underrate Colonel Ingersoll's services, but as you will see by the memorandum which I enclose, we are in a very bad position financially", and in no way denies or contravents their obligation for the payment of the full amount for which the writer of said letter acknowledged to this witness the said Coram and Bent were indebted to the estate and legal representative of Robert G. Ingersoll, deceased, but is simply a plea and excuse and pretense set forth and alleged in said letter to the effect that they were not financially in a position to pay their indebtedness; and counsel for complainant further objects on the ground that said letter is merely by its terms a request to John S. Harris, the witness, to present the offer and poverty plea contained therein to Mrs. Eva A. Ingersoll, administratrix of the estate of Robert G. Ingersoll, deceased, or her representative.*]

Ans. Oh, I suppose that would be the proposition, or supposition, probably.

Cross-Int. 75. The letter was forwarded by you, was it not, to Mrs. Ingersoll's representatives with that object in view?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last and foregoing objection; and on the further ground that the object in view in so far as the witness was concerned is immaterial and irrelevant, and the object in view of Joseph A. Coram is expressed in said letter.*]

Ans. I forwarded it because he wanted me to.

Cross-Int. 76. What was the answer which you gave a moment ago to this same question which was not taken down by the typewriter by reason of the fact that he was interrupted by your counsel with an objection to the question?

[*To which question counsel for complainant objects on the ground that the witness did not answer the question referred to by counsel for defendants, his question having been first stated without the words "with that object in view," to which the witness answered simply that said letter was forwarded; then defendants' counsel added to his question the words "with that object in view" after the forepart of the question had been asked and answered, which made it an entirely different question, and the coupon objection was interposed, and after the objection the witness answered the question again as recorded.*]

Ans. I am lost on that: I don't remember. You will have to go back farther.

Cross-Int. 77. At the close of your interview on May 14th, it was understood, was it not, that a communication should be addressed to you by Mr. Coram, which in turn should be forwarded by you to Mrs. Ingersoll or her representative?

Ans. I should say no. The letter makes the request, but I don't think it was done before.

Cross-Int. 78. Was nothing said about Mr. Coram's writing you a letter containing the terms of some proposition with reference to this suit?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that said letter makes no reference to any suit whatever.*]

Ans. I don't remember that that was understood or agreed. He did bring the letter and asked me to send it, and I did forward it.

Cross-Int. 79. Now, General, to refresh your recollection, I want to ask you if but a few moments ago I did not ask you the following question, to which you made the following reply: "*Int.* Was there any understanding arrived at when this interview had terminated that Mr. Coram was to write you this letter." "*Ans.* I believe he said he would bring the communication the next morning to be forwarded at once. It was understood that he was going to furnish me with something, with some communication." That question was asked and that answer made a few moments ago, was it not?

Ans. I presume that that is correct.

Cross-Int. 80. To further refresh your recollection, was not the

following question asked by me and the following answer made by you but a few moments ago in this examination: "*Int.* Was it not your understanding that this communication addressed to you was to be used with a view of bringing about a settlement or compromise of this suit?" "*Ans.* Oh, I suppose that would be the proposition, or supposition, probably." That question was asked and that answer made, was it not?

[*To which question counsel for complainant objects on the ground that the record shows what questions have been asked and what answers have been made, and that it is improper and superfluous to reiterate these questions shown upon the record and the answers shown upon the record and then ask the witness if the same have not been asked and answered.*]

Ans. I think it was. That is my recollection.

Cross-Int. 81. Now, General, I wish you would enumerate these mining claims which you say were involved in the Davis estate and which you testify are worth five millions of dollars.

Ans. In answer to that I will say that I have a list of those claims furnished me some time ago. The names I will give as far as I can remember, and I can remember quite a good many of them. There is the Baltic, Dead Broke (this is my memory of the claims), Mount Moriah, Era (New Era, I think it is), Hibernia. There are about eight of the claims that I call very valuable; there are about fourteen or fifteen in the lot. Of course I speak from memory.

Cross-Int. 82. Can't you name more than these five claims of the fourteen or fifteen?

Ans. I might possibly.

Cross-Int. 83. Please name them if you can.

Ans. I don't seem to recall them just at this moment, the rest of them.

Cross-Int. 84. Where is the Dead Broke mining claim situated?

Ans. I could not undertake to bound these claims. They are located on the hill; valuable producing claims around them. I have a general knowledge of them.

Cross-Int. 85. Have you ever been upon the Dead Broke mining claim or have you ever had it pointed out to you?

Ans. I have been on the hill, on the property about there. I never have been on each one of these claims to see just where they are located.

Cross-Int. 86. Have you ever seen the Dead Broke mining claim, and are you positive that there is such a claim?

Ans. I had a list furnished me of these claims, and I suppose they are the claims and they exist. I have a list of all of the property of the Davis estate at one time; I have it in my office now. I could give it to you if you want it.

Cross-Int. 87. Did you ever see the Dead Broke mining claim; and, if so, state approximately its location and also the character of its development and improvement?

Ans. I do not claim to have any particular knowledge of this property. I only have a general knowledge.

Cross-Int. 88. Well, General, you have not answered my question. Have you ever seen the Dead Broke mining claim?

Ans. I suppose I have seen it.

Cross-Int. 89. Do you know whether you have seen it or not?

Ans. I would say that I believe I have seen the surface of them all, but I never examined any one of the claims in particular.

Cross-Int. 90. What character of ore is produced in the Dead Broke mining claim?

Ans. I could not tell you; I can only say that they are copper claims; valuable for copper.

Cross-Int. 91. Is it patented or unpatented?

Ans. They are all patented; the whole group is patented.

Cross-Int. 92. Where is the Dead Broke claim situated with reference to the Anaconda mine, for instance?

Ans. I would not undertake to say that?

Cross-Int. 93. Is it north, south, east or west of the Anaconda claim?

Ans. I would not undertake to locate it. I have a general knowledge of these claims.

Cross-Int. 94. Is your information with reference to the location, development and other character of the other four mines that you

have mentioned no more definite than the knowledge you have of the Dead Broke mining claim?

Ans. I have a general knowledge of these claims, but a particular knowledge of each claim I don't pretend to have. I have seen them on the map and I have seen them on the surface.

Cross-Int. 95. Do you know of any one of these claims which is now producing ore?

Ans. I don't understand that any one of these claims are being worked. My understanding is that they are not being worked.

Cross-Int. 96. Did you ever see any ore which ever came from any one of the Davis mines or did you ever see what purported to be a statement of the ore proceeds of any one of these mines? Please answer this question yes or no, if it is possible.

Ans. I don't know that I ever have.

Cross-Int. 97. Where is the Mount Moriah mining claim situated?

Ans. I could answer you in Butte, or on Anaconda Hill, but I can't tell — remember — what claims adjoin it.

Cross-Int. 98. I want to ask you if, as a matter of fact, instead of being located on Anaconda Hill that the Mount Moriah claim is not situated back of and west of the Gagnon mine, a distance of over a half a mile from the Anaconda mine?

Ans. I would not undertake to locate these claims particularly, each one of them; I could not do it.

Cross-Int. 99. Do you know that any one of them is situated on Anaconda Hill; and, if so, which one?

Ans. I would not undertake to locate any one of them.

Cross-Int. 100. Do you think you could leave this office and without a map go within a half a mile of any one of these claims?

Ans. I think I could.

Cross-Int. 101. Is the New Era claim located on Anaconda Hill?

Ans. I have said that these fifteen claims I have a general knowledge of. I could not and do not pretend to say where each particular one is located.

Cross-Int. 102. What do you consider the New Era claim to be worth of itself?

Ans. I could not put a valuation upon each one of these claims.

As a whole lot my attention has been called to it two or three years ago; to the whole property.

Cross-Int. 103. Have you ever been in one of these mines; if so, which one?

Ans. I don't know that I have ever been in any one of them. I have been underground here a good deal, but I don't know that I have ever been in any one of these claims.

Cross-Int. 104. Is it your idea or information that these claims are all situated close together or that they are widely scattered over what is known as the Butte camp?

Ans. I should say that they are scattered some. That is my recollection about it.

Cross-Int. 105. What producing or valuable mine is situated near to the Hibernia claim?

Ans. I could not tell you.

Cross-Int. 106. In making your estimate of five million dollars as the value of these claims have you placed an estimate upon each mine; but if not, how have you arrived at this amount of five million dollars?

Ans. Well, I should say by a general knowledge of the value of mines in this camp and the location.

Cross-Int. 107. You are not able, then, to state what any one of these five mines you have mentioned is worth?

Ans. I could not come very near it.

Direct Examination resumed.

Int. 108. In your cross-examination a mining claim has been referred to as the Dead Broke claim. I will ask you to state whether or not, on reflection, the claim you have reference to is not known and patented as the Broker mining claim, instead of the Dead Broke?

Ans. There is a Broker in the list, I am quite sure.

Cross Examination resumed.

Cross-Int. 109. Where is the Broker situated?

Ans. I do not remember.

Cross-Int. 110. Do you know whether it is situated within a mile of the Anaconda hill; and, if so, in what direction from that hill?

Ans. There are fifteen claims in this group, and I could not say where any one of them is located.

JOHN S. HARRIS.

Attest: RAYMOND M. PLACE, *Notary Public.*

Adjourned.

BUTTE, MONTANA, June 15, 1904.

Mr. LEONARD: The defendants at this time move to strike from the record all the testimony of witness Harris with reference to the interviews held on May 14th, 1902, and all statements testified by him to have been made by defendant Coram therein and thereat, and also the letter marked as "Exhibit 64", for the reason that said statement and letter were made and written in connection with an attempt and offer to compromise an action based on a contract described in Exhibit B attached to plaintiff's bill of complaint herewith.

Counsel for complainant requests the notary public before whom the deposition of witness John S. Harris is given and recorded to attach to his deposition a true, complete and correct copy of said letter of Joseph A. Coram delivered to John S. Harris, as mentioned in his foregoing deposition, and certify and mark said copy for identification in the same manner as the original of said letter is marked by the notary public taking these depositions.

By RAYMOND M. PLACE, Notary Public: A true, correct and complete copy of the last mentioned letter is accordingly certified and marked and hereto annexed as requested in the foregoing request, as follows:

EXHIBIT WITH DEPOSITION OF JOHN S. HARRIS.

Copy of Complainant's Exhibit LXIV.

C. F. WILLMORE, Mining,
Silver Bow Block, Butte, Montana.

BUTTE, MONTANA, May 14, 1902.

Mr. JOHN S. HARRIS, Administrator, Est. Robt. G. Ingersol.

My dear Sir: — In compliance with our understanding after the long talk of today with you and Judge Harwood, I have to say that I am authorized to offer you $20,000, cash, in full settlement of the claim that you have against certain of the heirs of the Davis Estate, and will ask you to submit this proposition to Mrs. Ingersol or her

representatives. I am informed by Mr. Root that when he last saw the representatives in New York of Mrs. Ingersoll, they were solicitous to have a cash offer made. Our people were not then in a position to do this, but they are now. I do not want you to understand that we at all underrate Colonel Ingersol's services, but as you will see by the memorandum which I enclose, we are in a very bad position financially. We have compromised and settled with all the attorneys in the case on a basis lower than this offer as compared with the contracts which were made with them. These contracts were, of course, predicated upon a very large estate and assumed that we would recover very much more than will be recovered. In order that there shall be no question on this subject, I wish to say to you that there will never be made any offer of a higher figure, because it would be impossible and the figure here submitted is our best.

Will you kindly ask your people to wire you whether they will do this or not, as my stay in this section of the country will be very brief. If they are not disposed to do this, we will facilitate them in getting trial of the case at once, as we are as anxious as your people are to have this matter disposed of right away.

Very truly yours,

Enclosure.

J. A. CORAM.

[Endorsed:]

Complainant's Exhibit LXIV for identification.

And I hereby certify that the within is a true and complete copy of the original letter mentioned by said witness John S. Harris, in his foregoing deposition before me, and marked by me as above shown down to and including the word "identification".

RAYMOND M. PLACE, Notary Public.

DEPOSITION OF GEORGE H. MACDOUGALL.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name, age and place of residence, and what business or occupation you were engaged in during the year 1891.

Ans. My name is George H. Macdougall; my age is forty-three; my place of residence is Butte, Montana; in 1891 I was official stenographer of the District Court of the Second Judicial District of the State of Montana in and for Silver Bow County.

Int. 2. State whether or not you were in attendance upon said District Court during the trial of a certain contest of the alleged will of Andrew J. Davis, deceased, instituted and prosecuted in said court in the name of Henry A. Root in opposition to the admission of said alleged will for probate in and by said court.

Ans. I was.

Int. 3. Do you recall the period occupied by said trial? If so, state

Ans. The trial began some time in the first half of July, 1891, and was concluded about the 5th or 6th of September. The trial proceeded continuously during about eight weeks.

Int. 4. State, if you know, who reported the testimony of witnesses sworn and examined during said trial, and other proceedings therein.

Ans. I reported the testimony and proceedings in said trial, assisted by Frank E. McGurrin, of Salt Lake, and Charles F. Roe, of Butte, Montana. I reported the proceedings continuously with the exception of one afternoon when I was ill. Mr. Roe and Mr. McGurrin each reported about half of the proceedings and testimony.

Int. 5. State whether or not the other reporters whom you have mentioned acted under your supervision and direction in your official capacity as official stenographer of said court.

Ans. The other stenographers were employed by me to assist me in getting out the transcript daily. I am not quite sure whether that could be regarded as in my official capacity. I reported the

testimony in my official capacity and these gentlemen did most of the transcribing under my direction and supervision, for the reason that it was impossible for me to report five hours in court and get the transcript out daily. I checked up their transcripts with my notes quite closely. I was responsible for the correctness of the transcript.

Int. 6. Were said matters and proceedings reported by you stenographically?

Ans. Yes, sir.

Int. 7. Were you acquainted with Robert G. Ingersoll, late of Dobbs Ferry, Westchester County, New York, familiarly known and addressed as Colonel Ingersoll?

Ans. I became acquainted with Colonel Ingersoll a few days before the commencement of the trial referred to.

Int. 8. I will ask you to state whether or not Colonel Ingersoll appeared in said court and took part in the prosecution of said will contest?

Ans. He did.

Int. 9. Do you recall the names of the heirs for whom Colonel Ingersoll acted as attorney and counsel in the prosecution of said contest?

Ans. Colonel Ingersoll appeared for the heirs represented by Henry A. Root.

Int. 10. I will ask you to state what part Colonel Ingersoll took in the trial and prosecution of said will contest?

Ans. Colonel Ingersoll took the leading part for that side.

Int. 11. State whether or not Colonel Ingersoll was constantly in attendance during said trial, and whether or not he acted in examining and cross-examining witnesses and also in arguing questions of law and was otherwise active in said trial on behalf of said Henry A. Root and those associated with him in opposition to the admission of said will in probate.

Ans. I think Colonel Ingersoll was present constantly during the trial. He might have been absent for a session or two. He certainly took an extremely active part in the trial, examining and

cross-examining witnesses and particularly in the argument of objections and law points that arose.

Int. 12. State, if you know, what Colonel Ingersoll did in reference to the final argument and presentation of said case, in opposition to the admission of said will to probate, on behalf of Henry A. Root and those associated with him in said contest.

Ans. Colonel Ingersoll addressed the jury in the final argument for something over three hours. My recollection is that Mr. Meyer was the only other counsel on that side who addressed the jury.

Int. 13. Was Colonel Ingersoll's argument reported? If so, state by whom.

Ans. The "Inter Mountain", an evening newspaper published in Butte, employed Mr. Frank E. McGurrin and myself to report Colonel Ingersoll's argument, and we did so. Our transcript of his argument was published in the "Inter Mountain" in the issues of September 3d and 4th, 1891.

Int. 14. I show you what purports to be a report of the argument delivered by Colonel Robert G. Ingersoll in opposition to the admission of said will to probate set forth in pages numbered 1 to 18 consecutively and inclusive, and marked with the number and title of this action and the words "Complainant's Exhibit Argument of Colonel Ingersoll in Will Contest, for identification, B. H. B., Special Examiner", and ask you to state whether or not you have examined the contents of said report?

Ans. I examined this paper carefully in June, 1902, and at that time made an affidavit which is attached to and a part of the exhibit mentioned.

Int. 15. State whether or not the report of the argument of Colonel Ingersoll set forth in said exhibit is substantially a correct report of the argument delivered by Colonel Ingersoll, on the occasion you have mentioned, in opposition to the admission of said will to probate on behalf of said Henry A. Root and those associated with him in said contest.

Ans. The report contained in the exhibit, I can testify, is a substantially correct report of the argument of Colonel Ingersoll on the occasion referred to as to the part of it which I did, which was

approximately half. As to the part done by Mr. McGurrin, I can only say that he was at that time one of the most skilful stenographers in the world.

Int. 16. How many persons were impanelled, and sitting with the court, constituting the jury in said trial?

[*That is objected to as not the best evidence, the record of the court being the best evidence.*]

Ans. Twelve.

Int. 17. I will ask you to state whether or not much or little attention was given by the jury and by other people of Montana to said argument of Colonel Ingersoll delivered to the court and jury on the occasion mentioned?

[*That is objected to as being incompetent and immaterial in seeking to draw out merely the opinion of the witness concerning the effect of Colonel Ingersoll's speech, which, as far as the jury is concerned, can be better determined by their verdict or rather their failure to arrive at a verdict. As to the effect on the public, the expression of the opinion of the witness as to Colonel Ingersoll's speech would have no bearing upon any recovery to be had in this action.*]

Ans. The court room was crowded and the judges' chambers were filled with ladies, and the corridor outside of the court room was so crowded that Mr. McGurrin and I had the greatest difficulty in getting in and out when we changed tricks. I cannot state what the effect of Colonel Ingersoll's argument was on the jury or the audience, but it was listened to with absorbing attention.

Int. 18. State whether or not you discussed and heard discussed generally the effect produced on the minds of those who heard or read said argument of Colonel Ingersoll as delivered and published.

[*Objected to as incompetent, irrelevant and immaterial.*]

Ans. Yes, sir. It was a matter of common talk for months afterward.

Int. 19. State whether or not the impression made by said argument on the minds of those who heard or read and discussed the same was favorable or unfavorable to said alleged will of Andrew J. Davis, deceased, offered in said court for probate and opposed by the prosecution of said contest by Robert G. Ingersoll.

Objected to as incompetent, irrelevant and immaterial.

Ans. The impression caused by the argument of Colonel Ingersoll was decidedly unfavorable to the will.

Int. 20. Did you gain knowledge of how the jury stood upon the questions presented to said jury in said contest?

That is objected to as incompetent, irrelevant and immaterial, and calling for hearsay testimony unless the witness testifies that he was present at the time the jury deliberated upon the verdict. And objected to for the further reason that if the jury were polled and interrogated in open court as to how each one stood with reference to a verdict the record of the court is the best testimony.

Ans. My impression is that the jury were polled, but in some way I gained knowledge or information as to how the jury stood. At that time I knew, or believed I knew, which individuals of the jury voted for and against it. I have forgotten their names now.

Int. 21. Did you learn how many of said jurors were opposed to finding that said will offered for probate and contested was the last will and testament of Andrew J. Davis, deceased?

Objected to for the reason last above given.

Ans. I knew, or believed I knew, at that time.

Int. 22. Did you hear any members of said jury state or explain how many members thereof were opposed to finding that said will offered for probate and contested was the will of Andrew J. Davis, deceased?

That is objected to for the same reason.

Ans. My impression is that I heard the jury polled in open court, and in that way, or perhaps through street talk, I believed I knew at that time how the jury stood. I also have an impression amounting almost to a certainty that I talked with members of the jury about the matter, but it is so long ago that my recollection is not positive on that point.

Int. 23. I will ask you to state from the information which you have mentioned how many members of said jury were opposed to finding that said will offered for probate and contested in said trial was the last will and testament of Andrew J. Davis, deceased.

Objected to as incompetent, irrelevant and immaterial.

Ans. My information at that time was that the jury stood seven to five against the probate of the will. Seven against and five in favor.

Int. 24. I will ask you to state whether or not it was common and notorious knowledge and understanding of the officers of said court, and people generally in the city of Butte, that seven members of said jury were opposed finding that said writing offered for probate and contested in said trial was the last will and testament of Andrew J. Davis, deceased; and whether or not that fact, to your knowledge, has ever been disputed.

[*That is objected to as incompetent, irrelevant and immaterial.*

Ans. It was common knowledge at that time, and I never heard it disputed.

Int. 25. Are you acquainted with Joseph A. Coram?

Ans. Yes, sir, very well.

Int. 26. Have you knowledge of his handwriting and signature?

Ans. Yes, sir.

Int. 27. Please examine this letter marked by the notary public before whom you are giving your deposition with the title and number of this cause and the words "Complainant's Exhibit LXIV., for identification, Raymond M. Place, Notary Public", which I now show you, and state whether or not the signature subscribed thereto is the genuine signature of Joseph A. Coram.

Ans. I believe it is the genuine signature of J. A. Coram.

Int. 28. Were you present in the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow on the eleventh day of December, 1902, when a certain order was made, a certified copy of which I now show you marked at the head thereof "Order of Non-Suit"?

Ans. Yes, sir, I was.

[*Counsel for complainant requests the notary public who is taking this deposition to mark the paper shown to the witness as last above mentioned with the title of this cause and number thereof and "Complainant's Exhibit Order of Non-Suit, for identification", to identify the same as the paper examined and spoken of by this witness.*]

Int. 29. Has the last mentioned paper been marked by the notary

public before whom you are giving your deposition as requested in the foregoing request?

Ans. It has.

Int. 30. State whether or not any testimony or evidence whatever was introduced in the action mentioned in the last above mentioned paper at the time said order was made.

[*Objected to for the reason that the question seeks to draw out from the witness an account of the proceedings taken in a court of record, and the records of said court are the best evidence as to what evidence, if any, was introduced, and what other proceedings were had.*]

Ans. No evidence was introduced at the time and place stated.

[*Counsel for complainant here states that the direct examination of the witness, George H. Macdougall, is finished.*

And counsel for defendants here states that he does not desire to cross-examine the witness Macdougall.]

GEO. H. MACDOUGALL.

Attest: RAYMOND M. PLACE, *Notary Public.*

DEPOSITION OF JOHN E. DAVIS.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name, age and place of residence.

Ans. John E. Davis: age, forty-five: residence, Butte, Montana.

Int. 2. How long have you resided at the place last mentioned?

Ans. Nineteen years.

Int. 3. Were you acquainted with Andrew J. Davis in his lifetime?

Ans. Yes, sir, I was.

Int. 4. What relation was Andrew J. Davis to you?

Ans. He was my uncle.

Int. 5. About how long did you know him?

Ans. Thirty years.

Int. 6. Where did Andrew J. Davis reside during the latter part of his lifetime?

Ans. In Butte, Montana.

Int. 7. State about how long he resided in the city of Butte, Silver Bow County, State of Montana.

Ans. I should think about twenty or twenty-two years.

Int. 8. Where did he reside before he came to Montana?

Ans. In Iowa.

Int. 9. State the date of the decease of Andrew J. Davis, if you recall it.

Ans. It was March 11th, 1890.

Int. 10. Did Andrew J. Davis leave an estate?

Ans. Yes, sir.

Int. 11. Where was the principal part of his estate situated?

Ans. In Montana.

Int. 12. Did he leave estate also in the Commonwealth of Massachusetts?

Ans. Yes, sir, there is some part of his estate there.

Int. 13. Of what did his estate consist?

Ans. Personal property, real estate.

Int. 14. State what was the character of the real estate or the principal part of the real estate of which he died seized and possessed.

Ans. It was mostly mining property.

Int. 15. Where was the principal part of said mining property situate?

Ans. In Silver Bow County, Montana.

Int. 16. Have you knowledge of the character and value of the estate left by Andrew J. Davis, deceased, of which he died seized and possessed situate in Montana and Massachusetts?

[*Objected to for the reason that the witness has not qualified himself as being competent to testify concerning the valuation of mining property or other forms of real estate which partly compose, under his own evidence, the said estate.*]

Ans. Yes, sir, I have.

Int. 17. State the value of the personal estate left by Andrew J. Davis in Montana and Massachusetts in money and the equivalent of money, excluding all worthless personal property of which he

died possessed, which was worthless at the time of his decease or which may have become worthless since his decease.

[*Objected to for the reasons given above.*]

Ans. About a million and a half dollars.

Int. 18. Are you acquainted with the character and value of the real estate of which Andrew J. Davis died seized and possessed situate in Montana?

Ans. Yes, sir.

Int. 19. What is the character of said real estate?

Ans. Mostly mining property.

Int. 20. State whether or not there was also left by Andrew J. Davis city property, that is, town lots situate in the city of Butte, Silver Bow County, Montana, of considerable value.

Ans. Yes, sir, there was.

Int. 21. What is the value of the real estate of which Andrew J. Davis died seized and possessed situate in the State of Montana?

Ans. I should think about five million dollars.

[*Objected to for the same reasons last above given.*]

Int. 22. Was Andrew J. Davis a married man?

Ans. No, sir.

Int. 23. Who were his heirs-at-law entitled to succeed to his estate in case it were not disposed of by his will?

Ans. Brothers and sisters, nieces and nephews.

Int. 24. How many brothers and sisters had he who were entitled to share in his estate or whose children were entitled to take such share in case of the decease of a brother or sister in the event said estate were not disposed of according to the terms of the will of said Andrew J. Davis, deceased?

Ans. I think there were eleven.

Int. 25. Were you acquainted with John A. Davis, late of Butte, Montana?

Ans. Yes, sir, I was.

Int. 26. What relation was John A. Davis to you?

Ans. He was my father.

Int. 27. What relation was John A. Davis to Andrew J. Davis?

Ans. He was his brother.

Int. 28. State about how long John A. Davis lived after the decease of Andrew J. Davis.

Ans. Nearly three years.

Int. 29. State whether or not you resided in Butte, Montana, continuously since the decease of Andrew J. Davis up to the present time.

Ans. Yes, sir, I have.

Int. 30. Have you knowledge of the contentions and litigation which has occurred relating to the administration of, and succession to, the estate of Andrew J. Davis, deceased?

Ans. Yes, sir, I have.

Int. 31. What was the first contention in relation to said estate, and who were the parties thereto?

[*Objected to as incompetent, irrelevant and immaterial.*]

Ans. The first contention was over the administratorship: John A. Davis on one side and Henry A. Root on the other side.

Int. 32. Have you knowledge of a will being produced and offered for probate in the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, purporting to be the last will and testament of said Andrew J. Davis, deceased?

Ans. Yes, sir, I have.

Int. 33. Do you recall in what year said will purported to have been made, and at what place? If so, state.

[*Objected to for the reason that the will itself is the best evidence and should be produced.*]

Ans. In the year of 1866; in Van Buren County, Iowa.

Int. 34. To whom was the estate of Andrew J. Davis given by the terms of that will?

[*Objected to for the same reasons.*]

Ans. The will gave the estate to John A. Davis, with the exception of three annuities to Pet Davis, Miss Bergett and Thomas Jefferson Davis.

Int. 35. Were said persons whom you have mentioned to whom maintenance was given by the terms of said will living at the time of the decease of Andrew J. Davis?

Ans. I think two of them were dead.

Int. 36. Which of said annuitants were deceased, according to your understanding, at the time Andrew J. Davis died?

Ans. Pet Davis and Miss Bergett.

Int. 37. What was done with the will which you have mentioned?

Ans. It was offered for probate by John A. Davis some time, I think, in July, 1890, in the District Court of the Second Judicial District in and for Silver Bow County, Montana.

Int. 38. I will ask you to state whether or not John A. Davis prosecuted proceedings in said court to cause said will to be admitted to probate therein.

[*Objected to as not the best evidence, for the reason that the court records show what was done in this matter and they should be produced and introduced in evidence.*]

Ans. Yes, sir, he did.

Int. 39. Following the presentation of said will for probate in said court, what occurred in respect to contests thereof?

[*Objected to for the same reason.*]

Ans. There were two contests filed against the will, one by Henry A. Root and the other by Sarah Maria Cummings.

Int. 40. State, if you know, what heirs of Andrew J. Davis, deceased, were associated in prosecuting said contests.

Ans. Ellen S. Cornue, Elizabeth S. Ladd and Mary L. Dunbar and the two contestants.

Int. 41. What shares of said estate were those heirs whom you have named entitled to in case there was no will of Andrew J. Davis, deceased, by the terms of which said estate was disposed of?

[*Objected to as incompetent and calling for the legal opinion of the witness.*]

Ans. Henry A. Root and Ellen S. Cornue were entitled to one twenty-second each, or fifty eleven-hundredths each, and Sarah Maria Cummings was entitled to one-eleventh of one hundred eleven-hundredths. Elizabeth S. Ladd was entitled to one eleventh of one hundred eleven-hundredths, Mary L. Dunbar was entitled to one twenty-second or fifty eleven-hundredths.

Int. 42. Can you state, generally, the grounds of contest of said will set up by said Henry A. Root and Sarah Maria Cummings in their objections thereto interposed in said court?

[*Objected to as not the best evidence; the records of the court should be produced as constituting the best evidence.*]

Ans. They contested the will on the grounds that A. J. Davis died intestate; that it was not his will; that he never signed it and the witnesses were not the witnesses, and that they never signed the will, either of them; and that the will was fraudulent and void; and that there was a later will drawn up in Montana which revoked all former wills.

Int. 43. Was there a trial of either of said contests in said District Court of Montana?

Ans. Yes, sir, there was; the contest of Henry A. Root.

Int. 44. State whether or not you were present in Butte, Montana, during that trial, and whether you attended the same.

Ans. Yes, sir, I was, and I attended the trial a good deal of the time.

Int. 45. Are you acquainted with said Henry A. Root? If so, state about how long you have known him.

Ans. I have known him about forty years.

Int. 46. Who acted as attorney and counsel on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary L. Dunbar in the prosecution of said contest of Henry A. Root at said trial?

Ans. Robert G. Ingersoll and other attorneys.

Int. 47. Were you acquainted with Robert G. Ingersoll at that time?

Ans. Not personally acquainted, but knew him by sight; I never met him.

Int. 48. State about what period of time said trial occupied.

Ans. About seven weeks.

Int. 49. Was there a jury sitting in said trial with the court? If so, state how many jurors were in the panel.

Ans. Yes, sir, there was; there were twelve jurors.

Int. 50. I will ask you to state what part Colonel Robert G. Ingersoll took in said trial?

Ans. He took a very active part, and was the leading attorney on behalf of Henry A. Root and the other contestants associated with him in that contest.

Int. 51. Did Colonel Ingersoll make an argument on behalf of said Henry A. Root and those associated with him in said contest about the close of said trial?

Ans. Yes, sir, he did.

Int. 52. Did you hear that argument?

Ans. Yes, sir, I did.

Int. 53. Was that argument published, to your knowledge?

Ans. Yes, sir.

Int. 54. I show you a written document which purports to be a report of the argument delivered by Robert G. Ingersoll to the court and jury on the occasion of said trial in opposition to said will, set forth in pages numbered from one to forty-eight consecutively and inclusive, and ask you to state whether or not you have examined the same — which document has been marked by the special examiner appointed by the court in the above-entitled action with the title and number of this cause and the words "Complainant's Exhibit Argument of Colonel Ingersoll in Will Contest, for identification, B. H. B., Special Examiner".

Ans. This is a copy of Colonel Ingersoll's argument in that case; I have examined it.

Int. 55. From having heard said argument delivered by Colonel Ingersoll to the court and jury and your examination thereof as contained in the report thereof mentioned and marked as aforesaid, can you recall and state whether or not this writing which purports to be a record and report of said argument is substantially a correct report of the argument made by Colonel Ingersoll to the court and jury in opposition to the will of Andrew J. Davis, deceased, on the occasion mentioned?

Ans. Yes, sir, I think it is a correct copy.

Int. 56. Is said document which purports to be a report of

Colonel Ingersoll's argument, of which you have been speaking, marked as described in the foregoing question propounded to you?

Ans. Yes, sir, it is.

Int. 57. State whether or not many or a few of the citizens of Butte, Montana, attended and heard said argument.

[*Objected to as incompetent, irrelevant and immaterial, the address being delivered to the jury and not for the benefit of the general public, which had nothing to do with returning a verdict.*]

Ans. A great many of the citizens of Butte heard the argument; the court room was filled, also the corridor of the court house, and the crowd extended out on the front steps.

Int. 58. State whether or not there were citizens of Montana who resided elsewhere in the State than Butte attended and heard said argument.

[*Same objection.*]

Ans. People from Helena and other surrounding towns came to Butte to hear the argument.

Int. 59. State whether or not you, at that time, gained knowledge of the impression produced upon the minds of the citizens of Montana and others who heard said argument in respect to said will.

Ans. The argument raised a doubt in the minds of a great many of the people as to the genuineness of the will.

Int. 60. I will ask you to state whether or not that impression produced by the prosecution of said will contest and argument of Colonel Ingersoll in opposition to said will was conveyed to you by many or few sources of information, and whether or not you considered such information reliable?

[*Objected to as incompetent, irrelevant and immaterial.*]

Ans. I talked with a great many people after the argument, and that is the impression I have formed.

Int. 61. Do you know how the jury stood which was sitting in the trial of said will contest on the questions submitted to them at the close of said trial?

[*Objected to as not the best evidence, the record of the court being the best evidence.*]

Ans. I understood the jury was five for the will and seven against it.

Int. 62. You may state whether or not at the close of said trial and discharge of said jury John A. Davis, the proponent of said will, was defeated in his efforts to establish and cause the same to be admitted to probate.

[*Objected to as calling for the opinion and conclusion of the witness, the court being a tribunal to determine the legal effect of the disagreement of the jury.*]

Ans. Yes, sir, he was.

Int. 63. Do you know whether or not another trial of said will contest was insisted on by Robert G. Ingersoll on behalf of his clients for whom he was prosecuting the same?

[*Objected to as incompetent, irrelevant and immaterial.*]

Ans. Yes, sir, it was.

Int. 64. Is John A. Davis now living? If not, state the date of his decease.

Ans. He is not living; he died on January 24th, 1893.

Int. 65. State, if you know, who was appointed administrator of the estate of John A. Davis, deceased, and about when such appointment was made and the court which made the same.

Ans. I was appointed administrator on March 11th, 1893, by the District Court of the Second Judicial District, State of Montana.

Int. 66. What was done on your part as administrator of the estate of John A. Davis, deceased, in respect to said will and proceedings to cause the same to be admitted to probate and contests thereof?

Ans. A short time after I was appointed administrator I was substituted as proponent of the will.

Int. 67. State whether or not you were also substituted as party adverse to said contests of said will which you have mentioned.

Ans. Yes, sir, I was.

Int. 68. You stated that the contestants of said will represented by Robert G. Ingersoll were insisting on another trial of said contest; I will ask you to state whether or not preparation was made for another trial of the contest.

[*Objected to as incompetent, irrelevant and immaterial.*]

Ans. Another contest of the will was set for the forepart of May, 1893. Preparations were being made at the time of the death of John A. Davis and I continued preparing for trial as administrator and substitute for John A. Davis, proponent.

Int. 69. State whether or not about April 28th, 1893, you consented and entered into stipulations providing for the entry of a decree by said court wherein said will was pending for probate and contest thereof was pending awarding to said contestants Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary L. Dunbar portions of said estate directly, and also awarding to Charles H. Palmer and Andrew J. Davis, Jr., as trustees, portions of said estate for the use and benefit of said five contesting heirs.

[*Objected to for the reason that the agreement itself constitutes the best evidence and should be produced.*]

Ans. Yes, sir, I did.

Int. 70. I show you a paper writing dated April 28th, 1893, and ask you to state whether or not that contains the stipulation to which you referred in your last answer.

Ans. Yes, sir; I think that's the stipulation.

[*Counsel for complainant requests the notary public before whom this deposition of the witness, John E. Davis, is given to mark said last mentioned writing with the title and number of this cause and the words "Complainant's Exhibit LV., for identification", and sign his name and affix thereunder.*]

Int. 71. Please state what was the motive and consideration which moved you, as administrator of the estate of John A. Davis, deceased, and the heirs of John A. Davis, deceased, to consent and enter into the stipulation contained in this writing which you last mentioned and which has been marked by the notary public before whom you are giving your deposition "Complainant's Exhibit LV., for identification".

[*That is objected to as incompetent, irrelevant and immaterial.*]

Ans. Because the estate was tied up by this contest and we could not share in the benefits of the estate and because of the vigorous

fight put up by Colonel Ingersoll in the contest of the will we thought best to make these stipulations in order to stop this contest.

Int. 72. State whether or not the impression which you have mentioned as having been made by the prosecution of said contest and argument of Colonel Ingersoll, unfavorable to said will, entered into the considerations which led you as administrator of the estate and the heirs of John A. Davis, deceased, to consent and enter into the stipulations contained in the last mentioned writing.

[*Objected to as leading, and also as incompetent, irrelevant and immaterial.*]

Ans. Yes, sir, it did. We felt as it we had a hard fight.

Int. 73. State whether or not that feeling arose from the force, effect and stress of said contest as prosecuted by Colonel Robert G. Ingersoll in preventing the admission of said writing to probate as the last will and testament of Andrew J. Davis, deceased.

[*Objected to for the same reason.*]

Ans. Yes, sir, it did.

Int. 74. State whether or not there was any other consideration which led you as administrator of the estate of John A. Davis, deceased, and his heirs to consent and enter into the stipulations contained in the writing last mentioned than those considerations which you have mentioned above.

Ans. No, sir, there was not.

Int. 75. State whether or not some other heirs of Andrew J. Davis, deceased, interposed in said District Court of Montana contests and litigation to secure a share of the estate of Andrew J. Davis, deceased.

Ans. Yes, sir, there were other contests filed.

Int. 76. Among those contests last mentioned, was there one on behalf of Harriet R. Sheffield and Henry A. Davis, children and heirs of Asa Davis, a deceased brother of Andrew J. Davis, deceased?

Ans. Yes, sir, there was.

Int. 77. State whether or not after the stipulations contained in the paper marked by the notary public before whom you are giving your deposition "Complainant's Exhibit LV., for identification", were made the parties to those stipulations entered into stipulations

with said Harriet R. Sheffield and Henry A. Davis providing that they should have awarded to them by decree of said District Court of Montana wherein said will was pending for probate and contests thereof were pending a fractional part of the share of the estate of said Andrew J. Davis, deceased, to which said last mentioned heirs were entitled as his heirs-at-law.

[*Objected to for the reason that the contract or agreement itself constitutes the best evidence and should be produced. Objection is further made that said question is leading.*]

Ans. Yes, sir, there was.

Int. 78. State the date of the last mentioned stipulation.

Ans. March 25th, 1895.

Int. 79. Have you the paper writing containing the last mentioned stipulation now in your hands, and have you examined the same? If so, state whether or not that paper contains the stipulation to which you referred in your last foregoing answer.

Ans. Yes, sir; these are the stipulations.

[*Counsel for complainant requests the notary public before whom the deposition of the witness, John E. Davis, is being taken to mark the paper writing last mentioned by witness with the title and number of this cause and the words "Complainant's Exhibit LVI., for identification", and sign his name and office thereunder.*]

Int. 80. Was there litigation interposed in said District Court of Montana on behalf of Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, heirs of Andrew J. Davis, deceased, to secure a portion of his estate as his heirs-at-law?

Ans. Yes, sir, there was.

Int. 81. State whether or not after the stipulations set forth in the paper writing marked by the notary public before whom you are giving your deposition "Complainant's Exhibit LV., for identification", were made all the parties to those stipulations entered into stipulations with said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis providing that said District Court of Montana in a decree finally determining all of the contests and litigation which has been mentioned in reference to the estate of Andrew J. Davis, deceased, should award to said last mentioned heirs a fractional part

to which said last mentioned heirs were entitled as heirs-at-law of Andrew J. Davis, deceased.

Ans. Yes, sir, there was.

Int. 82. Please state the date of the writing in which said last mentioned stipulations were set forth.

Ans. June 22d, 1897.

Int. 83. Have you the last mentioned writing now in your hands?

Ans. Yes, sir, I have.

Counsel for complainant now requests the notary public before whom the witness, John E. Davis, is giving his deposition to mark said paper writing last mentioned by the witness with the title and number of this cause and thereunder the words "Complainant's Exhibit LVII., for identification", and subscribe his name and affix under said marking.

Int. 84. State whether or not litigation was interposed in said District Court of Montana on behalf of Elizabeth A. Smith, an heir of Andrew J. Davis, deceased, to secure a portion of his estate as one of his heirs-at-law.

Objected to as incompetent, irrelevant and immaterial.

Ans. Yes, sir, there was.

Int. 85. State whether or not, after the stipulations set forth in the paper dated April 28th, 1893, and marked by the notary public before whom you are giving your deposition "Complainant's Exhibit LV., for identification", to which you have heretofore referred, were made, all of the parties to said stipulation contained in the last mentioned paper entered into written stipulation with said Elizabeth A. Smith providing that said District Court of Montana, wherein said will was pending for probate and contests thereof were pending, should award the said Elizabeth A. Smith in a decree finally determining all of said contests and litigation a fractional portion of said estate of Andrew J. Davis, deceased, to which said Elizabeth A. Smith was entitled as one of his heirs-at-law.

Objected to as incompetent, irrelevant and immaterial.

Ans. Yes, sir, there was.

Int. 86. What was the date of the last mentioned writing con-

taining the stipulations with said Elizabeth A. Smith which you have mentioned?

Ans. August 6th, 1897.

Int. 87. Have you the last mentioned paper writing now in your hands?

Ans. Yes, sir.

[*Counsel for complainant requests the notary public before whom the witness, John E. Davis, is giving his deposition herein to mark said paper writing last mentioned by the witness with the title and number of this cause and thereunder the words "Complainant's Exhibit LVIII., for identification", and subscribe his name and office thereunder.*

Adjourned.]

BUTTE, MONTANA, June 16, 1904.

Int. 88. State whether or not each of the last mentioned four paper writings to which you have referred as containing the stipulations providing for the determination of said will contest and litigation over the estate of Andrew J. Davis, deceased, and for the parceling of said estate amongst the various heirs contending for a portion thereof, have been marked by the notary public before whom you are giving your deposition respectively as requested by counsel for complainant as shown by the foregoing record.

Ans. Yes, sir, they are marked by notary public as requested.

Int. 89. Were each of said papers containing said stipulations signed, executed and acknowledged by the several parties concerned therein?

Ans. Yes, sir, they were.

Int. 90. State whether or not said District Court of Montana approved and sanctioned your action as administrator of the estate of John A. Davis, deceased, in consenting and entering into said stipulations set forth in the last mentioned paper writings.

Ans. Yes, sir, the court did.

Int. 91. State whether or not the parties concerned in and who made said stipulations petitioned said District Court of Montana to make and enter a decree in conformity to the provisions set forth in said stipulations.

Ans. Yes, sir, they did.

Int. 92. State whether or not said District Court of Montana made and entered a decree finally determining all said litigation over the estate of Andrew J. Davis, deceased, and parceling said estate according to the provisions of said stipulations.

Ans. Yes, sir, it did.

Int. 93. Can you state on or about what date said last mentioned decree was made and entered.

Ans. On August 24th, 1897.

Int. 94. I call your attention to Exhibit C annexed to complainant's bill of complaint in this action, and ask you to state whether or not that exhibit embraces the terms and conditions of the decree you last referred to.

[*That is objected to as calling for the opinion or conclusion of the witness; a comparison of the instruments by the court is the only method of answering this inquiry.*]

Ans. Yes, sir, it does.

Int. 95. I believe you stated in your foregoing deposition that said will contest prosecuted by Robert G. Ingersoll was tried in the year 1891. I will ask you to state what time of the year said trial occurred and about how long it lasted?

Ans. It commenced in July, and extended through August up into September — about seven weeks.

Int. 96. You stated that you were appointed administrator of the estate of John A. Davis, deceased. I show you a certified copy of certain letters of administration issued by the clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, and ask you to state whether or not it is a copy of the letters of administration issued to you appointing and commissioning you as administrator of the estate of John A. Davis, deceased?

Ans. Yes, sir, it is a copy of those papers.

Int. 97. Have you been the duly appointed and acting administrator of the estate of John A. Davis, deceased, ever since the date of the issuance of said letters, and are you still acting as such?

Ans. Yes, sir, I am.

[Counsel for complainant requests the notary public before whom the deposition of witness, John E. Davis, is taken to mark said paper last mentioned by said witness with the title and number of this cause, and thereunder the words "Complainant's Exhibit Letters of Administration issued to John E. Davis upon the estate of John A. Davis, deceased, for identification", and sign his name and affix thereunder and incorporate said paper in the deposition of said witness.

Int. 98. State whether or not, by reason of said stipulations and said decree which you last mentioned, said alleged will of Andrew J. Davis, deceased, was superseded and defeated.

[That is objected to as calling for the opinion or conclusion of the witness as to the legal effect of the probate of the will under the circumstances. The question under plaintiff's contention as to whether or not the will was defeated by being probated is one to be determined solely by the court, and the opinion of the witness is incompetent.]

Ans. The decree of the court of August 24th, 1897, superseded the will.

Int. 99. State whether or not, in so far as the estate of Andrew J. Davis, deceased, has been distributed, it has been distributed according to the terms and provisions of the decree of said court a copy of which is annexed to complainant's bill of complaint in this action, marked "Exhibit C", which you have examined and referred to in your deposition.

Ans. Yes, sir, it has.

Int. 100. What shares of said estate did the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary L. Dunbar become entitled to by the proceedings and decree to which you have referred to made and entered in said District Court of Montana determining said will contest?

[Objected to for the reason that it calls for the legal conclusion of the witness, and for the further reason that the decree of the court is the best evidence.]

Ans. They received two hundred and fifty eleven-hundredths from the administrator and two hundred and sixty-five and a half eleven-hundredths from Andrew J. Davis, Jr., and Charles H.

Palmer, trustees, making in all five hundred and fifteen and a half eleven-hundredths of said estate.

Int. 101. What portion of said estate of Andrew J. Davis, deceased, is the administrator and heirs of John A. Davis, deceased, entitled to have and receive in view of the stipulations and decree determining said will contests and litigation over said estate?

Objected to as not the best evidence, for the reason that the decrees entered in the case constitute the best evidence and should be resorted to.

Ans. They received two hundred eleven-hundredths from the administrator and one hundred and sixty-five and a half eleven-hundredths from Andrew J. Davis, Jr., and Charles H. Palmer, trustees of said estate.

Int. 102. State whether or not the administrator and heirs of John A. Davis, deceased, can lawfully claim, receive, take or hold or do claim or demand any portion of said estate of Andrew J. Davis, deceased, except that portion which you have mentioned in your last foregoing answer.

That is objected to for the reason that in so far as the question seeks to draw from the witness an opinion as to what the estate of John A. Davis can lawfully do or ask that the question is incompetent.

Ans. They cannot claim, they do not claim, any more than that amount.

Int. 103. State whether or not the administrator and heirs of John A. Davis, deceased, can lawfully take, receive, receipt for, or hold or do they claim or demand any portion of the personal property belonging to said estate of Andrew J. Davis, deceased, situated in the Commonwealth of Massachusetts than the three hundred and sixty-five and a half eleven-hundredths thereof which you have mentioned as being a part of said estate to which the administrator and heirs of John A. Davis, deceased, is entitled.

That is objected to for the reason that the question calls for the legal conclusion of the witness, and is therefore incompetent.

Ans. They cannot and do not claim any greater portion of property in Massachusetts.

Int. 104. State whether or not practically all of the property of

the estate of Andrew J. Davis, deceased, situate in the State of Montana has been distributed heretofore, paid over and delivered to the distributees mentioned in said decree a copy of which is annexed to complainant's bill of complaint in this action marked "Exhibit C".

[*Objected to for the reason that the records of the court constitute the best evidence as to what portion of the estate has been distributed.*]

Ans. Yes, sir, most all the property has been distributed.

Cross Examination by CHARLES R. LEONARD, Esq., *of Counsel for Defendants.*

Cross-Int. 105. Mr. Davis, I will ask you if you have ever been engaged in the business of buying, selling or operating any mines in Montana or elsewhere, or whether you have ever been engaged in the real estate business in Montana?

Ans. I am an owner of mining property in Montana and have operated some. I have never been in the real estate business in Montana.

Cross-Int. 106. Where is the property that you are operating, and how long have you operated it?

Ans. I am not operating it at the present time. The property is situated in Madison County. I operated the property about three years.

Cross-Int. 107. Did you have personal charge of the operation of this property?

Ans. No, sir.

Cross-Int. 108. Do you consider yourself competent, from your mining experience, to examine and pass upon the value of mining property?

Ans. I consider myself competent to give my opinion as to the value of the piece of mining property.

Cross-Int. 109. Would you depend upon your own opinion of a mine if you were making a purchase of it?

Ans. No, sir, I would not.

Cross-Int. 110. Did you ever buy or sell a piece of mining property? If so, state what.

Ans. No, sir, I never did.

Cross-Int. 111. Have you personally examined any one of the mining properties formerly belonging to the estate of Andrew J. Davis, deceased; and, if so, which one?

Ans. I have been on all the mining property around Butte, but have not inspected it under ground.

Cross-Int. 112. Have you any personal knowledge of the character of development work on any of these mines, or the ore which has been produced from any one of them?

Ans. Yes, sir, some of them.

Cross-Int. 113. Please state fully these mines with whose workings and development you are acquainted, giving if possible the amount and value of the ores extracted therefrom, the time when the same was extracted, the character of the ore, and the net profit derived from the mining operations.

Ans. The Mount Moriah claim has been worked some; there are two or three shafts sunken on the property; I have seen some very rich samples of silver ore taken from this property; I do not know the value of the ore which has been mined in the Mount Moriah. The Hibernia claim has been worked before and after the death of A. J. Davis, and there has been quite an amount of ore taken from this mine; the administrator has received quite a large amount from royalties from this mine. The Great Republic claim has been worked some; I do not know exactly to what extent. The balance of the claims, there has been very little work done on.

Cross-Int. 114. Your information concerning these claims as to their actual production and character is quite general, is it not?

Ans. Yes, sir, I suppose so.

Cross-Int. 115. I will ask you then if, in your judgment, the valuation of five million dollars which you have placed as the valuation of the mining property and other real estate formerly belonging to the estate of Andrew J. Davis, deceased, is not simply an estimate, which may or may not be greatly in excess of its value?

Ans. I have talked with some of the principal mining men of this locality, and from their opinion and from all the opinions I have

been able to gather for the last ten or twelve years is what I based my estimate on: also the location of these properties.

Cross-Int. 116. I will ask you to state what prominent mining man in this locality has, after any examination of any of these properties, expressed to you his opinion of their value.

Ans. I have talked a great deal with Mr. Benjamin Tibbey in regard to the valuation of these properties: also with Mr. James A. Talbott.

Cross-Int. 117. How many years ago was it that you talked with Tibbey, and is it not a fact that he has been gone from Butte for about ten years?

Ans. It was shortly after the death of A. J. Davis that I talked with Mr. Tibbey.

Cross-Int. 118. That was in 1890 or 1891, or thereabouts?

Ans. From 1890 up to 1894 or 1895.

Cross-Int. 119. Do you know whether or not Tibbey had made a personal examination of any of these mines?

Ans. Yes, sir, I think he had.

Cross-Int. 120. How many of them and which ones, and did he make a written report upon them?

Ans. Mr. Tibbey was employed by the administrator to inspect some of these mines, and especially the ones that were being leased, and at that time he watched the working of the lessees.

Cross-Int. 121. What did Mr. Tibbey tell you that any of these mines was worth at that time?

Ans. I cannot recall the exact figures that he put on any of them.

Cross-Int. 122. Is it not a fact that at the time of the death of Mr. Davis in 1890 and for two or three years subsequent to that time silver properties in the Butte district were worth a great deal more than they have been worth since the great depreciation of silver?

Ans. Yes, sir: some of them.

Cross-Int. 123. What proportion of the five million dollars valuation is represented by the real estate other than the mines?

Ans. I should think about a hundred thousand dollars.

Cross-Int. 124. Then you consider the mines to be worth four million nine hundred thousand dollars?

Ans. Yes, sir.

Cross-Int. 125. Will you kindly name the mining claims which belonged to the Davis estate, giving as nearly as you can from your own knowledge, and not from any information which you have derived or may derive from others, the location of each claim, the character and extent of the mining development therein, the kind and character of the ore and also the mining improvements in the shape of machinery and other surface improvements situated upon the claims?

Adjourned.

BUTTE, MONTANA, June 16, 1904.

Ans. to Cross-Int. 125. The Baltic claim is situated two blocks east of Main Street between Granite and Park Streets in Butte; this claim is in the heart of the copper belt. The Moonlight joins it on the east and the Blue Jay joins it on the north; this claim has not been worked to any extent. I consider the value of this claim over a million dollars. The Blue Jay lode is situated just north of the Baltic between the Baltic and the Bologna; this claim has not been worked to any extent, and being in the same location as the Baltic and in the copper belt and very close to the Parrot, Moonlight and other large mines here, I consider this to be worth over five hundred thousand dollars. The West Gem claim is situated in the copper belt close to some of the best mines in the copper belt. The Speculator mine and the Bell mine are very close to the Gem; they have been large producers of copper ores. There has been no work to any extent done on the West Gem, but there is a deep shaft on the East Gem very close to the dividing line, from which, at the present time, they are taking out very rich ore. I have seen samples from this mine which would run fifty or sixty per cent. copper. I understand the lead they are working on runs through the West Gem. I consider this mine worth two million dollars. The Centerville claim lays in the heart of the copper district; this claim has not been worked to any extent, but is situated very close to some of the largest mines in this locality. I consider this claim worth two

hundred thousand dollars. The Mount Moriah claim is situated near the Gagnon mine; this claim has been worked before and after the death of A. J. Davis, deceased, and I understand there has been over two hundred thousand dollars worth of ore taken out of it. I think there are three shafts sunk on this claim; none of them are very deep. The New Era claim is quite a large piece of ground directly north, bordering on the Mount Moriah; there has been no work done on this claim to any extent. It is located just west of the Pacific and Poulin mines, which have been big producers. I consider this mine to be worth two hundred and fifty thousand dollars. I consider the value of the Mount Moriah mine five hundred thousand dollars. The Hibernia mine is situated about two miles west of Butte; it borders on the Nettie, which was owned by the Colorado Company, which is now a part of the Amalgamated Copper Company. The Hibernia has been worked quite extensively before and since the death of A. J. Davis, deceased. There is a shaft over five hundred feet deep on the property. The estate of A. J. Davis, deceased, has received quite a large amount from royalties from this mine. I consider the value of this mine to be five hundred thousand dollars. The Great Republic claim is situated about a mile west of the Hibernia, bordering on the town of Burlington. This claim has been worked some, to what extent I do not exactly know. There is quite a deep shaft on the property. I consider this claim worth one hundred thousand dollars. The Last Chance claim joins and borders on the Great Republic; this claim is undeveloped. I consider this claim worth one hundred thousand dollars. The Charlotta claim is situated in the west part of Butte City; commences near the corner of Galena and Jackson Streets and adjoins the Stevens mine; the Stevens mine has been a large producer of very rich ore. I consider this mine worth two hundred and fifty thousand dollars.

The Broker and Pawn Broker border on the Charlotta, I think on the north. There has been no work to any extent done on these two claims. I consider them to be worth one hundred thousand dollars each.

Cross-Int. 126. Have the valuations which you have given upon any of these claims been based upon any personal knowledge had

by you as to the extent and character of the ore bodies contained therein, or have you arrived at these figures by considering principally the proximity of the claims to other producing properties?

Ans. I have seen samples of ore from some of the claims. The other claims, which have not been worked, I base my estimate on the location and opinion formed from talking with mining people.

Cross-Int. 127. Not being a mining man and not being familiar with the extent and character of the ore bodies situated in these claims, you necessarily base your opinion in the main on what others have told you about the properties, do you not?

Ans. I base my opinion on the knowledge I have found in the last fifteen years, from my own observations, and from the opinion of other people.

Cross-Int. 128. Have you personally inspected the underground workings or showings of ore in any of these mines?

Ans. No, sir.

Cross-Int. 129. Is it not possible for very rich specimens of ore to come from very poor mines?

Ans. Yes, it is possible.

Cross-Int. 130. You spoke of the Hibernia being situated two miles west of Butte and bordering on the Nettie mine, which is now owned by the Amalgamated Mining Company. I will ask you if, as a matter of fact, the Nettie mine has been operated for years?

Ans. It has been operated for some years; I don't know how many.

Cross-Int. 131. Is the property being operated now?

Ans. I think not.

Cross-Int. 132. When did you know of its being last operated?

Ans. I can't remember when they did shut down.

Cross-Int. 133. Don't you know that it has not been operated for a number of years last past?

Ans. I have passed the property often for the last ten years, and I have seen it working from time to time.

Cross-Int. 134. Have you seen it working in the last five years?

Ans. I couldn't say exactly.

Cross-Int. 135. Can you tell me of any properties in the vicinity of the Hibernia which are now being worked?

Ans. No, sir, I cannot.

Cross-Int. 136. Can you tell me of any properties situated in the vicinity of the Great Republic or the Last Chance mines which are now being worked?

Ans. No, sir, I cannot.

Cross-Int. 137. Are not the Hibernia, the Great Republic, the Last Chance claims situated far to the west of what is known as the copper belt in the Butte district?

Ans. I should think they were about two miles and a half or three miles west.

Cross-Int. 138. How are you able to fix the valuation of a half a million dollars on the Hibernia claim, not knowing the extent of its ore bodies nor the character of the ore contained therein, if any? State fully how you have arrived at this valuation.

Ans. I base my estimate on the location of these properties and what they have produced and from the opinion of mining men.

Cross-Int. 139. I will ask you to state if there are any mines in the vicinity of the Charlotta, the Broker, or the Pawn Broker claims which are now being operated or have been for some time since.

Ans. No mines very close.

Cross-Int. 140. Are either of these claims, the Charlotta, the Pawn Broker or the Broker full claims?

Ans. The Charlotta is a large piece of ground, I should think about three-quarters of a claim. The Broker and the Pawn Broker are small fractions.

Cross-Int. 141. Does the estate own the surface of any of these three claims?

Ans. There has been quite a number of lots sold from this surface ground. I do not know just how much the estate owns at present of the surface ground.

Cross-Int. 142. Do you know that it owns any?

Ans. Yes, sir, I am pretty positive it does.

Cross-Int. 143. You place a valuation of two million dollars on

what you call the West Gem claim. Have you ever been in the workings of this claim?

Ans. No, sir.

Cross-Int. 144. Do you know of your own knowledge the depth, width or character of any of the ore bodies situated therein?

Ans. Only from estimated opinions of mining men.

Cross-Int. 145. Have you any written opinion, or have you ever had any written opinion, from a mining man concerning the ore bodies situated in the West Gem claim and the value of said claim?

Ans. No, sir.

Cross-Int. 146. I ask you the same question with reference to the Baltic and Blue Jay claims.

Ans. No, sir; no written opinion.

Cross-Int. 147. You stated, I believe, Mr. Davis, that your father, John A. Davis, now deceased, was the original proponent of the Davis will, and that upon his death you were substituted as the proponent of the will; is that correct?

Ans. Yes, sir.

Cross-Int. 148. Was the trial of the will contest in which Colonel Ingersoll participated had in your father's lifetime or after his death?

Ans. During his lifetime.

Cross-Int. 149. The position of Colonel Ingersoll and the parties whom he represented was antagonistic to the contention of your father as the proponent of the will, and subsequently to the position of yourself as proponent, was it not?

Ans. Yes, sir, it was.

Cross-Int. 150. Your father and yourself were contending that the will was genuine and seeking its probate, and Colonel Ingersoll was attempting to establish the fact that the will was a forgery; is that correct?

Ans. Yes, sir.

Cross-Int. 151. You stated yesterday that Colonel Ingersoll's speech raised a doubt in the minds of many as to the genuineness of the will; is that correct?

Ans. Yes, sir.

Cross-Int. 152. Do you consider that the speech of Colonel Ingersoll was responsible for this impression; or do you think that impression, if such impression existed, was largely caused by the witnesses who testified in the case?

Ans. I consider Colonel Ingersoll's speech had more influence on the jury and on the people that heard it than all the witnesses the contestants had.

Cross-Int. 153. How are you able to arrive at the effect of Colonel Ingersoll's speech on the jury other than by the fact that the jury after a deliberation were not able to arrive at a verdict?

Ans. It is my opinion that Colonel Ingersoll's speech caused such a doubt in the minds of the jury about the genuineness of the will, and also that there might have been a later will, that the jury failed to agree on a verdict, and the majority of them was against the genuineness of the will.

Cross-Int. 154. According to your information, however, as stated in your direct examination, there were, however, five members of the jury whom Colonel Ingersoll failed to convince of the fact that the will was a forgery; is not that right?

Ans. Yes, sir.

Cross-Int. 155. Did Colonel Ingersoll convince your father and yourself of the fact that there was any question at all as to the genuineness of the will?

Ans. No, sir.

Cross-Int. 156. You believed then and you believe now that the will was genuine?

Ans. Yes, sir. Yes, sir, I do; put that on.

Cross-Int. 157. And the will was eventually probated, as you have testified?

[*To which question counsel for complainant objects on the ground that it misstates the fact as to which the witness has testified and is not cross-examination, the witness having stated that by the decree of the court entered in the proceeding for the admission of said will to probate and said contests thereof superseded said will.*]

Ans. The will was probated with certain stipulations.

Cross-Int. 158. That is, it was probated as offered subject to the agreements to which you testified in your direct examination?

To which question counsel for complainant objects on the ground that the decree referred to therein which has been introduced and put in evidence in this action is the best evidence of the fact inquired of, and that the statement of the witness on that subject is incompetent; and on the further ground that said decree determining said contest and proceedings for the admission of said will to probate has been declared by the highest tribunal of the State of Montana not only to have annulled and superseded said will, but also that said decree itself became the basis of administration of said estate and the devolution of the property thereof". Hence it was the decree and not the stipulations which finally became, according to the decision of the courts of this State, the instrument of title to said estate, vesting the same in the distributees mentioned in said decree, a copy of which is annexed to complainant's bill of complaint in this action, and a duly authenticated copy of which has been put in evidence before the special examiner in this action; and for said reasons testimony of the witness in answer to the foregoing question is incompetent.

Ans. Yes, sir.

Cross-Int. 159. Your father was not living at the time the will was probated, was he?

To which question counsel for complainant objects on the ground that it embraces the statements that said will was probated, which is contrary to the fact, as shown by the admissions of the answer in this action and also by the statements of the witness.

Ans. No, sir.

Cross-Int. 160. In view of the objections of counsel, I want to ask you as the administrator of the estate of John A. Davis, deceased, your father, you deny that the will which was offered for probate by your father and subsequently by yourself was ever probated?

To which counsel for complainant objects on the ground that the decree determining the proceeding for the admission of said will to probate and contests thereof is the only competent evidence of what was

done in said proceeding, and the effect thereof is entirely a matter to be determined by the court.]

Ans. No, sir, I do not deny it.

Cross-Int. 161. You were the proponent of the will at the time of its probate, were you not?

Ans. Yes, sir.

Cross-Int. 162. You are now and for some time past have been the administrator of the estate of your late father, John A. Davis, deceased, are you not?

Ans. Yes, sir, I am.

Cross-Int. 163. Who is acting as your attorney as said administrator?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and that the testimony called for is irrelevant and immaterial to any issues in this case.*]

Ans. Judge Harwood.

Cross-Int. 164. The same gentleman who appears as one of the solicitors and counsel in this suit?

Ans. Yes, sir.

Cross-Int. 165. Has not Judge Harwood also acted and is he not now acting as one of the attorneys for J. H. Leyson, the administrator of the estate of Andrew J. Davis, deceased?

[*To which question counsel for complainant objects on the grounds stated in the last foregoing objection.*]

Ans. No, sir, I think not.

Cross-Int. 166. Do you not know of his having appeared for Leyson in a number of matters connected with the estate?

[*Same objection.*]

Ans. No, sir, I do not know that he has.

Cross-Int. 167. I will ask you if in the matter of the application of Henry A. Root and others for a partial distribution in the estate of Andrew J. Davis, deceased, Judge Harwood did not appear both in the District and Supreme Courts as one of the attorneys for said Leyson and also for yourself as administrator of the estate of John A. Davis, deceased?

[*Same objection.*]

Ans. In that matter he acted as attorney for me as administrator, but I did not understand that he was acting for Leyson.

Cross-Int. 168. Don't you recall that one of the objections to an account of Leyson as administrator of the estate of Andrew J. Davis, deceased, was based on the fact that he had paid money to Judge Harwood as attorney in some estate proceedings, whereas there were other attorneys acting for the estate?

[*To which question counsel for complainant objects on the ground stated in the last foregoing objection.*]

Ans. No, sir, I do not remember that.

Cross-Int. 169. I will ask you it, as a matter of fact, you do not feel friendly to the plaintiff in this suit and desire to see her recover?

[*To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that it is irrelevant and immaterial.*]

Ans. I am not acquainted with the plaintiff in this action, and have no feeling in the matter.

Cross-Int. 170. Have you not assisted Judge Harwood with all the information and knowledge which you possess concerning estate matters to maintain the suit which he instituted in Montana to collect from defendants on the contract sued on in this matter, and have you not and are you not rendering him like and and assistance in the matter of the prosecution of the suit in which you are now testifying?

[*To which question counsel for complainant objects on the grounds stated in the last foregoing objection.*]

Ans. No, sir, I have not aided Judge Harwood in any way further than acting as witness here.

Cross-Int. 171. I only referred in my question to aid extended him by way of information concerning estate matters. Have you not aided him in this way?

[*To which question counsel for complainant objects on the same grounds as stated in the last foregoing objection.*]

Ans. I have not aided him further than being a witness.

Cross-Int. 172. You stated, Mr. Davis, in answer to a question of

Judge Harwood, as I recall it, that the administrator and the heirs of John A. Davis cannot lawfully take, receive or hold, and that they do not claim or demand either in Massachusetts or Montana, any greater portion of the estate of Andrew J. Davis, deceased, than is mentioned and specified in the decree which was entered in the Montana court, to wit, three hundred and sixty-five and a half eleven-hundredths. Have I correctly quoted you?

Ans. Yes, sir.

Cross-Int. 173. In other words, you claim that the decree of the Montana court in that regard is binding as to the share which the estate of John A. Davis, deceased, shall take in the estate of Andrew J. Davis, deceased.

[*To which question counsel for complainant objects on the ground that the testimony called for is incompetent, it being a question of law as to the binding force and effect of said decree in the Commonwealth of Massachusetts; and on the further ground that the witness in making his statement in direct examination on the subject mentioned was asked if, in view of said stipulations made and executed as he had testified and said decree determining said will contests, the administrator and heirs of John A. Davis, deceased, could take or hold or demanded any greater portion of said estate of Andrew J. Davis, deceased, than that mentioned.*]

Ans. Yes, sir, that is the way I understand it.

Cross-Int. 174. I will ask you, Mr. Davis, if it is not a fact that in the Supreme Court of the State of Montana in the appeal taken by you as administrator of the estate of John A. Davis, deceased, through Judge Harwood, your attorney, from an order of the lower court decreeing a partial distribution to Henry A. Root and others in the matter of the estate of Andrew J. Davis, deceased, you did not take the position through your counsel that the decree of the lower court giving any portion of the estate to any one not mentioned in the will itself was beyond the jurisdiction of the court and absolutely void?

[*To which question counsel for complainant objects on the ground that the testimony called for is a matter of record, which record is the*

best evidence thereof; and on the further ground that it is immaterial, irrelevant and incompetent.]

Ans. Yes, sir, I think I did.

Cross-Int. 175. How do you reconcile that position with your statement made a moment ago that the decree of the lower court distributing the property is binding?

Ans. I had my doubts about the decree of the lower court, and wished to have it passed on by the Supreme Court.

Cross-Int. 176. That was your object in taking that position in the Supreme Court, was it?

Ans. Yes, sir.

Cross-Int. 177. Simply to have the highest tribunal in the State pass upon the validity of the decree?

Ans. Yes, sir.

Cross-Int. 178. Is it not a fact, Mr. Davis, that in a Probate Court in Massachusetts, through Judge Harwood, your counsel, or through other counsel, you are asking for a distribution of the funds and property of the estate of Andrew J. Davis, deceased, situated in Massachusetts, according to the terms of the will itself, regardless of the decree of the Montana court which adjudicates the parties who are entitled to share in the proceeds of said estate?

To which question counsel for complainant objects in so far as it calls upon the witness to state the contents or purport of said petition, on the ground that such petition is available to introduce the contents thereof properly in this action if defendants desire so to do, and on the further ground that it is not cross-examination.

Ans. As I understand my petition, it asks for the interest of John A. Davis, deceased, the same as in the decree, being two hundred eleven-hundredths from the administrator, and one hundred and sixty-five and a half eleven-hundredths from A. J. Davis, Jr., and Charles H. Palmer, trustees.

Cross-Int. 179. Did you personally read or subscribe this petition?

Ans. Yes, sir, I think so.

Cross-Int. 180. Do you now state that it was your intention and understanding that you were in that petition recognizing the Montana decree fixing the distribution of the property, and that you

were simply asking for that portion of the estate to which you would be entitled under those decrees?

Ans. I understood the petition asked for what I was entitled to under the decree as administrator.

Cross-Int. 181. It was not your intention, then, if I understand you correctly, to take the position in that petition that Henry A. Root, Joseph A. Coram and other parties mentioned in the Montana decree as entitled to a distribution and not specified in said will were not entitled to distribution in the property of the estate situated in Massachusetts?

Ans. No, sir.

Direct Examination resumed.

Int. 182. You spoke of having talked with people engaged in mining operations in this locality in respect to the mining properties which formerly belonged to the estate of Andrew J. Davis, deceased, situated in this county, which you mentioned, as to the character and value of said property: I will ask you to state whether or not the persons you referred to as having talked with on that subject were mining experts or actively engaged in mining in this locality, and whether they were familiar with said Davis estate mining properties?

[*Objected to as not proper redirect testimony.*]

Ans. They were mining experts and practical miners who had mined extensively in this locality, and they were familiar with the Davis estate properties.

Int. 183. State whether or not there are certain mines bordering upon or located very near to the Baltic mining claim, any one of which is worth alone five million dollars.

[*Objected to for the reason that the witness has not qualified himself in any regard to testify as to the value of any mining property, he not being a mining man nor professing to be so; further, on the ground that witness has not shown that he knows anything about the character and value of any of these properties or any of the adjoining properties save from the information he has derived from talking with others, and that any testimony he should give in this regard will be hearsay.*]

Ans. Yes, sir, I think there are.

Int. 184. Mention some of them.

Ans. The Parrot mine is very close to the Baltic, and the Bologna lays between the Parrot and the Baltic. The Anaconda mine is not more than half a mile from the Baltic. The Moonlight mine joins the Baltic on the east; this mine has been worked extensively and continuously for the last eight years.

Int. 185. Are you acquainted with the reduction works situate near Butte, Montana, known as the Parrot smelter, wherein copper and other ores are reduced? How long have you known that institution?

Ans. Nineteen years.

Int. 186. Have you knowledge of the quantities of ore reduced at that institution?

Ans. Not the exact quantities; but large quantities, I should say.

Int. 187. State from whence the main supply of copper ore which has kept that institution in operation during the last nineteen years came.

Ans. The smelter has been shut down for about seven years. Before that time it run almost exclusively on the production of the Parrot mine.

Int. 188. Did the mining and extraction of ore from the Parrot mine continue since the closing of the old Parrot smelter?

Ans. Yes, sir, they have been extracting ore there most all the time since the smelter shut down.

Int. 189. Can you state what combination of mining properties the said Parrot mine is now included in?

Ans. The Parrot mine itself is their main property; they had some other properties which produced some ore.

Int. 190. You are speaking now of the Parrot Copper Mining Company, are you not?

Ans. Yes, sir.

Int. 191. State whether or not the holdings of that company, including said Parrot mine, were absorbed by the Amalgamated Copper Company in recent years.

Ans. I understand the Amalgamated Company control the Parrot Company.

Int. 192. Do you know of any of these mines of great producing capacity which you have mentioned as situate near the Baltic in the copper belt of this camp which were sold in former years for a considerable sum of money? If so, state which one and the consideration for which it changed hands.

Ans. The Moonlight was sold about eight or nine years ago for about seven hundred and fifty thousand dollars.

Int. 193. Please state, if you know, the names of the principal mines from which the Amalgamated Copper Company derive the principal supply of ore which comes under the control of that combination of mining properties.

Ans. The principal and most noted of those mines are the Anaconda mine, the St. Lawrence, the Mountain View, the Never Sweat and the Moonlight.

Int. 194. State about how near the group of mines last mentioned are to said Baltic mine which formerly belonged to the estate of Andrew J. Davis, deceased, and has since been distributed to the distributees of said estate under the decree of court, a copy of which is annexed to complainant's bill in this action marked "Exhibit C"

Ans. I think they are all within a mile.

Int. 195. And what have you to say as to the proximity of some of those mines under the control of the Amalgamated Copper Company which you have mentioned to said Baltic mine?

Ans. The Moonlight, which adjoins the Baltic on the east, is a continuation of the same class of property. I understand the veins run from east to west in that locality. The Parrot is the next property of the Amalgamated Company, and then comes the Never Sweat, Anaconda, St. Lawrence and Mountain View.

Int. 196. State whether or not the veins running east and west from those mines which you have mentioned as being the large producing properties controlled by the Amalgamated Copper Company, or some of them, would enter the Baltic.

[*That is objected to as entering into the field of speculation and as entirely incompetent, irrelevant and immaterial. The question is,*

what veins are actually located within the Baltic, not what veins might or would run into the Baltic if they went far enough. The witness has testified that he is not a mining man, has never been into the Baltic workings, and all his testimony with reference to probable location of veins is but guesswork.

Ans. I think some of those veins run into the Baltic.

Int. 197. State whether or not active mining operations are being carried on and large quantities of ore being produced from mines situate so as to almost surround said Baltic mine.

Ans. Yes, sir, there is.

Int. 198. Were you a party to a certain petition filed in said District Court of Montana in the matter of the estate of Andrew J. Davis, deceased, to which Henry A. Root was also a party, and which was signed and verified by said Henry A. Root, in which it was stated that the jury sitting in the trial of the contest of the alleged will of Andrew J. Davis, deceased, offered for probate in said court upon the trial of said contest, stood "seven against the validity of said will and five in favor of the validity thereof"?

Ans. Yes, sir, I was a party to that petition.

Int. 199. Have you a duly certified copy of that petition now in your hands?

Ans. Yes, sir.

Counsel for complainant requests the notary public before whom the witness, John E. Davis, is giving his deposition herein to mark said petition referred to by the witness, accompanied by the certificates authenticating the same, with the title and number of this cause and the words "Complainant's Exhibit Petition of Henry A. Root and others, containing statement that the Jury in trial of Davis Will Contest stood seven against the validity of said will and five in favor thereof, for identification", and incorporate said petition in the deposition of said witness.

Int. 200. Were you acquainted with the affairs of Andrew J. Davis, deceased, and of his estate since his decease sufficiently to know whether or not he was indebted at the time of his decease?

That is objected to as immaterial.

Ans. Yes, sir, I was.

Int. 201. State whether or not said Andrew J. Davis owed any debts at the time of his decease.

Ans. No, sir, he did not, except there might be some personal ones.

Int. 202. State whether or not in the determination of said will contest and the provisions made for the parceling and distribution of said estate of Andrew J. Davis, deceased, and the actual distribution and delivery thereof there was any compromise, concession or relinquishment on the part of said Robert G. Ingersoll, who prosecuted said will contest on behalf of said Henry A. Root and other four heirs associated with him and Joseph A. Coram in said contest, or either of them, of any part of the shares or interests in said estate to which either of said five heirs represented by Robert G. Ingersoll in said contest were entitled as heirs-at-law of Andrew J. Davis, deceased.

[*That is objected to as calling for the legal opinion and conclusion of the witness, and also as being incompetent, irrelevant and immaterial.*]

Ans. No, sir, there was no compromise on their part.

Int. 203. State whether or not other heirs of Andrew J. Davis, deceased, in the stipulations and proceedings which you have mentioned as made in the determination of said will contests and litigation, compromised and made concessions of portions of said estate to which they were entitled as heirs-at-law of Andrew J. Davis, deceased.

Ans. Yes, sir, they did.

Cross Examination resumed.

Cross-Int. 204. Do you not regard it as a concession on the part of Colonel Ingersoll and of clients whom he represented that the will should be by them conceded to be genuine and not a forgery as they had contended, and that said will should be probated as the genuine will of Andrew J. Davis and not pronounced a forgery by the court or jury?

[*To which question counsel for complainant objects on the ground that the testimony called for is irrelevant and immaterial, inasmuch*

as the event stated in the contract with Colonel Ingersoll upon which payment for his services should be made was that the heirs at law and the cestui in whose behalf he prosecuted said contests should "get their shares" of said estate.

Ans. No, sir, I do not, as they received through this settlement more than they would have if they had defeated the will.

Cross-Int. 205. The contract which Judge Harwood has referred to provides that the fee should be paid "in case the will is defeated and our clients get their shares". In view of this provision, to the effect that the will should be defeated, do you consider that Colonel Ingersoll and his clients made no concession when they were forced to admit, and did admit, by the agreement that the will was genuine and allowed the same to be probated?

To which question counsel for complainant objects on the ground that it is not cross-examination, and on the further ground that the question misrepresents the true state of facts shown by the undisputed evidence introduced in this case and by the admissions set forth in the answer of the defendants, in that it is shown and admitted that, contrary to said Henry A. Root and those associated with him in said will contest prosecuted by said Robert G. Ingersoll being "forced to admit that said will was genuine", did not admit anything to that effect, nor were they forced to admit anything because they voluntarily acquiesced in each and all of said stipulations and proceedings for the determination of said will contest and acquired thereby a large portion of said estate over and above that to which they were entitled as heirs-at-law of Andrew J. Davis, deceased, which they could not acquire in said proceeding without the defeat of said will, by the terms of which the estate was devised and bequeathed to John A. Davis, except certain bequests of inconsiderable amount of no consequence.

Ans. I consider that Colonel Ingersoll and his clients received a big price for allowing the will to be probated.

Cross-Int. 206. Mr. Davis, is not the Baltic claim bounded on the west by the Smokehouse lode which underlies the main business part of the town of Butte?

Ans. The Smokehouse joins the Baltic on the west.

Cross-Int. 207. Have you ever heard of this claim being anything of a producer?

Ans. No, sir; but I don't think you could buy it for the value that I put on the Baltic claim.

Cross-Int. 208. Have you ever heard or known of the Yellow Jack, Colorado and Lizzie lode claims, which adjoin the Baltic on the south, ever being producers to any considerable extent?

Ans. No, sir, I do not know that they have produced to any extent.

Direct Examination resumed.

Int. 209. If the will of Andrew J. Davis, deceased, offered for probate in said District Court had prevailed, and its terms had been carried into effect as provided in said will, then said Henry V. Root and four heirs associated with him in said contests thereof prosecuted by said Robert G. Ingersoll would not have gotten anything from said estate by reason of their kinship to Andrew J. Davis, deceased, would they?

Ans. No, sir, they would have gotten nothing.

Int. 210. And if said decree determining said will contests entered August 24th, 1897, by said District Court of Montana became controlling as to the administration of said estate and the devolution of the property thereof, as held and decided by the courts of Montana, said will was thereby defeated, was it not?

[*Objected to as incompetent, irrelevant and immaterial, as calling for the conclusion of the witness and as an attempt on the part of counsel to have the witness usurp the functions of the court in deciding the issues in this case.*]

Ans. Yes, sir; I consider it so as to the distribution of the estate.

Int. 211. In so far as said estate has been distributed, state whether or not it has been distributed, paid over and delivered in accordance with said decree of August 24th, 1897, determining said will contests.

Ans. Yes, sir, it has.

JOHN E. DAVIS.

Attest: RAYMOND M. PLACE, *Notary Public.*

COMPLAINANT'S EXHIBIT LETTERS OF ADMINISTRATION ISSUED TO JOHN E. DAVIS UPON THE ESTATE OF JOHN A. DAVIS DECEASED FOR IDENTIFICATION.

(Exhibit with Deposition of John E. Davis.)

LETTERS OF ADMINISTRATION ISSUED TO JOHN E. DAVIS, UPON THE ESTATE OF JOHN A. DAVIS, DECEASED.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of John A. Davis, deceased. Letters of Administration.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

John E. Davis is hereby appointed Administrator of the Estate of John A. Davis, deceased.

Witness, H. A. Neidenhofen, Clerk of the District Court of the Second Judicial District of the State of Montana, with the seal thereof affixed, the 11th., day of March, 1893.

By order of the Court.

H. A. NEIDENHOFEN, *Clerk*.

(L. S.) *By* A. LAIST, *Deputy Clerk*.

STATE OF MONTANA

COUNTY OF SILVER BOW, ss.

I, John E. Davis do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Montana; and that I will faithfully perform, according to law, the duties of Administrator of the Estate of John A. Davis, deceased.

JOHN E. DAVIS.

Subscribed and sworn to before me, the 11th., day of March, 1893.

H. A. NEIDENHOFEN, *Clerk*.

(L. S.) *By* A. LAIST, *Deputy Clerk*.

[Endorsed:]
491.
Letters of Administration.
Issued to John E. Davis, on the 11th., day of March, 1893.
Filed March 11th, 1893.
H. A. Neidenhofen, Clerk.
By A. Laist, Deputy Clerk.

STATE OF MONTANA
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow do hereby certify that the foregoing is a full, true, correct and complete copy of the Letters of Administration duly issued by order of said Court under the seal thereof to John E. Davis as administrator of the estate of John A. Davis deceased, and that said letters have not been revoked or annulled but have been ever since the date thereof and are now in full force and effect as appears by the records and files of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 16th day of June, A.D. 1904.

SAMUEL M. ROBERTS, *Clerk.*

[SEAL] *By*, W. N. WAUGH, *Deputy Clerk.*

COMPLAINANT'S EXHIBIT PETITION OF HENRY A. ROOT AND OTHERS,

Containing statement that the Jury in trial of Davis Will Contest stood seven against the validity of said will and five in favor thereof, for identification.

(Exhibit with Deposition of John E. Davis.)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the Contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent and Henry A. Root et al, contestants; and the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis deceased has been substituted for said deceased; and also upon the petitions of Elizabeth S. Bowdoin Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

To the Honorable Judge Lindsay, Judge of the Second Judicial District Court of Montana, in and for Silver Bow County:

Your petitioners, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Harriet Wood, Sarah M. Cummings, Diana Davis, Calvin P. Davis, John E. Davis, administrator of John A. Davis,

Elizabeth S. Ladd and Charles H. Ladd, her husband, Harriet R. Sheffield, Henry A. Davis, Henry A. Root and Rosine F. Root, his wife, Ellen S. Cornue and Joshua G. Cornue her husband, Mary Louise Dunbar, Elizabeth A. Smith, and J. Howard Smith her husband, John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, and Thea Jane Davis, Edward A. Davis and Mary A. Davis, his wife, George W. Davis, Charles G. Davis, and Gertrude F. Davis, his wife, Morris A. Davis, Andrew J. Davis, Jr., and Helen M. Davis, his wife, John E. Davis and Tennie B. Davis his wife, each separately and severally and jointly show unto your Honor:

That the said Andrew J. Davis, deceased, died at the County of Silver Bow, in the State of Montana, on the 11th day of March, 1890, being at that time a resident of Butte, in said County and State, and possessed and seized of a large estate, real, personal and mixed, situate in said county and elsewhere in the United States of America.

That at the time of the death of the said Andrew J. Davis, he left surviving him the following heirs and next of kin: Elizabeth S. Bowdoin, a sister residing at Springfield, in the State of Massachusetts; Harriet Wood, residing at Springfield, in said last named state; Sarah Maria Cummings, a sister residing at Ware in said State; Diana Davis, a sister residing at the town of Somers in the State of Connecticut; Erwin Davis, a brother, residing at New York City, in the State of New York; Calvin P. Davis, a brother, residing at Sebastopol, in the State of California; John A. Davis, a brother, now deceased, formerly residing at Butte, in the State of Montana; Elizabeth S. Ladd, a niece residing at Springfield in the State of Massachusetts, a daughter of Sophrona Firman, a sister of said deceased; Harriet R. Sheffield, a niece residing at Northport in the State of New York, and Henry A. Davis, a nephew residing at Munson in the State of Massachusetts, being children of Asa Davis, a brother of said deceased; Henry A. Root, a nephew, residing at Butte, in the State of Montana, and Ellen S. Cornue, a niece, residing at Croton Falls, in the State of New York, being children of Anna C. Root, a sister of the said Andrew J. Davis, deceased; Mary

L. Dunbar, a niece residing at Springfield in the State of Massachusetts, and Elizabeth A. Smith, a niece residing in Alameda County in the State of California, being children of Roxanna Davis, deceased, a sister of the said Andrew J. Davis, deceased, and that the above named persons comprise all of the heirs at law and next of kin of the said deceased, Andrew J. Davis.

II.

That on the 20th day of July, A. D., 1890, the said John A. Davis, being a brother of the said Andrew J. Davis, deceased, and and in all respects duly entitled and qualified in that behalf, filed in this Court a certain instrument, in writing, purporting to be the last will and testament of the said Andrew J. Davis, deceased, and in connection therewith his petition in due form of law, for probate of said alleged will and testament, and for his appointment as administrator of the estate of said Andrew J. Davis, deceased, with the said alleged last will and testament annexed.

That the said John A. Davis, with the exception of a few small bequests, was the sole legatee, devisee and beneficiary under said alleged last will and testament.

III.

That after due and proper notice in accordance with the statutes in such case made and provided, for the probate of said alleged last will and testament, and within the time prescribed therefor, the said Henry A. Root and Sarah Maria Cummings interposed in writing their objections to the probate thereof, in which said contest the said Elizabeth S. Ladd, Mary L. Dunbar and Ellen S. Cornue were interested, and the said Harriet R. Sheffield and Henry A. Davis likewise interposed in writing their objections to the probate thereof.

That thereafter on the 24th day of January, 1893, the said proponent of said alleged last will and testament, John A. Davis, died intestate, leaving surviving him as sole heirs at law and next of kin, his wife Thea Jane Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Andrew J. Davis, Jr., and John E. Davis, all sons of the said John A. Davis, deceased, all of whom are now living.

And on the 11th day of March, 1893, his said son John E. Davis, being in all respects entitled and qualified to administer upon the estate of his said father, was duly appointed administrator thereof by this court, and letters of administration were thereupon issued to him, the said John E. Davis, who is now and ever since hath been the duly qualified and acting administrator of the estate of said last named deceased, and as such was substituted as proponent of said alleged last will and testament.

That thereafter, by the consent, compromise and agreement of all the parties to the said contests, said alleged last will and testament was duly admitted to probate, and a decree of this Court on the 27th day of March, A. D. 1895, duly rendered and entered probating said will upon the proper necessary proofs adduced in pursuance of said contests compromises and agreements, and defining therein the respective rights and interests coming to the said parties in pursuance of the said compromise and agreement.

IV.

That after said alleged last will and testament was so admitted to probate, and said decree so entered as aforesaid, and within the time prescribed by law therefor, some of the heirs at law and next of kin, not including the contestants hereinbefore named, one Hulda Queen Davis, claiming to be the widow of said Andrew J. Davis, deceased, Mary Isabella Morrow and Laura Annis Calhoun, claiming to be children of the said Andrew J. Davis, deceased, filed their petition to set aside the decree probating said alleged last will and testament, and to cancel and annul the same.

That the said Hulda Queen Davis, Mary Isabella Morrow and Laura Annis Calhoun have heretofore abandoned their said claim and dismissed their said petitions, all of which will appear by reference to the records of this court in that behalf.

V.

That on the 8th day of April, A. D. 1895, John H. Levson was duly appointed administrator of the estate of Andrew J. Davis, deceased, with the said will annexed, and letters of administration duly issued to him as such, which are still in full force and effect;

and that the said John H. Leyson hath ever since been, and now is the duly appointed and qualified and acting administrator of the said estate of said deceased; that due and proper notice to the creditors of said estate has been regularly given in pursuance of the statute in such case made and provided, and that more than twelve months have elapsed since the appointment of said administrator, and that more than ten months have elapsed since the first publication of said notice to creditors of said estate. And that like notice has been given by the administrator of the estate of said John A. Davis, deceased, and that the time has long since expired for approving claims against the same.

VI.

That the said contests of the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Mary L. Dunbar and Ellen S. Cormie, as hereinbefore stated, came on for trial in the summer of 1891, and that said trial and the preparation therefor necessitated the expenditure of many thousand of dollars by the parties interested therein. That said trial was very protracted and ended in a disagreement of the jury, said jury standing seven against the validity of the said will, and five in favor of the validity thereof.

That the disagreement of said jury left the matters of said estate entirely unsettled, and required a retrial of the issue of said contest; that said retrial would have involved the estate of said John A. Davis, deceased, and the heirs at law of the said Andrew J. Davis, deceased, in other and further large expenditures with doubtful result.

That the estate of the said Andrew J. Davis, deceased, was and is constantly depreciating in value, and your petitioners, heirs at law and next of kin of the said Andrew J. Davis, deceased, and also the said John A. Davis, deceased, and also the administrator of the estate of the said John A. Davis, deceased, and heirs at law and principal beneficiaries under said will, believing it to be for the best interest of said estate, made the compromise agreement and procured the order to be made on the 27th day of March, 1895, A. D., as hereinbefore set forth, and among other things provided in said contracts of compromise and settlement, and in

said decree, that the said Henry A. Root, Sarah Maria Cummings and the said Harriet R. Sheffield and Henry A. Davis, should on the request and demand of the parties to the said compromise agreements, withdraw their said contests, and allow the said will to be probated, all of which was done and accomplished accordingly.

VII.

That thereafter, to wit, and within the time allowed by the statutes in such case made and provided, the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith and Diana Davis, for the purposes of contesting the validity of said alleged will in this court, in which the said will was proven, filed their petitions in writing, containing the allegations against the validity of said will and praying that the probate thereof be revoked.

VIII.

That, actuated by the same purpose and motives and for the same reasons, upon which the compromise and settlement of the contests heretofore mentioned were made, the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith and Diana Davis, settled and compromised the said controversies, so that the portion of the said estate mentioned and referred to in said compromise agreements, and to be distributed accordingly, was to be retained and held by the administrator of the estate of said Andrew J. Davis, deceased, and administered by and through the administrator of the said estate, and was not to pass to the estate of said John A. Davis, deceased, or to be administered upon by the administrator of said last named estate. That the said John E. Davis, administrator as aforesaid, was a party to all of said compromises hereinbefore mentioned.

IX.

That in pursuance of a petition duly filed in said Court by the administrator of the estate of said John A. Davis, deceased, a certain order was duly made and entered approving, the acts of said administrator in making executing and delivering the said several compromise agreements last aforesaid, and that subsequent to the filing of said petitions to set aside the order probating said will,

certain contests theretofore instituted by Diana Davis and Harriet Wood were dismissed by said Court, leaving only then pending the contests of the said Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, which said last named contests by said last mentioned compromise agreement and the order of the Court directing the same, are to be dismissed in accordance therewith.

X.

That the said Erwin Davis filed no contest against the probating of said alleged will, nor did he at any time within the time prescribed by the statutes in such case made and provided, contest said alleged will or the validity thereof, or file any petition for that purpose after the order and decree was entered admitting said will to probate, on account whereof and of the said compromises hereinbefore set forth, there will be no contests or petitions contesting the validity of said will in this Court, after the dismissal of the contests of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith by the order to be made hereon.

And that by reason of the foregoing facts all of the parties interested in the estate of said Andrew J. Davis, deceased, as heirs at law and next of kin, and all of the parties interested under the said will, have settled and compromised their conflicting interests.

XI.

That in pursuance of said last named compromise agreements, the separate and individual rights of the parties so interested in said estate as aforesaid, have been specifically defined and designated on account of which it becomes and is necessary that the order March 27th, 1895, so heretofore made, may be superceded, and supplemented by an order of this Court, in the matter of the estate of said Andrew J. Davis, deceased, as hereinbefore set forth, so as to conform to the compromise agreements.

XII.

That in pursuance of all of the compromise agreements hereinbefore mentioned and set forth, the shares and interests of the various parties thereto have been fixed and defined as follows, to wit: Subject to the bequests in said will given to Thomas Jefferson Davis,

Pet Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate of said Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven hundredths (200-1000) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornie and Joshua G. Cornie are entitled to have and receive two hundred and fifty eleven hundredths (250-1000) of said estate in kind, the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty-four eleven hundredths (44-1000) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive fifty eleven hundredths (50-1000) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven hundredths (25-1000) of said estate in kind; but by the terms of said compromise agreements it is provided that no portion of the real estate owned by the said Andrew J. Davis, and situated in the State of Iowa shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to in pursuance thereof; nor are they to be chargeable with any part of the bequest given to the said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed in and by the compromise agreement dated April 23, 1895, are entitled to have and receive as such trustees, and for the purposes of such trust, two hundred and forty-one eleven hundredths (241-1000) of said estate in kind.

Wherefore, your petitioners pray that all of said contest now pending be dismissed, and that a be ordered, adjudged and decreed that the said order and decree heretofore made upon the 25th day of March, 1895, be so changed and modified as to set forth the rights of the petitioners and persons interested in said estate, and as to require the administrator of said estate of the said Andrew J. Davis, deceased, to retain and hold in the hands and possession

and control all of that portion of said estate to be held and distributed by him in pursuance of the compromise agreements aforesaid, and the order to be made hereon.

And your petitioner will ever pray, etc.

HENRY A. ROOT.

TOOLE & WALLACE.
J. B. CLAYBERG.
Attys for Henry A. Root et al
W. W. DIXON & FORBIS & FORBIS attys for heirs of John A. Davis, deed & J. H. Leyson Admr estate of A. J. Davis, Decd.
C. P. DRENNEN & CHAS. M. DEMOND attys for Calvin P. Davis, Harriet Wood & Elizabeth S. Bowdoin.
J. HOWARD SMITH atty for Elizabeth A. Smith, contestant.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Henry A. Root makes oath and says: That he is one of the petitioners in the foregoing petition; that he has read the same, and knows the contents thereof and that the same is true, except as to those matters stated therein upon information and belief, and that as to those matters he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this 24th, Day of August A. D. 1897.

CLINTON C. CLARK,
Clerk of the District Court of the Second Judicial District of the State of Montana, within and for the County of Silver Bow.

(L.S.) *By* R. E. LEONARD, *Deputy Clerk.*

(Filed Aug. 24, 1897)

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, within and for the County of Silver Bow, do hereby certify that the foregoing petition entitled in said Court, "In the Matter of the Estate of Andrew J. Davis deceased, upon the contest of Henry A. Root, Sarah Maria Com-

ings against the probate of the will of Andrew J. Davis deceased," being a petition of Henry A. Root and others to the Judge of said Court, is a true, complete and correct copy or transcript of a certain petition duly filed by said petitioners and of record in the office of the Clerk of said Court, as appears by the records and files thereof.

In Testimony Whereof, I Have hereunto subscribed my name and affixed the seal of said Court at the office of the Clerk thereof in Butte, Montana, this 17th day of June, A. D. 1904.

SAMUEL M. ROBERTS *Clerk.*

SEAL. *By* W. N. WAGAR *Deputy Clerk.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, John B. McClernan Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that Samuel M. Roberts, whose genuine signature is subscribed to the annexed Certificates and Attestation is and was, at the time of making the same, the Clerk of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Clerk; that full faith and credit are due and ought to be given to his official acts, one of which is his foregoing certificate; that he is the legal keeper of all the Records and the Seal of said Court; that said Certificate and Attestation is in due form of law; and that the Seal affixed thereto is the genuine Seal of said Court.

Witness my hand at Butte, Montana, this 17th day of June A. D. 1904.

JOHN B. MCCLERNAN
Judge of said Court.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that the Honorable John B. McClernan, whose

name is subscribed to the annexed and foregoing certificate, is and was at the time of making the same, Judge of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Judge, to all whose acts as such full faith and credit are due, and that the signature of said Judge to said Certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said District Court at Butte, Mont., this 17 day of June A. D. 1904.

[SEAL.]

SAMUEL M. ROBERTS,
Clerk of said Court.

DEPOSITION OF WILLIAM Y. PEMBERTON.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state narratively your name and what profession you are engaged in, how long you have practiced the same, how long you have resided in the Territory and State of Montana, and what judicial positions you have held under the government of said Territory and State.

Ans. My name is William Y. Pemberton: I am a lawyer by profession and have been engaged in the practice about forty years: I have resided in the Territory and State of Montana for more than thirty years: during the years 1891 and 1892 I was District Judge of the Second Judicial District of the State of Montana: in the year 1893 to 1899 I was Chief Justice of the Supreme Court of the State of Montana.

Int. 2. If you have held other official position under the government of the Territory or State of Montana in which you practiced your profession under the laws thereof, please state what positions you may have held other than judicial.

Ans. During the years 1883, 1884, 1885 and 1886 I was District Attorney of the Second Judicial District of the Territory of Montana, the district comprising all of the Territory west of the Rocky

Mountains. I was also a member of the Constitutional Convention of Montana of the year 1884, I believe.

Int. 3. State whether, from your experience in the practice of law in the Territory and State of Montana and in the discharge of the official duties involved in the official positions which you have mentioned, you have gained knowledge of the statutory law and decisions of the highest court of the Territory and State of Montana, namely, the Supreme Court thereof, as the same have been enacted by the Legislative Assembly of said Territory and State and decided by said Supreme Court, and published and used in the government of said Territory and State and in the adjudications of the courts thereof.

Ans. Yes, sir.

Int. 4. Have you a statement here with you of the statutory provisions enacted by the Legislative Assembly of the Territory and State of Montana and of decisions of the highest judicial tribunal, namely, the Supreme Court of said Territory and State, on certain subjects?

Ans. Yes, sir.

[Counsel for complainant requests the notary public before whom the deposition of the witness, William Y. Pemberton, is given herein to incorporate in his deposition herein the statement of the laws and decisions last mentioned by the witness in his deposition herein, as follows:

COMPLAINANT'S EXHIBIT STATEMENT OF LAWS, STATUTES AND DECISIONS OF MONTANA.

Referred to in Deposition of Henry N. Blake in above mentioned case

STATEMENT BY WILLIAM Y. PEMBERTON OF CERTAIN STATUTORY PROVISIONS, ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY AND STATE OF MONTANA, AND OF DECISIONS OF THE HIGHEST JUDICIAL TRIBUNAL, TO-WIT, THE SUPREME COURT OF SAID TERRITORY AND STATE ON CERTAIN SUBJECTS, TO-WIT:

From the tenth day of January 1887, to the first day of July 1895, the Statute Laws of Montana of a general nature, existing and in force during that period, (except some amendments thereto contained in session laws enacted during said last mentioned period)

were embraced in one volume of Statutes, designated, called and cited as the "Compiled Statutes of Montana", divided into five divisions. That Section 2071 of the Fifth Division of said "Compiled Statutes" among enacting provisions thereof reads as follows:

"Sec. 2071. The foregoing five divisions, to-wit: First division, entitled 'Code of Civil Procedure;' second division entitled 'Probate Practice Act;' third division entitled 'Criminal Practice Act;' *fourth division, entitled 'Criminal Laws;'* and *fifth* division, entitled 'General Laws,' embrace the statutes of the Territory of Montana, general and permanent in their nature, in force on the tenth day of January, A. D. one thousand eight hundred and eighty-seven, and the same shall be designated and cited as the "Compiled Statutes of Montana."

That Section 2076, of the Fifth Division of said "Compiled Statutes" among the enacting clauses thereof reads as follows:

"Sec. 2076. The arrangement and classification of the several sections of the compilation have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title, title of the chapter, or title of the article under which any particular section is placed."

That said Probate Practice Act, embraced in said "Compiled Statutes of Montana," which was existing and in force during all the time from January tenth, 1887, to July first 1895, contained on pages 277-284 of said "Compiled Statutes", provisions relating to presentation of wills for admission to probate and contests thereof.

That Section 9 of said Probate Practice Act on page 278 of said "Compiled Statutes", prescribes what class of persons may petition for the probate of a will: and Section 10, on the same page, prescribes what shall be set forth in such petition: and other provisions follow, relating to the procedure on that subject down to Sections 20 and 21 on pages 280-281 of said "Compiled Statutes", which Sections read as follows:

"Sec. 20. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested

in the estate, any one or more of whom may demur thereto to any of the grounds of demurrer provided for in the civil practice act of this territory applicable thereto. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving: 1, the competency of the decedent to make a last will and testament; 2, the freedom of the decedent, at the time of the execution of the will, from duress, menace, fraud, or undue influence; 3, the due execution and attestation of the will by the decedent or subscribing witnesses; or 4, any other substantial grounds affecting the validity of the will — must, on request of either party in writing (filed three days prior to the day set for the hearing) be tried by a jury. If no jury is demanded, the court must try and determine the issues joined.

On the trial the contestant is plaintiff, and the petitioner is defendant."

"Sec. 21. When a jury is demanded, the probate court must summon and impanel a jury to try the case in the manner provided for summoning and impaneling trial juries in Courts of record, and the trial must be conducted in accordance with the provisions of the civil practice act for trials of issues of fact. A trial by the court must be conducted as provided in said civil practice act in cases of trials by the Court."

That the provisions of said statute contained in Sections 20 and 21, last above quoted, were existing and in force during all the time from January tenth, 1887, to July first, 1895, and the practice of the Courts of Montana conformed thereto during said period.

That the contest of a will under the procedure prescribed by said "Compiled Statutes of Montana", was not classified by any provision thereof, or decision of the Courts of Montana, as a special proceeding but such contest possessed all the characteristics of an action, "for the enforcement or protection of private rights or the redress or prevention of private wrongs", as defined in Section 1, of the Code of Civil Procedure in said "Compiled Statutes"; and the Supreme Court of said State held in Re McFarland's Estate, published in volume 10 of Montana Reports of the Supreme Court decisions, page 153, that a *judgment* in such a case admitting or refusing to admit a will to probate, was such a judgment as defined

in Section 238 of the Code of Civil Procedure contained in said "Compiled Statutes,— *i.e.*, "the final determination of the rights of the parties in an action or proceeding,"— and was appealable in the same manner as any judgment. That said decision, last above mentioned, has been cited, and approved by the Supreme Court of Montana, many times, as shown by the following citations, to-wit: In 10 Mont., 124; in 11 Mont., 14 and 240; in 12 Mont., 202; in 14 Mont., 257; in 15 Mont., 505; and in 18 Mont., 314; and has never been overruled or reversed.

That said "Compiled Statutes" were succeeded and superseded on July first, 1895 by the four codes designated in the enactment thereof as the "Political Code", "Civil Code", "Code of Civil Procedure", and "Penal Code", enacted by the Legislative Assembly of the State of Montana, which last mentioned Codes went into force and effect on the said first day of July 1895, and have ever since been, and now are in force, and with certain session laws since enacted by the Legislative Assembly of said State, contain the statute law, of a general and permanent nature of the State of Montana, in force ever since said last mentioned date, but not prior thereto.

That said last mentioned Code of Civil Procedure of the State of Montana, now and since July first 1895, in force, in Sections 2321 and 2322 thereof, provide for the presentation of wills for probate by petition of certain persons, and what shall be set forth in such petition, which provisions are the same as the provisions of the former "Compiled Statutes" on the same subject.

That Sections 2340 and 2341 of the present Code of Civil Procedure of the State of Montana, are substantially the same as Sections 20 and 21 of the Probate Practice Act in the former "Compiled Statutes of Montana", quoted above. Said Sections 2340 and 2341 of the Code of Civil Procedure of Montana, now and ever since July first 1895, in force, read as follows:

"Sec. 2340. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon

any of the grounds of demurrer provided for in Part II., Title VI., Chapter III., of this Code. If the demurrer is sustained, the court or judge must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others, interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1, the competency of the decedent to make a last will and testament: 2, the freedom of the decedent at the time of the execution of the will, from duress, menace, fraud, or undue influence: 3, the due execution and attestation of the will by the decedent or subscribing witnesses: or, 4, any other questions substantially affecting the validity of the will must on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. On the trial, the contestant is plaintiff, and the petitioner is defendant."

"Sec. 2341. When a jury is demanded, the District Court must impanel a jury to try the case, in the manner provided for impaneling juries in courts of record: and the trial must be conducted in accordance with the provisions of Part II., Title VIII., Chapter IV., of this Code. A trial by the Court must be conducted as provided in Part II., Title VIII., Chapter V., of this Code."

That the general statutory provisions regulating proceedings in the State of Montana in force since July first 1895, are set forth in Part III of said Code of Civil Procedure which went into force on the last mentioned date, and that part of said Code of Civil Procedure is entitled, "Part III Special Proceedings of a Civil Nature." But it is provided among the provisions enacting said four last mentioned Codes, in subdivision 1 of section 5182 of said Political Code that the change in the statute laws of said State from said "Compiled Statutes," to said Codes shall not:

"abridge abolish or impair . . . any rights accruing . . . or suit or proceeding had or commenced . . . but all such rights and liabilities may be enforced and the proceedings continued conforming the same as far as practicable to the provisions and remedies prescribed by said Codes."

And it is further provided in subdivision 3 of said last mentioned section as follows:

"The arrangement and classification of the several parts of said Codes have been made for the purpose of convenience and orderly arrangements, and therefore no implication or presumption of a legislative construction is to be drawn therefrom, nor shall annotations be deemed any part of the statutes."

It is also provided in section 1930 of Part III of said last mentioned Code of Civil Procedure, as follows:

"Sec. 1930. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant."

And a Judgment in a Special Proceeding is defined by provisions of said Part III of the Code of Civil Procedure which went into force July first 1895, the same as a judgment in an action. A judgment in an action is defined in Section 1000 of said Code of Civil Procedure, to be: "the final determination of the rights of the parties in an action or proceeding." And section 1931 of the same Code defines a judgment in a Special Proceeding as follows:

"Sec. 1931. A Judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding."

It has also been held and decided by the Supreme Court of the State of Montana, in a case entitled, "In Re Davis Estate, Leyson et al., appellants, *v.* Root et al., respondents," decided at the March term 1903 of said Court, and published in volume 27 of the Montana Reports of said Supreme Court decisions commencing at page 490 — in passing upon the validity of a certain order, judgment or decree, which had been made and entered in the Matter of the Estate of Andrew J. Davis, deceased, by the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, on August 24th., 1897, determining a certain will contest, commonly known as the Davis will contest, prosecuted in said last mentioned Court by Robert G. Ingersoll as attorney and counsel for and on behalf of Henry A. Root and Sarah Maria Cummings, contestants and other heirs of said Andrew J. Davis deceased, and persons interested with said contestants in

said will contest, a copy of which order, judgment or decree, is annexed to complainant's bill of complaint in the first above entitled action marked "Exhibit C", the validity of which was drawn in question by appeal to said Supreme Court from an order of distribution of property of said Estate, made by said District Court in conformity with said judgment, order or decree made and entered on August 24th., 1897, in said will contest — that such an order, judgment or decree, entered in a will contest "ascertaining the shares to which the parties are respectively entitled," of, in and to, the Estate in question, is a valid and binding order, judgment or decree, and that said order, judgment or decree "of August 24th., 1897, was therefore clearly a proper order to make": that "the Court had jurisdiction of the subject matter, and of the parties, and its action in the premises is not open to question either by the administrator or by one of the parties at whose instance the order was made:" and said Supreme Court in speaking of said judgment, decree or order of August 24th., 1897, further held and decided that:

"The order itself became the basis of administration and controlling as to the devolution of the property. In effect it became the will under the agreement of the parties, each one becoming entitled to just such a share of the estate as he would have been entitled to had he been mentioned as a legatee or devisee to the same extent."

There is also a provision in said Code of Civil Procedure which went into force July first 1895, that the word *action*, as used in that title, "is to be construed whenever it is necessary so to do, as including a special proceeding of a civil nature." (Sec. 559, Code of Civil Procedure). Also a provision that,

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions, and all proceedings under it, are to be liberally construed with a view to effect its objects and to promote justice." (Sec. 3453, Code of Civil Procedure.)

That the said Code of Civil Procedure of the State of Montana which went into force July first 1895, also contains provisions in

relation to the effect of an order or judgment of *non suit, or dismissal of an action, such* as the order and judgment a copy of which is hereto annexed marked "Order of Non-suit," which provisions of states have been in force ever since said last mentioned date, and are still in force as follows:

"Sec. 1007. A final Judgment, dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits."

"Sec. 1008. Upon the dismissal or disposition of an action in which the Court has jurisdiction of the subject matter of the action, it is the duty of the Court to render such judgment for costs."

Moreover it is settled law by the decision of the Supreme Court of Montana that such a dismissal or judgment of non-suit of an action as that shown in the order and judgment of dismissal hereto annexed marked "Order of Non-suit," made and entered in and by the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, is not a bar to another action for the same cause of action, the same having been so decided by the Supreme Court of Montana in the case of Kliendschmidt *vs.* Binzel reported in Volume 14 of Montana Reports commencing at page 31, which ruling and decision has been cited with approval by the Supreme Court of said State of Montana as shown in Volume 18, page 12 and 100 of Montana Reports, and there has been no ruling or decision of said Court to the contrary.

That the subject of *abandonment* of property or a right by a person invested therewith, has been many times considered by the trial and appellate Courts of the Territory and State of Montana in adjudicating cases wherein the rights of parties were involved, and it has been held by said Courts in an unbroken line of decisions promulgated during a quarter of a century last past, commencing with the case of Atchison *vs.* Peterson, considered and determined at the August term 1872, of the Supreme Court of the Territory of Montana, and reported in volume 1 of Montana Reports, beginning at page 561, which decision was also affirmed by the Supreme Court of the United States in an opinion delivered by Mr. Justice Field,

reported in 20 Wall. 507, that *abandonment* of a right or thing by the person entitled thereto, is a matter of "*intention;*" and the decisions of the Supreme Court of Montana are to the effect that *abandonment* being a matter of *intention* if relied upon as affecting a right in litigation, it must be alleged so that issue may be raised thereon, and the fact determined *upon proof* showing whether or not there was any *intention* to abandon the right or thing in question. Thus in the case of Tucker versus Jones decided by the Supreme Court of Montana at its July term in 1888, and reported in 8 Montana Reports commencing at page 225 the Court in its opinion at page 230 of said volume, says: "*abandonment is a mixed question of fact and act;*" and that, "if it were necessary to decide the question of abandonment, we would hold with the trial Judge that the *evidence fails to* estsblish any such charge." So in the case of McCauley versus McKeig decided by the Supreme Court of Montana in 1889, and reported in volume 8 of Montana Reports, commencing at page 389 the Supreme Court recites in its opinion on page 392 of said volume, that "the cause was tried with a jury;" and that the *Jury returned* "*special findings covering the issues in the case*," among which was a *finding* that the defendant appropriated certain waters, "in controversy for the purpose of placer mining in 1869, and has never abandoned the same." And in the case of Middle Creek Ditch Company versus Henry, decided by the Supreme Court of Montana in 1895, and reported in volume 15 of the Montana Reports commencing at page 558, the Court in its opinion on page 576 of said volume says: "Abandonment is a matter of intention;" and cites other Montana decisions; and then quotes from a decision of the Supreme Court of California as follows:

"It was said by Terry C. J., Field J., concurring, in Stevens *v.* Mansfield 11 Cal. 366: 'We think the ruling of the Court below clearly erroneous. Admitting the interest of plaintiff in the premises such as could be divested by abandonment, there can be no such thing as abandonment, in favor of a particular individual, or for a consideration, such act would be a gift or sale. And abandonment is 'the relinquishment of a right, the giving up of something to which we are entitled'. (Bouvier's Law Dictionary.) 'Abandonment must be made by the owner, without

being pressed by any duty, necessity, or utility to himself, or simply because he desires no longer to possess the thing; and further it must be made without any desire that any other person shall acquire the same; for if it were made for a consideration, it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift.' (Bouvier's Law Dictionary.)"

And in Beatty versus Murray Placer Mining Company reported in 15 Montana commencing on page 314, the Supreme Court of said State, observe (page 316) that, "*unless abandonment is proved*," the transfer of the land and appurtenances conveyed the water right in controversy.

Again in the case of Smith versus Hope Mining Company, considered and decided by the Supreme Court of the State of Montana at its June term 1896, and reported in volume 18 of the Montana Reports commencing at page 132, the Court in its opinion on page 138 of said volume says:

"We are also of opinion that the *evidence does not sustain the finding* that the plaintiffs had abandoned their right to the use of the waters which they owned, as against the defendant, in 1883. . . . Abandonment is a question of intention."

Also in the case of Wood versus Lowney decided by the Supreme Court of Montana, at its October term 1897, reported in volume 20 of Montana Reports commencing on page 273, the Court in its opinion at page 278 of said volume, says:

"But where is the evidence of such an abandonment other than the relinquishment of a personal intention on J. B. Stewart's part to acquire title to the land for himself? His own statement to his brother that the water went with the land when he told him he could have the land if he proved up on it, his own subsequent cultivation of it, and later on when William acquired title thereto, his purchase of it, all, *as appeared on the trial*, disclose not only that he had no *intent* to abandon the place but every purpose and wish to hold onto the land and water rights he had, and to transfer the same to his brother."

Again in the case of Goon versus Proctor et al., decided by the Supreme Court of Montana at its March term 1903, reported in

volume 27 of Montana Reports of Supreme Court decisions, commencing on page 526, the Court in its opinion recites the substance of the *pleadings* in said cause on the part of the defendants, and among other things on page 528 of said volume, say:

"As an *additional defense it is alleged that*, if any right was ever acquired by Jonathan Goon, the predecessor of plaintiff, it was abandoned by him during his life time, and long before the purchase of her said lands by the defendant Pinney, and that the plaintiff never used it, nor asserted any right to it, until the commencement of this action."

That according to the course of jurisprudence of the territory and now State of Montana, the discussion by a Court or Judge of the question of abandonment of a right or thing in litigation, by a party claiming the same or by his privies or predecessors in interest, in a pending case wherein such proposition or question had not been raised by the pleadings and no opportunity of taking issue thereon, or presenting proofs, touching such issue, and no trial thereof, had ever been had, would be purely and entirely *obiter dicta* on the subject of abandonment, because in such a case no such question could be before the Court for Judicial consideration or decision.

That each and all statutes and decisions in this affidavit or deposition mentioned, cited, or quoted, have been enacted by the Legislative Assembly, and decided by the highest Judicial Court, to-wit, the Supreme Court, of said Territory and State of Montana, as herein mentioned, and were and are in force without change, amendment or reversal as herein stated, and said statutes and decisions have been published and promulgated by the authority of the Legislature of said Territory and State of Montana, as the statutes of said Territory and State, and decisions of said highest Court thereof, in the said statute books and reports herein referred to, cited and quoted from, and the same are deposited in the department of the State, and are received in evidence and used in all the Courts of said State of Montana, and of the United States in and for the District of Montana.

That according to the statute laws of the State of Montana in force since August first, 1897 a promise in writing for the payment

of money in which no rate of interest is stipulated would bear interest, from the date last mentioned at the rate of ten per cent per annum up to February 28, 1899, and thereafter at the rate of eight per cent per annum.

COMPLAINANT'S EXHIBIT ORDER OF NON-SUIT, FOR IDENTIFICATION.

(Exhibit with Deposition of William Y. Pemberton.)

ORDER OF NON SUIT.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

At a regular term of the District Court of the Second Judicial District of the State of Montana, sitting in and for the County of Silver Bow, held at the Court House, in Butte, the County Seat of the said County of Silver Bow on the 11th., day of Dec. A. D. 1902.

Hon. E. W. HARNEY, Judge presiding.

The following proceedings, among others were had, to-wit:

J. S. HARRIS, Administrator, Plaintiff, vs. HENRY A. ROOT, ET AL., Defendants. Department One. Cause No. 2346.

This day the parties hereto being present in Court as on Wednesday, Dec. 10th, 1902, and the jury being present, and answering to their names the further trial herein is by the Court resumed, now the opening statement on behalf of the plaintiff is resumed and being concluded, comes now defendants and object to the introduction of any and all testimony on behalf of plaintiffs upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. After argument of counsel the motion to exclude testimony is by the court sustained to which ruling of the court plaintiff by counsel duly excepts, and is by the court granted 30 days additional time to prepare and serve bill of exceptions herein and upon motion of counsel for defendants the complaint herein is by the Court ordered dismissed and the motion to discharge receiver herein is by the Court reserved for further consideration. Whereupon the jury herein is discharged from further attendance of this cause and this term of court.

E. W. HARNEY, *Judge.*

In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

John S. Harris, as Administrator of the Estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root et al., Defendants.

This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the court and sustained,

Now, therefore, in consideration of the premises aforesaid and the law,

It is ordered, adjudged and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred therein, amounting to the sum of $12.50.

Done in open court this twelfth day of December, 1902.

E. W. Harney, *Judge*.

The State of Montana,

County of Silver Bow, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow do hereby certify that the foregoing is a full, true, correct and complete copy of Journal Entry showing Order of Court in above entitled action made and entered upon the minutes of said District Court, in Journal U Page 176 on the 11th., day of Dec. A. D. 1902; and also of the Judgment for costs on dismissal of said action made and entered in and by said Court on the twelfth day of December A. D. 1902.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of June, A. D. 1904.

Samuel M. Roberts, *Clerk*.

[SEAL] By W. N. Waugh, *Deputy Clerk*.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, John B. McClernan, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that Samuel M. Roberts, whose genuine signature is subscribed to the annexed Certificate and Attestation is and was, at the time of making the same, the Clerk of the said Court, duly elected, sworn, qualified and acting as such Clerk; that full faith and credit are due and ought to be given to his official acts, one of which is his foregoing certificate; that he is the legal keeper of all the Records and the Seal of said Court; that said Certificate and Attestation is in due form of law; and that the Seal affixed thereto is the genuine Seal of said Court.

Witness my hand at Butte, Montana, this 23rd., day of June, A.D. 1904.

JOHN B. McCLERNAN
Judge of said Court.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that the Honorable John B. McClernen, whose name is by him subscribed to the annexed and foregoing certificate, is and was at the time of making the same, Judge of the said District Court of the State of Montana, duly elected, sworn, qualified and acting as such Judge, to all whose official acts as such Judge full faith and credit are due and ought to be given, and that the signature of said Judge to said Certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Butte, Montana, this 23d., day of June, A.D. 1904.

SAMUEL M. ROBERTS
Clerk of said Court.

[SEAL.]

[*Counsel for defendants object to the incorporation of the statement above referred to, for the reason that the same is incompetent, irrelevant and immaterial.*]

Int. 5. Were you acquainted with Colonel Robert G. Ingersoll, late of Dobbs Ferry, Westchester County, State of New York, in his lifetime?

Ans. I was.

Int. 6. Were you present in the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow on some day from the 1st to the 6th of September, 1891, on an occasion when said Robert G. Ingersoll delivered to the court and jury in said court, sitting in the trial of the contests of a writing purporting to be the last will and testament offered for admission to probate in and by said court, an argument in opposition to the admission of said will to probate?

Ans. I was.

Int. 7. State whether or not you heard Colonel Robert G. Ingersoll deliver such argument on that occasion from the commencement to the close thereof.

Ans. I did.

Int. 8. State whether or not, from having been present and heard said argument and having examined the report which I now show you marked on the inside of the cover thereof with the title of this cause and number thereof and the words "Complainant's Exhibit Argument of Colonel Ingersoll in Will Contests, for identification, B. H. B., Special Examiner", which purports to be a report and record of said argument, you can recall and state whether such report is substantially a correct report of said argument as delivered on that occasion by Robert G. Ingersoll in opposition to the admission of said alleged will to probate.

Ans. Well, from having heard the argument and having read this report which is now shown to me purporting to be the argument of Colonel Ingersoll on that occasion, I am satisfied that this report is substantially the speech and argument delivered by Colonel Ingersoll on the occasion in question.

Int. 9. Have you been speaking in your last foregoing answer of

the contents, typewritten on pages 1 to 18 inclusive, of the paper which you now have in your hands?

Ans. I have.

[*Counsel for complainant requests the notary before whom this witness is giving his deposition to mark on sheet numbered 18 of said typewritten report the title and number of this cause and thereunder the words "Complainant's Exhibit Argument of Colonel Ingersoll in Davis Will Contests, for identification", and subscribe his name and official title as notary public thereunder, for the purpose of identifying the paper writing to which the witness last referred.*]

Int. 10. Has said paper writing of which you have been speaking as embracing substantially a correct report of said argument been marked by the notary public before whom you are giving your deposition as above requested?

Ans. Yes, sir.

Int. 11. I will ask you to state whether in making the statement of the statutory law and decisions of the Supreme Court of the Territory and State of Montana, which has been presented here by you and incorporated in the foregoing deposition, you carefully considered the same, and what you have to say as to whether or not the same is a correct statement of the statutory law verbatim, as recited or in effect as set forth in said statement, and as to whether said statement in reference to the course of decisions of the Supreme Court of the Territory and State of Montana upon the subjects mentioned in said statement is correct?

Ans. I have carefully considered the statement, and wherein the statutes therein are quoted verbatim they must of course be correct, and in my judgment where the effect of a statute or statutes is stated therein I believe that to be correct, and I believe the course and effect decisions as stated therein is correct.

[*Counsel for complainant here stated that the direct examination of the witness, Hon. William Y. Pemberton, is concluded. And counsel for defendants states that there will be no cross-examination of the witness.*]

WILLIAM Y. PEMBERTON.

Attest: RAYMOND M. PLACE, *Notary Public.*

Counsel for complainant gives notice on the record that in addition to calling the other witnesses mentioned in the notice for the taking of these depositions he will, on Monday, June 20th, 1904, or as soon thereafter as they can be heard, call and take on behalf of complainant the deposition of James A. Talbott, and perhaps other witnesses, on the question of value of the mining property situated in Silver Bow County, Montana, of which Andrew J. Davis died seized and possessed, before Raymond M. Place, Notary Public, to be certified and returned with the depositions already taken before said notary public under the notice heretofore given in this action.

Adjourned.

BUTTE, MONTANA, June 20, 1904.

DEPOSITION OF HENRY N. BLAKE.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state narratively your name and place of residence, how long you have resided in the Territory and State of Montana, of what profession, if any, you are a member, how long you have practiced said profession in the Territory and State of Montana excepting such time as you may have held judicial positions under the government of said Territory and State, and what official positions you have held and discharged the duties of under the government of said Territory and State.

Ans. My name is Henry N. Blake. I am SIXTY-SIX years of age, and am now and have been during the period of thirty-eight years last past a resident and citizen of the Territory and State of Montana, and a regularly admitted and practicing attorney and counselor at law in the courts of said Territory and State and of the United States within the Ninth Circuit. When holding a judicial position, as hereinafter testified to, I did not engage in the practice of law; from April 22, 1869, to March 3, 1871, I held and discharged the duties of the office of United States Attorney for the District of Montana, having been regularly appointed to that office; from August 10, 1875, to March 2, 1880, I held and discharged the duties of Associate Justice of the Supreme Court of the Territory of Montana;

from March 26, 1889, until the admission of the Territory of Montana into the union of the States, November 8, 1889, I held and discharged the duties of the office of Chief Justice of the Supreme Court of said Territory, having been regularly appointed to that office; from November 8, 1889, until January 2, 1893, I held and discharged the duties of the office of Chief Justice of the Supreme Court of the State of Montana, having been regularly elected to that office; from January, 1895, until January, 1897, I held and discharged the office of District Judge of the First Judicial District of the State of Montana, having been regularly appointed to that office. I am now standing master in chancery and examiner for the United States Circuit Court, Ninth Circuit, for the District of Montana.

Int. 2. State whether or not from your experience in the practice of law in the Territory and State of Montana, and in the discharge of the official duties involved in the official positions which you have mentioned, you gained knowledge of the statutory law and decisions of the highest court of the Territory and State of Montana, namely, the Supreme Court thereof, as the same have been enacted by the Legislative Assembly of said Territory and State, and decided by said Supreme Court, and published and used in the government of said Territory and State and in the adjudication of the courts of said Territory and State and of the United States.

Ans. Yes.

Int. 3. Have you examined a statement purporting to be a statement of certain statutory provisions enacted by the Legislative Assembly of the Territory and State of Montana, and of decisions of the highest judicial tribunal, namely, the Supreme Court of said Territory and State, on certain subjects incorporated in the deposition of Honorable William Y. Pemberton, given before Raymond M. Place, Notary Public, in this case in which you are giving your deposition, which statement commences with the words "Statement by William Y. Pemberton of certain statutory provisions, enacted by the Legislative Assembly of the Territory and State of Montana, and of decisions of the highest Judicial Tribunal, to wit, the Supreme Court of said Territory and State, on certain subjects, to

wit", and continuing from such heading through eleven pages, typewritten, and closing with the words "per annum" on said eleventh page, with exhibit of certain court records thereto annexed?

Ans. Yes, I have carefully examined said statement.

Int. 4. What have you to say as to the correctness of said statement?

Ans. I am of the opinion that the statement is in all respects correct.

Int. 5. Are you familiar with the statutes and decisions and the course of decisions referred to in said statement?

Ans. I am.

Int. 6. Are you acquainted with E. N. Harwood, sometimes referred to as Judge Harwood?

Ans. I am.

Int. 7. Have you knowledge of the judicial position occupied by Judge Harwood in the State of Montana during the period from November 8th, 1889, up to January 2, 1893, and of the cases with which he had to do judicially during said period?

That is objected to as incompetent, irrelevant and immaterial, as having no bearing whatever upon the issues in this case and not raising any presumption as to the right of plaintiff to recover in this action.

Ans. During the period referred to in the question Judge Harwood was Associate Judge of the Supreme Court of the State of Montana, and I am familiar with the cases that were argued before the Supreme Court during that period.

Int. 8. Have you knowledge generally of certain will contests of the alleged will of Andrew J. Davis, deceased, which was prosecuted by Robert G. Ingersoll on behalf of Henry A. Root, Sarah Maria Cummings and others associated with them in the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow?

Ans. Yes.

Int. 9. State whether or not said Judge Harwood, in the discharge of the judicial duties which you have mentioned, had anything to do with said will contest commonly known as the Davis will case.

[*That is objected to as incompetent, irrelevant and immaterial.*]

Ans. During the period from November, 1889, until January 1893, said Davis will case was never upon the docket, and no proceeding was had with reference to it.

Int. 10. State whether or not said Davis will contest, as a case ever came into the Supreme Court for adjudication.

Ans. No.

Int. 11. Were there other matters and proceedings relating to the estate of Andrew J. Davis, deceased, brought into the Supreme Court of the State of Montana during the period you have mentioned, for consideration, review and determination on appeal, in which Robert G. Ingersoll appeared on behalf of Henry A. Root and others who may have been associated with said Henry A. Root?

[*Objected to for the reason that the records of the court are the best evidence.*]

Ans. Yes.

Int. 12. Have you resided in Montana continuously since the 1st of September, 1891?

Ans. Yes.

Int. 13. State whether or not you are acquainted generally with the people throughout the State of Montana.

Ans. I have a large acquaintance with people residing in every county of the State of Montana.

Int. 14. State whether or not you retired from the office of Chief Justice of the State of Montana on January 2d, 1893.

Ans. Yes.

Int. 15. State whether or not you have heard discussion by people of the State of Montana, in various parts of said State, of the argument delivered by Robert G. Ingersoll before the court and jury sitting in the trial of said Davis will contest on or about September 3d, 1891, in opposition to the admission of said will to probate in said District Court of Montana sitting at the city of Butte, Montana.

[*That is objected to as incompetent, irrelevant and immaterial.*]

Ans. I have heard people residing in the counties of Lewis & Clarke and Silver Bow speak about said argument.

Int. 16. I will ask you to state, based upon the discussion of said

argument which you have heard, whether or not, in your judgment, said argument made a deep and lasting impression upon the minds of many people in the State of Montana unfavorable to said alleged will on the point or question of its genuineness as the last will and testament of Andrew J. Davis, deceased.

Objected to as incompetent, irrelevant and immaterial, for the reason that the contract upon which this suit is instituted shows on its face that Colonel Ingersoll was retained to defend said will, which, under the evidence, it has been shown he failed to do, and that under said contract he was not retained to make a deep and lasting impression, or any impression at all, on the minds of the public by reason of his oratorical powers or otherwise, and that the opinion of the general public or of the witness as to the character of the speech of Colonel Ingersoll or concerning its effect is wholly incompetent.

Counsel for complainant moves the court to strike out the statement in the foregoing so-called objection of counsel as to what the evidence shows in this case, and also the argumentative matter stated in the foregoing so-called objection, and impose costs on the defendants for having thrust in that and like immaterial and superfluous matter into the record of testimony in this case.

Ans. The persons with whom I conversed who were residents of the counties of Silver Bow and Lewis & Clarke, Montana, were convinced by the argument of Colonel Ingersoll that his position was correct in reference to said alleged will.

Int. 17. State whether or not you heard few or many intelligent citizens and residents of the counties in the State of Montana which you have mentioned discuss that argument delivered by Colonel Robert G. Ingersoll in said will contest in opposition to said will.

That is objected to as incompetent, irrelevant and immaterial.

Ans. At this time I cannot recall all the persons with whom I conversed concerning said argument of Colonel Ingersoll, but I am satisfied that I heard, I believe, twenty residents of the county of Silver Bow and fifteen residents of the county of Lewis & Clarke.

Counsel for complainant requests the notary public before whom the witness, Henry N. Blake, is giving his deposition here to mark the statement of William Y. Pemberton as to certain statutory provisions

and decisions of the courts of Montana referred to, examined and spoken of by witness Henry N. Blake, with the title and number of this case in which he is giving his deposition and thereunder the words "Complainant's Exhibit Statement of Laws, Statutes and Decisions of Montana referred to in Deposition of Henry N. Blake in above mentioned case", and sign said notary's signature and affix thereunder to identify said statement.]

Int. 18. Has said statement of William Y. Pemberton incorporated in his deposition in this case concerning the laws, statutes and decisions of the Territory and State of Montana, which you have examined and of which you have spoken in your deposition, been marked for identification, as requested in the foregoing request, on the back of the last page of said statement?

Ans. Yes.

Int. 19. Is there attached to said statement of the laws, statutes and decisions to which you have referred and which has been marked as aforesaid certain certified copies of orders and judgment of nonsuit referred to in said statement concerning the laws, statutes and decisions?

Ans. Yes.

[*Counsel for defendants states that he does not care to cross-examine this witness.*]

HENRY N. BLAKE.

Attest: RAYMOND M. PLACE, *Notary Public.*

DEPOSITION OF ANDREW J. DAVIS.

Direct Examination by E. N. Harwood, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name, age and place of residence.

Ans. Andrew J. Davis; forty years; Butte, Montana.

Int. 2. How long have you resided in Montana?

Ans. Twenty years.

Int. 3. What relation were you to the late Andrew J. Davis, who died at Butte, Montana, on or about March 11th, 1890?

Ans. Nephew.

Int. 4. Are you acquainted with Joseph A. Coram, one of the defendants in this action?

Ans. Yes, sir.

Int. 5. Are you acquainted with his handwriting and signature?

Ans. Yes, sir.

Int. 6. Have you seen him write?

Ans. I have.

Int. 7. What business have you been engaged in during most of the time since you arrived at the age of maturity, and what business are you engaged in now?

Ans. Banking.

Int. 8. At what place?

Ans. In Butte, Montana.

Int. 9. I show you a certain writing, in the form of a letter, subscribed "J. A. Coram", which letter has been marked by the notary public before whom you are giving your deposition with the title and number of this cause in which you are sworn to testify, and thereunder the words "Complainant's Exhibit LXIV., for identification", with the name Raymond M. Place, Notary Public, subscribed under said marking, and ask you to examine the signature subscribed to said letter and state whether or not you recognize the same?

Ans. I do.

Int. 10. State whose signature it is.

Ans. It is the signature of Joseph A. Coram.

Int. 11. Have you handled and acted in respect to checks for payment of money and other papers signed by Joseph A. Coram, the validity of which papers depended upon the genuineness of the signature of Joseph A. Coram subscribed thereto?

Ans. I have.

Int. 12. Please state what business relation you occupied for some years prior to the death of Andrew J. Davis, your uncle, in respect to business in which he was interested or engaged.

[*Objected to as incompetent, irrelevant and immaterial.*]

Ans. I transacted and attended to considerable of his personal affairs.

Int. 13. Did you continue to look after such business for your uncle, Andrew J. Davis, up to the time of his decease?

[*Objected to as incompetent, irrelevant and immaterial, and having no bearing whatever on any of the issues in this case.*]

Ans. Yes, sir.

Int. 14. State whether or not your uncle, Andrew J. Davis, was indebted at the time of his decease.

[*Objected to as not the best evidence, the records of the court in which the estate is being probated being the best evidence.*]

Ans. He left very little indebtedness: nothing more than ordinary living expenses and expenses of his last sickness.

Int. 15. Have you been acquainted with the affairs of the estate of Andrew J. Davis, deceased, sufficiently to state whether or not claims of any consequence have been allowed against said estate?

[*Same objection.*]

Ans. Yes, sir.

Int. 16. State whether or not claims have been allowed against said estate of any consequence.

[*Same objection.*]

Ans. No, sir.

Int. 17. State whether or not all claims allowed against said estate have been paid.

Ans. They have been paid.

[*Direct examination closed.*

Counsel for defendants announces that he does not desire to cross-examine the witness.]

ANDREW J. DAVIS.

Attest: RAYMOND M. PLACE, *Notary Public.*

Adjourned.]

BUTTE, MONTANA, June 21, 1904.

DEPOSITION OF THOMAS T. BAKER.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name and age and place of residence.

[*Objected to for the reason that the notice served upon defendants for the taking of these depositions did not provide for the taking of the deposition of Mr. Baker, and no notice whatever has been given of the fact that his deposition would be taken, and for that reason all questions which may be propounded to Mr. Baker are herewith objected to.*

Counsel for complainant states upon the record that the notice served upon counsel for defendants on June 4th, 1904, of the taking of these depositions provided for the taking of the depositions of the witnesses specifically named therein and others", at this time and place, and before Raymond M. Place, Notary Public. That, moreover, on Friday, June 17, counsel for complainant gave notice to counsel for defendants, upon the record, that on Monday, June 20th, 1904, or as soon thereafter as the same could be taken, counsel for complainant would call James A. Talbott and other witnesses to give their depositions at this time and place, and before said notary public, as to the value of the real estate holdings of which Andrew J. Davis died seized and possessed; and this witness is called as one of the witnesses to be interrogated on that subject. Counsel for complainant further states, after the direct examination of this witness, if counsel for defendants so desires, the cross-examination may be continued and not taken up for two or three days in order to give

defendants' counsel time to prepare therefor, so that no prejudice could occur by reason of this witness not having been specifically named in said notice for taking these depositions.]

Ans. My name is Thomas T. Baker; age, sixty-four years past, and my residence is Butte, Montana.

Int. 2. How long have you resided at Butte, Montana?

Ans. Twenty-six years past.

Int. 3. What profession or occupation have you been engaged in during your residence at Butte, Montana?

Ans. I am United States Deputy Mineral Surveyor and Mining Engineer, and followed that business exclusively.

Int. 4. Does that calling require you to do underground surveying as well as surface surveying?

Ans. It does.

Int. 5. State whether or not you have studied geology and mineralogy in institutions during your preparation for pursuing your profession as surveyor and mining engineer.

Ans. I did take a course in both geology and mineralogy.

Int. 6. State whether or not you have carefully studied and investigated the geologic conditions and mineral character existing in the mining camp here at Butte, Montana, generally known as the Butte mining district.

Ans. I have.

Int. 7. Are you acquainted with the patented mining claims situated in said district of which Andrew J. Davis died seized and possessed, among which are the Baltic, the Blue Jay, the Gem, the New Era, the Mount Moriah, the Broker, the Pawnbroker, the Great Republic, the Centerville, the Charlotta, the Hibernia, and also other real estate holdings generally, such as city property?

Ans. I am acquainted with the claims and property.

Int. 8. How long have you been acquainted with said property?

Ans. I have been acquainted with said property since 1878.

Int. 9. State whether or not said mining claims have been granted by patent from the United States government as mining locations.

Ans. As far as I know they have; most of them I know have.

Int. 10. State whether or not you surveyed said mining claims.

or some of them, as Deputy United States Mineral Surveyor as part of the proceedings to obtain patent therefor.

Ans. I did, quite a number of them.

Int. 11. Are you acquainted with the character and value of said mining locations of which Andrew J. Davis died seized and possessed, and which were left as part of his estate, known as the Davis group of mining claims situate in said mining district, together with the other real estate holdings of which said Andrew J. Davis died seized and possessed situate in said district?

Ans. I am acquainted with the claims and their character as shown by the workings on the veins, and some of them with the underground workings, and know their relation with reference to the surrounding property; but as to their value it is in most instances only relative or prospective, as there are only a few of the properties where I have been underground in the veins.

Int. 12. Have you knowledge of the production of certain noted mines in this district adjoining or close by mining claims of which Andrew J. Davis died seized and possessed?

Ans. In a general way I have.

Int. 13. Have you knowledge of the mineralized conditions of certain zones or belts in said district in which said mines owned by Andrew J. Davis, deceased, are situate?

Ans. I have.

Int. 14. I will ask you to state now, from your knowledge of said group of mining properties of which Andrew J. Davis died seized and possessed, and other real estate holdings of his situate in the City of Butte and in said mining district, the value thereof.

[*Objected to for the reason that the witness himself testifies that his knowledge of the physical conditions as to ore bodies in said properties is imperfect; that he has only examined the underground workings of a few of said properties, and hence he is not qualified to give an opinion in answer to the question asked.*]

Ans. I am not prepared to give an exact valuation, but believe from their proximity to other paying properties situated on the same and adjoining veins that a reasonable valuation would be four or five million dollars.

Int. 15. Have you with you a map showing the mining claims situated in said district and showing the relative situation of the mining claims mentioned to other mining claims of great value and which have produced great quantities of ore and been the source of supply of mineralized ore for various reduction works situate in said district? If so, please state the relative situation of said mining claims owned by Andrew J. Davis, of which he died seized and possessed, to said other large producing mines, and something of the mineral character of the zone or zones in which said group of Davis mines are situate. And you may refer to such map for the purpose of refreshing your memory as to the exact location of said mining claims if you desire to do so.

Ans. I have such a map with me, a colored map, showing the claims as surveyed and patented up to 1889. I will state that the Gem lode is situated in the copper producing belt of Meadersville; the Centerville lode is situated in the copper producing belt in the vicinity of the Mountain Consolidated; that the Baltic and Blue Jay are situated in a copper producing belt just south of the Parrot; that the Mount Moriah and New Era are situated just northwest of the Gagnon lode; one claim and a strip lying between the Mount Moriah and the Gagnon; that the Poulin and Buffalo lodes copper producing claims lie north-east of these claims — the New Era and the Mount Moriah, and that the Stewart lode lies just east of the Mount Moriah, and that the Mount Moriah may prove to be on the same vein as the Stewart; that the Stewart is a copper producing claim, while the Mount Moriah surface ores are silver producing, which was the same condition with the Anaconda mine; that the Hibernia lode lies just east of the Nettie lode, both of which produced great quantities of silver; that the Great Republic lies in the western portion of the district, in the vicinity of the Champion and other silver producing claims; that the Broker and the Pawnbroker, the Charlotta lie just west and within the Butte townsite and were silver producing claims. That with reference to the Gagnon mine, it has been continuously worked and the ores treated from the time I came to Butte in 1878 down to the present date, as also the Origi-

nal mine being the eastern extension of the Gagnon, also the Parrot mine referred to has been continuously worked and its ores treated for the last twenty years past; with reference to other mines in the Meaderville district, the Colusa, the Piccolo, the Modoc, the Modoc Extension, the Speculator, the Bell, the Diamond and the High Ore and the Grey Rock and Wild Bill claims, situated in the same copper belt as the Gem lode, have worked, at least most of them worked, continuously for the last twenty years.

Int. 16. Do some of the mining claims in said district, the surface ores of which are principally silver at and near the surface, turn into copper ore as depth is attained in working such mines?

Ans. That is the case with a number of them.

Int. 17. What mine has furnished the principal supply of ore for the Colorado smelter, situate in said district?

Ans. The Gagnon mine.

Int. 18. How was the Gagnon mine being operated when you first knew it?

Ans. It was being worked by miners with a windlass for a hoist, and its ores in 1878 were some of them fabulously rich, and two men at that time in a shift of ten hours hoisted ten thousand dollars of ore from the Gagnon mine.

Int. 19. State whether or not the Colorado smelter is a large or small reduction works.

Ans. Well at first it was small; but, as I understand it, at the present time it is quite extensive works.

Int. 20. What have you to say as to the extent of the Parrot reduction works, which was known as the Parrot smelter?

Ans. The Parrot reduction works were of good capacity, but just how extensive I am not able to state.

Int. 21. What is the situation of the Moonlight lode mining claim as respects the Baltic lode mining claim?

Ans. It lies just east of the Baltic.

Int. 22. State whether or not said Moonlight claim is one of the noted mines in said district.

Ans. It is.

[*Counsel for complainant here stated that the direct examination of the witness, Thomas T. Baker, is concluded.*

Counsel for defendants here stated that he will not cross-examine the witness.]

THOMAS T. BAKER.

Attest: RAYMOND M. PLACE, *Notary Public.*

Counsel for complainant here states that James A. Talbott being physically unable to appear and give his deposition and counsel for complainant having no other witness available to give his deposition before Mr. Raymond M. Place, Notary Public, as mentioned in the notice to take depositions of witnesses in the above-entitled cause, now requests said notary public to certify the foregoing depositions and transmit the same to the above entitled court as provided by law.

BOSTON, MASS., June 29, 1901.

Present: HOLLIS R. BAILEY, Esq., *of Counsel for Complainant;*
THADDEUS D. KENNESON, Esq., *of Counsel for Defendants, except* ANDREW J. DAVIS, Jr., *Trustee.*

Counsel for complainant offers and puts in evidence that certain letter-press impression copy of a letter set forth on pages 129 and 130 of the letter-press copy-book heretofore marked by the special examiner herein "Complainant's Exhibit Letter-Press Copy-Book No. 1, for identification", and requests the special examiner herein to mark said letter-press copy appearing on pages 129 and 130 of said last mentioned book "Complainant's Exhibit XXXII." for use in evidence in this cause.

Counsel for defendants objects to the admission in evidence of the same upon the ground that it is but secondary evidence, and that no foundation for the admission of secondary evidence has been laid, as it has not been proved that Mr. Ingersoll ever wrote or signed an original of which this is claimed to be a copy, or, if he did, that Mr. Root ever received the same, or that the same was ever mailed to Mr. Root, properly directed or with postage prepaid.

The special examiner marks the same as requested.

Counsel for complainant offers and puts in evidence the depositions of John S. Harris, George H. Macdougall, John E. Davis, William Y. Pemberton, Henry N. Blake, Andrew J. Davis and Thomas T. Baker, heretofore taken in said cause before Raymond

M. Place, Notary Public, in and for the County of Silver Bow, State of Montana, at his office in the City of Butte, said county and State, pursuant to notice duly served on defendants' counsel and solicitors; at the taking of which depositions defendants appeared by counsel and cross-examined such of said witnesses as they desired; which depositions are now in this court in the custody of the clerk thereof, and counsel for complainant requests the special examiner herein to include said depositions in the record of proofs on the part of complainant in this cause when the same are opened and published in and by said court, according to law and the practice thereof.

Counsel for defendants objects to this offer upon the ground that it is not a proper method of putting the depositions in evidence, and that the special examiner has no right to receive in evidence these depositions, as counsel is informed, which have been opened and filed by the clerk of this court, and are thereby already in evidence.

Counsel for complainant offers and puts in evidence a certain original letter dated Butte, Montana, May 14, 1902, to which the name "J. A. Coram" is subscribed, and requests the special examiner herein to mark the same with the title and number of this cause and thereunder the words "Complainant's Exhibit LXIV.", for use of the contents thereof in evidence in this cause.

Counsel for defendants objects to this letter as against each of the defendants represented by him, except the defendant J. A. Coram, upon the ground that it is immaterial, irrelevant and incompetent, and the said Coram is not shown to have had authority to have acted for anyone but himself, and counsel for defendants objects to it as against the defendant Coram and the other defendants on the ground that it was a letter written during efforts to effect a compromise.

The special examiner herein marks the same as requested.

Counsel for complainant offers and puts in evidence a certain verified stenographic report of the argument delivered on or about September 3, 1891, by Colonel Robert G. Ingersoll to the court and jury on behalf of Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, Mary L. Dunbar and Joseph A. Coram, associated in contesting the alleged will of Andrew J. Davis, deceased, in opposition to the admission thereof to probate in the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, upon the trial of the contest of said will instituted in said court in the name of Henry A. Root; which verified stenographic report of said argument has been heretofore marked by the special examiner herein "Complainant's Exhibit Argument of Colonel Ingersoll in Davis Will Contests, for identification", and the same has been mentioned by witnesses examined in this cause by reference to said marking, and complainant's counsel now requests the special examiner herein to mark said veri-

fied stenographic report of said argument with the title and number of this case and thereunder the words "Complainant's Exhibit Verified Stenographic Report of the Argument of Col. Robert G. Ingersoll to Jury in Trial of Davis Will Contest, delivered September 3, 1891", for use in evidence in this cause.

Defendants' counsel objects to the admission of the same upon the ground that it is immaterial, irrelevant and incompetent and hearsay.

The special examiner herein marks the same as requested.

Counsel for complainant offers and puts in evidence that certain paper-writing dated April 28th, 1893, containing stipulation between John E. Davis, as administrator of the estate, and the heirs of John A. Davis, deceased, on the one part, providing for the entry of a decree in and by the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow determining certain contests of the alleged will of Andrew J. Davis, deceased, and parceling and awarding certain portions of the estate of said Andrew J. Davis, deceased, directly to Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cormie and Mary Louise Dunbar, parties of the other part to said stipulation, and awarding other portions of the estate of Andrew J. Davis, deceased, for their use and benefit to Charles H. Palmer and Andrew J. Davis, Jr., trustees; and counsel for complainant requests the special examiner herein to mark said last mentioned paper-writing with the title and number of this cause and thereunder the words "Complainant's Exhibit LV.", for use in evidence in this cause.

Counsel for defendants objects to the introduction of the same in evidence upon the ground that it is immaterial, irrelevant and incompetent.

The special examiner herein marks the same as requested.

Counsel for complainant offers and puts in evidence that certain paper-writing dated March 25, 1895, containing stipulation between Harriet R. Sheffield and Henry A. Davis, heirs of Andrew J. Davis, deceased, on the one part, and John E. Davis as administrator and the heirs of John A. Davis, deceased, and others interested in the estate of Andrew J. Davis, deceased, on the other part, providing for the entry of a decree determining certain contests of his alleged will offered for probate in said District Court of Montana, and awarding to said Harriet R. Sheffield and Henry A. Davis a fractional part of the estate of said Andrew J. Davis, deceased, to which they were entitled as his heirs-at-law; and counsel for complainant requests the special examiner herein to mark said last mentioned paper-writing with the title and number of this cause and thereunder the words "Complainant's Exhibit LVI.", for use in evidence in this cause.

Counsel for defendants objects to the introduction in evidence of

the same upon the ground that it is immaterial, irrelevant and incompetent.

The special examiner herein marks the same as requested.

Counsel for complainant offers and puts in evidence a certain paper-writing dated June 22, 1897, containing stipulation between Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, heirs-at-law of Andrew J. Davis, deceased, on the one part, and John E. Davis as administrator and the heirs of John A. Davis, deceased, and others interested in the estate of Andrew J. Davis, deceased, on the other part, providing for the entry of a decree of said District Court of Montana determining certain contests of the will of said Andrew J. Davis, deceased, offered for probate in said District Court and awarding to said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis a fractional part of the estate of said Andrew J. Davis, deceased, to which they were entitled as his heirs-at-law; and counsel for complainant requests the special examiner herein to mark said last mentioned paper-writing with the title and number of this cause and thereunder the words "Complainant's Exhibit LVII.", for use in evidence in this cause.

Counsel for defendants objects to the admission in evidence of the same upon the ground that it is immaterial, irrelevant and incompetent.

The special examiner herein marks the same as requested.

Counsel for complainant offers and puts in evidence a certain paper-writing dated August 6, 1897, containing stipulation between Elizabeth A. Smith, an heir-at-law of Andrew J. Davis, deceased, on the one part, and John E. Davis as administrator and the heirs of John A. Davis, deceased, and others interested in the estate of Andrew J. Davis, deceased, on the other part, providing for the entry of a decree by said District Court of Montana determining a certain contest of the will of said Andrew J. Davis, deceased, offered for probate in said District Court, and awarding to said Elizabeth A. Smith a fractional part of the estate of said Andrew J. Davis, deceased, to which she was entitled as his heir-at-law; and counsel for complainant requests the special examiner herein to mark said last mentioned paper-writing with the title and number of this cause and thereunder the words "Complainant's Exhibit LVIII.", for use as evidence in this cause.

Defendants' counsel objects to the admission of the same in evidence upon the ground that it is immaterial, irrelevant and incompetent.

The special examiner herein marks the same as requested.

Counsel for complainant offers and puts in evidence a duly certified copy of three deeds of conveyance and assignment made, executed, acknowledged and recorded in the office of the county clerk and recorder of Silver Bow County, State of Montana, to

wit: (1) a deed of conveyance and assignment made, executed and delivered by Elizabeth S. Ladd and her husband, Charles H. Ladd, and Mary L. Dunbar, grantors and assignors to Joseph A. Coram, grantee and assignee, conveying and assigning to him certain interests in the estate of Andrew J. Davis, deceased, both real and personal, to which said grantors were entitled; (2) a deed of conveyance made, executed and delivered by Joseph A. Coram and his wife, Ellen S. Cornue and her husband and Sarah Maria Cummings, grantors to Henry A. Root, grantee, and duly recorded in the office of the county clerk and recorder of said Silver Bow County, State of Montana, granting, conveying and assigning to said Henry A. Root certain interests in the real estate formerly belonging to the estate of Andrew J. Davis, deceased, to which said last mentioned grantors were entitled; (3) a certain deed made, executed and delivered by Henry A. Root and his wife, grantors, to Winfield S. Stern, grantee, and duly recorded in the office of the county clerk and recorder of Silver Bow County, State of Montana, whereby said grantors assigned, granted and conveyed certain interests to which they were entitled in and to certain real property formerly belonging to the estate of Andrew J. Davis, deceased, to said Winfield S. Stern, grantee, which copies of said deeds are accompanied by proper certificates duly authenticating the same, all annexed under one cover; and counsel for complainant requests the special examiner herein to mark said certified copies of said deeds and certificates authenticating the same with the title and number of this cause and thereunder the words "Complainant's Exhibit LIX", for use as evidence in this cause.

Counsel for defendants objects to the admission in evidence of the copy of the deed dated November 25th, 1898, by and between Elizabeth S. Ladd and Charles H. Ladd, her husband, and Mary Louise Dunbar, parties of the first part, and Joseph A. Coram, party of the second part, upon these grounds: that the same is immaterial, irrelevant and incompetent; that the same is not duly authenticated in that the certificate of John Weston, County Clerk, does not identify it as one of the instruments or deeds referred to in his certificate; also in that in the certificate of the presiding justice of the District Court the name of the judge is omitted, and that in the certificate of Samuel M. Roberts no name is inserted showing who the presiding justice of the District Court of the Second Judicial District is, or was.

Counsel for defendants objects to the admission in evidence of the deed dated June 2d, 1899, between Joseph A. Coram and Cora E. Coram, his wife, Ellen S. Cornue and Joshua G. Cornue, her husband, and Sarah Maria Cummings, parties of the first part, and Henry A. Root, party of the second part, upon the same ground upon which he objected to the introduction of the last deed.

Counsel for defendants objects to the introduction in evidence of the deed dated May 10th, 1900, between Henry A. Root and Rosine B. Root, his wife, parties of the first part, and Winfield S. Stern, party of the second part, upon the same grounds upon which he objected to the last two deeds.

The special examiner herein marks the same as requested.

Counsel for complainant thereupon announced to the special examiner herein and to counsel and solicitors for defendants that upon the evidence introduced on behalf of complainant, before the special examiner herein, and upon the aforementioned depositions of witnesses taken before Raymond M. Place, Notary Public, now on file in the clerk's office in this court in evidence on behalf of complainant, complainant rests in the introduction of evidence in chief in support of her bill of complaint filed in this cause.

NOTICE OF FILING ORIGINAL PAPERS AND DOCUMENTS WITH SPECIAL EXAMINER FOR USE IN EVIDENCE.

The defendants and their solicitors and counsel in the above-entitled action will please take notice that pursuant to rule 11 and other rules of the above-entitled Court, and rules of the Supreme Court for Courts of Equity of the United States, the complainant in the above-entitled action has offered and put in evidence before Benjamin H. Bradlee, Special Examiner, appointed to take and report to the Court the evidence introduced and submitted in said action, certain original writings, documents, contracts and letters which purport to have been signed by certain of the defendants and other persons mentioned in complainant's bill of complaint in said action for use as evidence on the part of complainant in support of her bill of complaint in said cause, and said writing, documents, contracts and letters have been marked by said special examiner, respectively, as "Complainant's Exhibits XXXII., LXIV.", "Complainant's Exhibit Verified Stenographic Report of the Argument of Robert G. Ingersoll to Jury in trial of Davis Will Contest, delivered September 3, 1891", "Complainant's Exhibit LV.", "Complainant's Exhibit LVI.", "Complainant's Exhibit LVII.", "Complainant's Exhibit LVIII.", and "Complainant's Exhibit LIX."; and that the same are filed with, and now in the custody of, said special examiner, and are subject to your inspection in his custody.

Boston, June 29, 1901.

Respectfully,

E. N. HARWOOD,
J. H. HAZELTON,
HOLLIS R. BAILEY,

Service of the foregoing notice on us by delivery of a copy thereof to each of us, on this twenty-ninth day of June, 1901, is hereby acknowledged.

FREDERICK N. WEIR.
Solicitor for JOSEPH A. CORAM, HENRY A. ROOT, CHARLES H. PALMER, *Trustee*, CHARLES H. LADD, *personally and as Administrator of* ELIZABETH S. LADD, MARY LOUISE DUNBAR and HERBERT P. CUMMINGS, *Exec'r*.

HORACE G. ALLEN.
Solicitor for JOHN H. LEYSON, *Adm'r*, and ANDREW J. DAVIS, JR., *Trustee*.

EVIDENCE FOR COMPLAINANT IN REPLY.

TAKEN DE BENE ESSE PURSUANT TO REVISED STATUTES UNDER SECTIONS 863, 864 AND 865, PURSUANT TO NOTICE, BEFORE ME,

JOSEPH GRASHEIM,
Notary Public.

NEW YORK, N. Y., August 16, 1904.

Present: EDGAR N. HARWOOD, Esq., *of Counsel for Complainant;* THADDEUS D. KENNESON, Esq., *of Counsel for Defendants except for* ANDREW J. DAVIS, *Trustee.*

DEPOSITION OF ROBERT J. WILSON.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name.

Ans. Robert J. Wilson.

Int. 2. Are you the same Robert J. Wilson who testified heretofore in this action before Benjamin H. Bradlee, Special Examiner?

Ans. I am.

Int. 3. You stated in your former testimony in this action that you were employed by Colonel Robert G. Ingersoll in and about his law office in the City and State of New York for some time prior to the decease of Colonel Ingersoll; please state now about the month and year when your employment with Colonel Ingersoll terminated.

Ans. February, '97.

Int. 4. Had Colonel Ingersoll a law office in New York City when you were last employed by him?

Ans. He had.

Int. 5. In what building was Colonel Ingersoll's law office located at the time your employment by Colonel Ingersoll terminated?

Ans. 58 William Street, New York City, State of New York.

Int. 6. His law office was at the place last mentioned, then, in February, 1897?

Ans. It was.

Int. 7. Have you knowledge as to how long Colonel Ingersoll's law office remained at 58 William Street after your employment by him terminated in February, 1897?

Ans. About two months.

Int. 8. Where was Colonel Ingersoll's law office next located, that is, in what building, city and State?

Ans. Postal Telegraph Building, 253 Broadway, New York City.

Int. 9. When was his law office established at the last mentioned place?

Ans. I wasn't in the city at the time it was established there.

Int. 10. Did you visit Colonel Ingersoll's law office in 1897, at said Postal Building, 253 Broadway, New York City?

Ans. I visited it about half a dozen times.

Int. 11. State about the date when you first, of your own personal knowledge, became aware of the fact that Colonel Ingersoll's law office was located at said Postal Building, 253 Broadway, New York City.

Ans. In the latter part of June or first part of July, 1897.

Int. 12. Was Colonel Ingersoll's law office located at the place last mentioned at the time last mentioned, to your personal knowledge?

Ans. It was.

Int. 13. How many times did you visit Colonel Ingersoll's law office at the Postal Building, 253 Broadway, New York City, from the time you first called there in June or July, 1897, up to the end of that year?

Ans. Half a dozen times more or less.

Int. 14. Did you find Colonel Ingersoll there, at each time you visited his law office during the summer and fall of 1897, at said Postal Building?

Ans. I did not.

Int. 15. How many times did you find Colonel Ingersoll there?

Ans. Once I found him with Mr. Farrell, and twice with Maud Ingersoll.

Int. 16. Did you call there to see Colonel Ingersoll personally at

the time you have mentioned as having called at his office at said Postal Building?

Ans. I did.

Int. 17. State whether or not other persons were occupying said law office of Colonel Ingersoll at the place last mentioned.

Ans. A man named Alford G. Coale was occupying the outer office, and Clarence Brown was using a desk in the colonel's private office.

Int. 18. Have you knowledge whether or not Mr. C. P. Farrell also had a desk at Colonel Ingersoll's law office at said Postal Building?

Ans. I saw him occupying the desk and using it for his own purposes, for publishing purposes.

Int. 19. Were you, during the year 1897, acquainted with the members of Colonel Ingersoll's family, and by that I mean those who occupied the same residence with Colonel Ingersoll as their home?

Ans. I was.

Int. 20. You may state whether or not you were then acquainted with Maud Ingersoll.

Ans. I was.

Int. 21. And what relation was Maud Ingersoll to Colonel Robert G. Ingersoll?

Ans. His daughter.

Int. 22. Were you in 1897 acquainted with Clinton P. Farrell, frequently mentioned as C. P. Farrell?

Ans. I was.

Int. 23. State whether or not the said Farrell was a member of Colonel Ingersoll's family, using the term in the sense I mentioned heretofore, that is, one residing in the same household with Colonel Ingersoll?

Ans. He was.

Int. 24. What was the state of Colonel Ingersoll's health in 1896 and 1897?

Ans. His health was bad from November, 1896. There was a slight improvement when I saw him in '97.

Int. 25. State whether or not you became aware about the period mentioned that Colonel Ingersoll's health had become seriously impaired: and if you had such knowledge, state about the time you became aware of that fact.

Ans. I think it was in the latter part of November, 1896; at that time I brought up a phonograph to the house and the colonel was in bed, and I brought it up in his room and set the parts together so it could be operated, and had a fair chance of observing his condition.

Int. 26. You may state whether or not, if you know, Colonel Ingersoll's health continued from the time last mentioned to be seriously impaired.

[*Defendants' counsel objects to this question on the ground that the testimony called for is immaterial, irrelevant and incompetent.*]

Ans. It appeared so.

Int. 27. Had you, while you were in the employ of Colonel Ingersoll, any instruction or direction on the subject of leaving his office when Colonel Ingersoll was there, or during the time that he was at his office?

Ans. I had.

Int. 28. You may state what that instruction or direction was.

[*Defendants' counsel objects on the ground that it is immaterial and irrelevant, incompetent and not rebuttal.*]

Ans. I had positive instructions not to leave the office under any circumstances, unless at the direction of Colonel Ingersoll, when he was there.

Int. 29. State whether or not you faithfully conducted yourself according to that direction, while you were in the employ of Colonel Ingersoll, after November, 1896, up to the time your employment with him terminated.

[*Defendants' counsel takes the same objections to this question as to the last.*]

Ans. I did.

Int. 30. How often did Colonel Ingersoll come to his law office after November, 1896, while you remained in his employ?

[*Defendants' counsel takes the same objection.*]

Ans. About four or five times, to the best of my recollection.

Int. 31. State whether or not some member of Colonel Ingersoll's family came with him when he visited his law office after November, 1896.

Defendants' counsel takes the same objection.

Ans. While I was with him at the William Street office during that time Mr. and Mrs. Farrell always came.

Int. 32. State whether or not, when you called on Colonel Ingersoll at his office at said Postal Building after your employment with him had terminated, you found some member of his family with him each time when you found Colonel Ingersoll at his office at the place last mentioned.

Defendants' counsel takes the same objection.

Ans. I did.

Int. 33. Which member of his family did you find with him at the times and place last mentioned?

Defendants' counsel takes the same objection.

Ans. Miss Maud Ingersoll or Mr. Farrell.

Int. 34. State whether or not you are acquainted with and have personal knowledge of the streets, blocks and buildings in New York City in the neighborhood of 40 Wall Street and up to 253 Broadway in said city, State of New York.

Ans. I am acquainted with the streets, but I would not be able to recollect all the buildings.

Int. 35. State at what place you are now employed and how long you have been employed at that place.

Ans. I am employed in the general postoffice in the City of New York as a regular clerk; I think it is since March, 1898.

Int. 36. Where is said general postoffice situated in respect to 40 Wall Street and 253 Broadway, New York City? I mean whether in the same neighborhood.

Ans. You would pass the general postoffice in going from one place to the other.

Int. 37. Where is said general postoffice building situate with relation to said Postal Building at 253 Broadway, New York City?

Ans. It is about two blocks away.

Int. 38. Are you acquainted with the situation of the building known as 40 Wall Street in said city of New York?

Ans. I am.

Int. 39. State whether or not that building occupies the same position ever since the year 1896 that it now occupies.

Ans. It has.

Int. 40. State whether the building known as the Postal Building, 253 Broadway in said city of New York, has stood in the same position it now occupies during and since the year 1897.

Ans. They have extended it a little on Murray Street since then.

Int. 41. State whether or not the portion of the last mentioned building which is known as the Postal Building, 253 Broadway, New York City, in 1897 has remained in the same position ever since.

Ans. Yes.

Int. 42. Have you knowledge of the distance by city blocks, and also about the distance by linear measurement, a person would be obliged to travel in going by the shortest course in which a person could go, since the year 1896, from 40 Wall Street, leaving that building on the Pine Street side, to said Postal Building at 253 Broadway, New York City?

Ans. About eleven blocks. I suppose it is about half a mile from the Pine Street entrance of 40 Wall Street to the entrance of 253 Broadway.

Int. 43. How many streets would one have to cross in going from 40 Wall Street, leaving that building on the Pine Street side, and proceeding in the nearest course one could select since the year 1896?

Ans. If he took the nearest course, by walking it would take longer than going there by riding.

Int. 44. Well, take the usual course that pedestrians would take in proceeding from 40 Wall Street to 253 Broadway.

Ans. Cross eleven or twelve streets.

Cross Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 45. 253 Broadway is situated at the corner of Broadway and what cross street?

Ans. Murray.

Cross-Int. 46. Do you know where the Chemical Bank Building is?

Ans. It is opposite the City Hall Park on Broadway.

Cross-Int. 47. Is it on the same side of Broadway as No. 253; and, if so, how far from 253 and in what direction?

Ans. It is about two hundred feet on the same side of the street; in a northerly direction.

Cross-Int. 48. If a person were to leave 40 Wall Street on the Pine Street side to go to the Chemical Bank Building, he would pass 253 Broadway, would he not?

Ans. He would.

Cross-Int. 49. Assuming that a person left 40 Wall Street on the Pine Street side, and proceeded through Pine Street west to Broadway, on the west side of Broadway, name the streets that he would pass or cross in going to 253 Broadway.

Ans. Nassau Street is the first, cross to the west side of Broadway, first street Thames, Cedar, Liberty, Cortlandt, Dey, Vesey, Barclay, Park Place, Murray.

Cross-Int. 50. You have omitted Fulton Street, have you not?

Ans. I probably have.

Direct Examination resumed.

Int. 51. How many city blocks would one pass by in proceeding from 40 Wall Street to the Postal Building, 253 Broadway, New York City, by the same route considered in your answer to the last cross-question but one?

Ans. About eleven blocks.

Int. 52. State how many blocks you know of.

Ans. I know of eleven.

Int. 53. Then in going from 40 Wall Street by the course men-

tioned, would one pass by eleven city blocks or "about" eleven city blocks? I wish to get a definite statement, the things mentioned being physical and not subject to much variation?

Ans. You would have reached the eleventh block.

ROBT. J. WILSON.

Attest: JOSEPH GRASHEIM, *Notary Public.*

DEPOSITION OF CLINTON P. FARRELL.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. State your name and place of residence.

Ans. Clinton P. Farrell; New York City, New York.

Int. 2. Are you the same Clinton P. Farrell who testified heretofore in the above-entitled action before Benjamin H. Bradlee, Special Examiner?

Ans. I am.

Int. 3. You testified in your former examination in this action about your acquaintance and residence with Colonel Robert G. Ingersoll and his family during a long period of years; I will ask you to state whether you resided in the same house with Col. Robert G. Ingersoll during the years 1896 and 1897?

Ans. I did.

Int. 4. Will you state whether or not you were acquainted with Robert J. Wilson, who testified here this morning and who was formerly employed by Col. Robert J. Ingersoll in and about his law office, and whether you remember about the time that employment terminated?

Ans. I was acquainted with him, and do remember about the time the employment terminated.

Int. 5. You may state about what time Robert J. Wilson's employment with Colonel Ingersoll terminated.

Ans. Some time in February, 1897.

Int. 6. State whether or not you attended to private business matters for Colonel Robert G. Ingersoll during the year 1897.

Ans. I did.

Int. 7. You may state whether or not Colonel Ingersoll had a law office in New York City in the years 1896 and 1897.

Ans. He did.

Int. 8. Where was his law office situated in those two years?

Ans. At 58 William Street and 253 Broadway, the Postal Telegraph Building.

Int. 9. Where was his law office last situated?

Ans. 253 Broadway.

Int. 10. State when Colonel Ingersoll's law office was established at the place last mentioned.

Ans. The lease commenced to run May 1st, 1897. He was allowed to move during March and April; he had the privilege of moving in and getting the office in readiness during March and April.

Int. 11. State whether or not you personally directed the removal of Colonel Ingersoll's law office to 253 Broadway, New York City, and from what place was said office removed when it was taken to the place last mentioned?

Ans. I did direct the moving of his office from 58 William Street to 253 Broadway.

Int. 12. You say you had the months of March and April to move in to 253 Broadway with said law office; I will ask you to state then about what time Colonel Ingersoll's law office was established in said building at 253 Broadway, as near as you recall?

Ans. I couldn't give the exact date when we were completely settled in the office. It was during the month of April.

Int. 13. Are you acquainted with the location of the building known and numbered 40 Wall Street as it stood in New York City during the years 1896 and ever since?

Ans. I am.

Int. 14. You may state whether or not that building, known as 40 Wall Street, has been standing in the same position ever since the year 1896.

Ans. So far as I know it has.

Int. 15. Have you knowledge of the distance by blocks and also

about the distance by linear measurement of said building known as No. 40 Wall Street from the Postal Building located at and known as 253 Broadway, New York City?

Ans. I have.

Int. 16. Please state the distance by city blocks a person would have to travel from 40 Wall Street, leaving that building on the Pine Street side and proceeding by the nearest course a person could walk to 253 Broadway, New York City.

Ans. It is eleven blocks.

Int. 17. And how many streets would a pedestrian be obliged to cross in going from one of said places to the other?

Ans. He would cross just the same number of streets.

Int. 18. You may state about the distance between those two places by linear measurement, following the course a pedestrian would usually pursue as the most direct and convenient course in proceeding from 40 Wall Street, leaving that building on the Pine Street side, to the Postal Building, 253 Broadway, New York City.

Ans. I should say it was more than half a mile and less than three-quarters; about three-fifths of a mile.

Int. 19. Can you state positively whether the distance between said places is fully or more than a half a mile?

Ans. I should say it was more than half a mile.

Int. 20. You may state whether or not you have carefully considered the distance by examination of the space between said places.

Ans. I have.

Int. 21. Were you acquainted with Colonel Ingersoll's law office and the rooms occupied thereby after it was established at 253 Broadway, New York City?

Ans. I was.

Int. 22. How long did his office remain at the place last mentioned?

Ans. From May 1st, 1897, until the time of his death, a little over two years.

Int. 23. You may state whether or not Colonel Ingersoll had a law office at any time after May 1st, 1897, within two blocks or

within eight hundred feet of the building known as 40 Wall Street, in the city of New York.

Ans. He did not.

Int. 24. How many rooms were occupied by Colonel Ingersoll's law office at 253 Broadway, New York City?

Ans. He had two rooms, one of which was divided, making an office of three rooms.

Int. 25. Describe briefly how those rooms were situate, commencing with the room which would first be entered by a person or persons leaving the elevator and entering said office from the hallway.

Ans. As you entered from the hallway, the first room would be a small reception room; to the left of that was a door which opened into a large room, which was Colonel Ingersoll's private room, but as you entered from the hall into the reception room and went straight along you entered another room.

Int. 26. Who occupied the last mentioned room?

Ans. Mr. Alford G. Coale.

Int. 27. You may state whether or not the large room, which you say was Colonel Ingersoll's private room, occupied the same length occupied by the two smaller rooms.

Ans. It did, exactly.

Int. 28. Then the room occupied by Mr. Coale was in a direct line beyond the reception room?

Ans. It was.

Int. 29. Which way would a person be obliged to turn on entering said reception room to go into Colonel Ingersoll's private office?

Ans. To the left.

Int. 30. Could a person entering said reception room go into Colonel Ingersoll's private office by proceeding to the right?

Ans. He could not.

Int. 31. If Colonel Ingersoll had a private desk in his private room in said law office where he usually sat, I will ask you to state where that desk was located.

Ans. It stood at the farther end of the room near the window fronting toward the centre of the room, the back being toward the

partition wall, far enough from the wall to permit one going to
book cases, and about three feet from the window.

Int. 32. One end of the said desk was toward the window?

Ans. Yes, and the other end toward the door entering the offi

Int. 33. Can you state whether or not at any time while Colo
Ingersoll's law office was at 253 Broadway, New York City, he h
his private desk arranged therein so that the same faced the wall

Ans. I don't think it ever faced the wall. I don't think the po
tion of his desk was ever changed during his occupancy of the offic
It might have been changed in the night: it was always in the sa
position while the office was occupied by us.

Int. 34. What was the state of Colonel Ingersoll's health in 18
and 1897?

[*Defendants' counsel objects on the ground that it is immaterial
irrelevant and incompetent and not rebuttal.*]

Ans. From November 16, 1896, until the time of his death h
was in a very serious condition.

Int. 35. State at what time Colonel Ingersoll's health becam
seriously impaired or when you first became aware of that fact.

[*Defendants' counsel makes the same objection.*]

Ans. Colonel Ingersoll had a slight stroke of paralysis Novembe
16, 1896. From that time on until the time of his death his healt
was considered in a serious condition.

Int. 36. State about how frequently Colonel Ingersoll went to hi
law office in New York City after November, 1896.

Ans. Well, he had no regular time for going to his office after
November 16, 1896. For two months after that date he never left
the house. After he did commence to go about he only went to his
office at occasional intervals, and during the summer of 1897 he
spent most all of his time at Dobbs Ferry.

Int. 37. You may state whether or not, after Colonel Ingersoll
suffered a slight stroke of paralysis in November, 1896, there was
any understanding by members of his family on the subject of some
member of his family accompanying him whenever he left his resi-
dence to go to his office or elsewhere: and if there was any under-
standing on that subject, state what it was.

Defendants' counsel objects on the ground that it is immaterial, irrelevant, incompetent and not rebuttal.

Ans. After he commenced going about it was thoroughly understood by each and every member of his family that he was not to be left alone at any time, and whenever he did go about there was always some one member of his family with him.

Int. 38. Do you recollect any occasion when Colonel Ingersoll went away from his residence anywhere, to your knowledge, after November, 1896, without being accompanied by a member of his family?

Ans. I do.

Int. 39. You may state what occasion that was and whether it was known and made the subject of comment or concern by Colonel Ingersoll's family.

Defendants' counsel objects upon the ground that the testimony called for is immaterial, irrelevant and incompetent and not rebuttal.

Ans. I believe it was in the spring before he died, and before moving to the country, Dobbs Ferry, the colonel went up to the Waldorf-Astoria. Mrs. Ingersoll happened to miss him and came down stairs into my office to see if he was there and was much astonished at not finding him there, so I at once went over to the Hotel Amsterdam, thinking perhaps he had gone to send a telegram or on some other errand, and know that we were all in a great state of excitement. In a short time he returned and told us where he had been. That was the only time I ever knew him to have been left alone.

Int. 40. As a member of the family residing in the same house with Colonel Ingersoll after November, 1896, have you knowledge and can you state whether or not on each and all times when Colonel Ingersoll left his residence, except the occasion which you have just mentioned, he was accompanied by some member of his family?

Ans. I know he never left the house without some member of the family going with him, except that one instance which I have described.

Int. 41. If Colonel Ingersoll was confined at his residence by reason of said slight stroke of paralysis for a period of two months following November 16, 1896, he did not begin to go about until

about the middle of January, 1897. I will ask you to state, if you can recall, whether he went to his office frequently after that during the year 1897, or infrequently.

Ans. Infrequently.

Int. 12. Who accompanied Colonel Ingersoll when he left his residence to go to his law office, or to the City of New York, during said year 1897?

Ans. Either his daughter Maud or myself.

Int. 13. You may state what was the occasion of the care and concern of the family of Colonel Ingersoll that some member of his family should at all times be with him after he suffered said slight stroke of paralysis.

Defendants' counsel objects on the ground that it is incompetent, immaterial and irrelevant and not rebuttal.

Ans. We were all afraid that he might at any moment have a sudden collapse, and always went prepared with the necessary restoratives, which consisted of nitro-glycerine tablets and nitrate of amyl globules, which are given in such cases to resuscitate the patient.

Int. 14. Were those restoratives prescribed by physicians?

Ans. They were. He always had them on his person and so did I.

Int. 15. Did you personally accompany Colonel Ingersoll to his law office in New York City at times during the year 1897?

Ans. I did.

Int. 16. You may state whether or not you faithfully carried out the understanding which you have mentioned as to a member of his family being with Colonel Ingersoll at all times after he suffered such stroke of paralysis, whenever you were the one who left his residence with him to accompany him to his law office.

Ans. I did.

Int. 17. You may state to the court how carefully you observed that understanding or otherwise. Whether you left unattended your personal affairs in fulfilling the injunction or understanding that some member of the family should be with him at all times after he had suffered said stroke?

Defendants' counsel objects on the ground that it is immaterial, irrelevant and incompetent and not rebuttal.

Ans. The understanding was observed most religiously, and no personal interests would be important enough to hinder my observing the understanding I had with the family.

Int. 48. You may state whether or not when you accompanied Colonel Ingersoll at his law office, after he had suffered said stroke, you remained with him and returned to his residence with him.

Ans. I did, always.

Int. 49. Have you personal knowledge where Colonel Ingersoll was during the last days of September, 1897?

Ans. I have.

Int. 50. Where was he?

Ans. At Dobbs Ferry, New York.

Int. 51. State whether or not Colonel Ingersoll left the State of New York about the first of October, 1897?

Ans. He did.

Int. 52. Where did he go about that time?

Ans. Boston, Massachusetts.

Int. 53. Can you state whether or not Colonel Ingersoll visited his law office in New York City during the latter days of September, 1897?

Ans. He may have done so, but I have no distinct recollection of it.

Int. 54. You may state whether or not you kept a record of the times that Colonel Ingersoll left New York and where he went during the period from November, 1896, until his death.

Ans. Well, I kept a record of all appointments calling him out of New York relating to lecturing engagements upon which I accompanied him. I didn't keep a daily record of all his movements from day to day.

Int. 55. Please state in what kind of a book such record was kept.

Ans. A regular date book, containing the months, weeks and days of each year.

Int. 56. You may state whether such book contained a calendar printed therein, and whether that was in form of a diary.

Ans. It did contain a printed calendar and did contain a calendar.

Int. 57. Have you said book or books here with you?

Ans. I have.

Int. 58. I will ask you to state, if you know, and you may look at the date book or calendar which you have to refresh your memory if you need to, on what day of the week was September 29th, 1897.

Ans. Wednesday.

Int. 59. On what day of the month was the next Friday following September 29th, 1897?

Ans. October 1st.

Int. 60. On what day of the month was the next Monday following October 2d, 1897?

Ans. October 4th.

Int. 61. You have stated that Colonel Ingersoll went to Boston, Massachusetts, about the first of October, 1897. I will ask you to state now on what day of the week and the day of the month Colonel Ingersoll took that trip.

Ans. He left New York City, Saturday, October 2d, for Boston.

Int. 62. Did you accompany him?

Ans. I did.

Int. 63. Could you have stated the dates you have just been mentioning and where Colonel Ingersoll went at that time without the aid of some record to refresh your memory?

Ans. Probably I could not.

Int. 64. You have not referred to any book or books while under examination in making answers to said questions, have you?

Ans. I have not.

Int. 65. Have you recently referred to the record you have mentioned?

Ans. I have.

Int. 66. And have you examined the same to aid or refresh your memory as to where Colonel Ingersoll was at the times mentioned?

Ans. I have.

Int. 67. I will ask you to exhibit to counsel for defendants, Mr.

Kenneson, the entries in said date book to which you have referred to refresh your memory.

Ans. Very well, I will do so.

Int. 68. State whether or not you have exhibited to defendants' counsel, Mr. Kenneson, who is attending the taking of your deposition, the entries in the books which you have mentioned and to which you referred to refresh your memory.

Ans. I have.

Int. 69. State at what place Colonel Ingersoll took his lodgings while in Boston about the first of October, 1897.

Ans. He stopped at the Adams House.

Int. 70. You may state who, if any other members of Colonel Ingersoll's family, accompanied him to Boston about the first of October, 1897.

Ans. Mrs. Ingersoll and myself.

Int. 71. State what persons, if any, occupied Colonel Ingersoll's law office, as an office, during the year 1897?

Ans. Mr. Clarence Brown had a desk in Colonel Ingersoll's room; for quite a time a man named Judge Murphy had a desk there; I also had a desk in the office; Mr. Alford G. Coale. Those are all who had desks in the office.

Int. 72. You may state whether or not those persons whom you have just mentioned did their office work and business at said office in the year 1897.

Ans. They did.

Cross Examination by T. D. KENNESON, Esq., *of Counsel for Defendants.*

Cross-Int. 73. No. 253 Broadway, when Colonel Ingersoll had his office there, was situated, was it not, at the northwest corner of Broadway and Murray Street?

Ans. Yes.

Cross-Int. 74. Upon what floor of the building was the colonel's office?

Ans. I think it was the fifth. I won't be sure as to that.

Cross-Int. 75. Did his office overlook Broadway or Murray Street?

Ans. Murray Street.

Cross-Int. 76. The room which Colonel Ingersoll occupied had four walls, did it not?

Ans. To the best of my recollection, it had.

Cross-Int. 77. The desk which he used must have faced one of those four walls, must it not?

Ans. I presume you could not place a desk in a room having four walls so that it would not face one wall.

Cross-Int. 78. As you entered the office how did the door leading into the office swing, to the right or to the left, and into the office or out of the office?

Ans. It swung in and swung back to the left.

Cross-Int. 79. Where was the door into Colonel Ingersoll's office with reference to this outer door when swung inward and towards Colonel Ingersoll's office?

Ans. As you entered the office from the hall, which landed you in this reception room, to your left was a door which opened into Colonel Ingersoll's private office, as it was called. That door on opening it swung to the right; you turned to the left from the reception room to go into the room, but the door swung to the right.

Cross-Int. 80. The witness appears to have misunderstood my question. Will the stenographer re-read it?

Ans. The door that you entered swung back to the left; that brought you almost to the door going into Colonel Ingersoll's private room, which swung to the right. Both doors opened inside of this small reception room.

Cross-Int. 81. Do you know where the Chemical National Bank is situated in New York City?

Ans. I know about where it is.

Cross-Int. 82. Was it situated at the same place through the year 1897?

Ans. So far as I know.

Cross-Int. 83. Where was the Chemical National Bank in 1897 situated with reference to the building 253 Broadway?

Ans. It was on Broadway north of 253, near the end of the next block and on the same side of Broadway.

Cross-Int. 84. Do you know where 40 Wall Street is and was in 1897?

Ans. I do.

Cross-Int. 85. Would not a person leaving 40 Wall Street on the Pine Street side and walking to the Chemical National Bank be likely to pass the building 253 Broadway?

To which question counsel for complainant objects on the ground that the testimony called for is not cross-examination, nor is it relevant or material.]

Ans. If he went up Pine Street to Broadway and then up Broadway to the Chemical Bank, he would; but if he went from Pine Street through Nassau and then up Nassau to City Hall Park and through City Hall Park to the Chemical Bank he would not.

Cross-Int. 86. If he went up Nassau Street and passed from Nassau Street to Broadway through any street south of City Hall Park to Broadway, he would pass 253 Broadway on his way to the Chemical Bank, would he not?

Ans. He would.

Direct Examination resumed.

Int. 87. Could a person who entered the reception room of Colonel Ingersoll's law office at 253 Broadway, New York City, proceed in to the private office occupied by Colonel Ingersoll at said place by turning to the right after entering said reception room?

Ans. He could not.

Int. 88. Which way would such person be obliged to turn on entering said reception room to go into Colonel Ingersoll's private office?

Ans. To the left.

CLINTON P. FARRELL.

Attest: JOSEPH GRASHEIM, *Notary Public.*

DEPOSITION OF MAUD R. INGERSOLL.

Direct Examination by E. N. Harwood, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name and relation to Colonel Robert G. Ingersoll, who died at Dobbs Ferry, New York, about July 21st, 1899?

Ans. Maud R. Ingersoll: am his daughter.

Int. 2. Are you the same Maud Ingersoll who testified heretofore in this action before Benjamin H. Bradlee, Special Examiner therein?

Ans. I am.

Int. 3. Please state what was the condition of Colonel Robert G. Ingersoll's health in 1896, and from that time on until his decease.

Ans. Very serious.

Int. 4. When did you first become aware that Colonel Ingersoll's health was seriously impaired?

Ans. November 16th, 1896.

Int. 5. What event occurred about that time in respect to his health?

Ans. He had a slight stroke of paralysis.

Int. 6. Were you with him at the time he suffered said stroke?

Ans. Yes.

Int. 7. Please state what Colonel Ingersoll did following that event.

Ans. He came home and stayed in the house for two months.

Int. 8. State about the time of the year and the year when he began to get about after the stroke which you have mentioned.

Ans. In January, '97.

Int. 9. You may state whether or not you resided at home with Colonel Ingersoll and his family during all the time throughout the year 1897, when Colonel Ingersoll was at home from the first of said year.

Ans. Yes.

Int. 10. Did you have knowledge personally of each time that Colonel Ingersoll left his residence to go to the city or elsewhere while he was at home in New York State during the year 1897?

Ans. Yes.

Int. 11. Can you state of your own knowledge whether or not some member of his family accompanied Colonel Ingersoll each time when he left his residence to go elsewhere while he was in New York State during the said year 1897?

Ans. Yes.

Int. 12. Please state.

Ans. Someone always went with him.

Int. 13. How frequently did Colonel Ingersoll visit his law office in New York City after he began to get about in January, 1897, and during the rest of that year?

Ans. He did not go very often.

Int. 14. Where was his office located in New York City during that year 1897?

Ans. In the Postal Telegraph Building, 253 Broadway.

Int. 15. Do you remember what time in that year Colonel Ingersoll's law office was first located at 253 Broadway, New York City?

Ans. Early in the spring.

Int. 16. Who accompanied Colonel Ingersoll when he left his residence to go to his law office in New York City at the times he went there during the year 1897?

Ans. Either my uncle, Mr. Farrell, or myself.

Int. 17. Is the Mr. Farrell you mention Clinton P. Farrell, who testified here in this room today?

Ans. Yes.

Int. 18. Do you recall about how many times you accompanied Colonel Ingersoll to his law office in New York City during the year 1897?

Ans. I couldn't tell.

Int. 19. You may state whether or not you went there with Colonel Ingersoll occasionally.

Ans. Yes.

Int. 20. State whether or not there was any understanding by yourself and other members of the family on the subject of someone accompanying Colonel Ingersoll when he left his residence after he suffered that stroke of paralysis in November, 1896.

Ans. It was.

Int. 21. You may state what understanding there was in that respect.

Ans. He might be ill at any time and someone must always be with him.

Int. 22. You may state whether it was understood that some member of his family who resided in the same household with him should accompany him and remain with him when he left his residence until he returned thereto.

Ans. That was perfectly understood.

Int. 23. Please state what, if any, directions were given by Colonel Ingersoll's physician to members of his family as to what should be done in case he suffered any stroke of paralysis or attack of that nature.

Ans. We had medicines to give him.

Int. 24. Were such medicines always kept by the one who accompanied Colonel Ingersoll when he left his residence after November, 1896?

Ans. Yes.

Int. 25. Can you state of your own knowledge and recollection whether or not Colonel Ingersoll's law office was at 253 Broadway in June, 1897, and continued to be there during the rest of that year?

Ans. I can.

Int. 26. Please state.

Ans. His office was at 353 Broadway from June, 1897, until July, 1899.

Int. 27. State whether or not Colonel Ingersoll had a law office at any other place in New York City during the period last mentioned.

Ans. He had not.

Int. 28. State whether or not, when you accompanied Colonel Ingersoll to his law office, at each time you so accompanied him after November, 1896, you remained with him while he was at his law office and returned with him to his residence.

Ans. I never left him but once, for about half an hour in '99, to go on an errand for my mother.

Int. 29. At the time you left him on the one occasion in 1899, did you leave Colonel Ingersoll with any other person or persons at his law office?

Ans. I left him with Mr Clarence Brown and Mr. Hazelton.

Int. 30. You may state whether or not those two persons last mentioned were friends of Colonel Ingersoll and occupants of his law office.

Ans. They were.

Int. 31. State whether or not you are acquainted with Robert J. Wilson, who testified here in this room today.

Ans. I am, yes.

Int. 32. State whether or not Robert J. Wilson called on Colonel Ingersoll at any time in the year 1897 at Colonel Ingersoll's law office when you were there.

Ans. He did.

Int. 33. How many times, according to your best recollection?

Ans. Two or three.

Int. 34. Are you acquainted with Henry Root, Joseph A. Coram and Walter S. Logan or either of them?

Ans. I am, all of them.

Int. 35. State whether or not Henry Root, to your knowledge, called on Colonel Ingersoll at his law office at 253 Broadway, New York City.

Ans. He did.

Int. 36. State who, if anyone, accompanied Henry A. Root at the time he called on Colonel Ingersoll at his law office at the place last mentioned.

Ans. Mr. Coram and Mr. Logan.

Int. 37. State as near as you can recall when those persons came to Colonel Ingersoll's law office at 253 Broadway, New York City.

Ans. In the fall of 1897.

Int. 38. Did they hold an interview or have some conversation with Colonel Ingersoll at that time?

Ans. They talked for some time with him.

Int. 39. Do you know Simon H. Stern personally?

Ans. I do.

Int. 10. Did you hear him testify in giving a deposition in New York City on or following July 22d of this year?

Ans. Yes.

Int. 11. Do you remember being in Philadelphia with your father, Colonel Robert G. Ingersoll, at a theatre on an occasion when Simon H. Stern came and had some conversation with your father?

Ans. I do.

Int. 12. When did said event occur?

Ans. In June, 1899.

Int. 13. How do you fix the exact date or month in which said event occurred?

Ans. I went with my father to Philadelphia when he tried the Russell will case, and it was the last time he ever spoke in public.

Int. 14. Is there any other event that you can refer to as showing the date when Mr. Stern met your father at a theatre in Philadelphia?

Ans. It was the last time I ever went away with my father; we have the speech he made in the Russell will case; it was on the twenty-first of June, 1899.

Int. 15. Has that argument been published in Colonel Ingersoll's permanent works?

Ans. Yes.

Int. 16. Did you help prepare that matter for publication?

Ans. I did.

Int. 17. State whether or not Colonel Ingersoll gave any interview which was published in any newspaper on that occasion when he was in Philadelphia and Mr. Stern met him at the theatre as mentioned.

Ans. He gave an interview, the last interview he gave, and was published in his works.

Int. 18. And can you state from that publication the date on which Colonel Ingersoll was in Philadelphia on the occasion that Mr. Stern met and conversed with him a little at the theatre?

Ans. Yes.

Int. 19. How long did Colonel Ingersoll stay in Philadelphia at the time of the trial of the Russell will case that you have mentioned?

Ans. We were there several days: three days, I think.

Int. 50. Can you recall and state the condition of the weather at the time of Mr. Simon H. Stern met Colonel Ingersoll and had a little conversation with him at the theatre in Philadelphia?

Ans. It was very warm.

Int. 51. By what circumstance do you recall the condition of the weather?

Ans. I know it was very warm in the court room while the case was being tried.

Int. 52. How was it at the theatre?

Ans. It was a little cooler in the evening, but warm.

Int. 53. Was some friend or associate of Colonel Ingersoll in said will case at the theatre the same evening when Mr. Stern met Mr. Ingersoll?

Ans. Mr. Clarence S. Brown went with us, but left before the theatre was over.

Int. 54. Do you remember why he left or the reason suggested for his leaving?

Ans. Yes, he was so warm and tired.

[*Direct examination finished.*

No cross-examination.]

MAUD R. INGERSOLL.

Attest: JOSEPH GRASHEIM, *Notary Public*.

EVIDENCE FOR COMPLAINANT IN REPLY.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED, BEFORE ME.

BENJAMIN H. BRADLEE,
Special Examiner.

BOSTON, MASS., Sept. 1, 1904.

Present: EDGAR N. HARWOOD, Esq., *of Counsel for Complainant;* THADDEUS D. KENNESON, Esq., *of Counsel for all Defendants except* ANDREW J. DAVIS, Jr., *Trustee.*

Counsel for complainant offers and puts in evidence in rebuttal on behalf of complainant the depositions of Robert J. Wilson, Clinton P. Farrell and Maud R. Ingersoll, heretofore taken on or about August 16th, 1904, before Joseph Grasheim, a notary public within and for the county of New York, State of New York, at No. 117 East Twenty-First Street in the city of New York, pursuant to notice duly served on solicitors and counsel for defendants, and annexed to said depositions; which depositions were duly transmitted to this court by said notary public and are now in the custody of the clerk thereof; and counsel for complainant requests the special examiner herein to include said depositions in the record of proofs in this cause on the part of complainant in rebuttal when the same are opened and published in and by said court according to law and the practice thereof.

Counsel for respondents objects to the introduction in evidence of these depositions on the ground that it is not proper practice to offer them in evidence; the fact that they are on file makes them a part of the evidence in this case without any offer of them in evidence, and the offer is improper.

DEPOSITION OF JOHN H. LEYSON.

Direct Examination by E. N. HARWOOD, Esq., *of Counsel for Complainant.*

Int. 1. Please state your name and place of residence.

Ans. John H. Leyson; Butte, Montana.

Int. 2. Are you the same John H. Leyson who testified heretofore in this action before Benjamin H. Bradlee, Special Examiner?

Ans. I am.

Int. 3. Were you personally acquainted with Colonel Robert G. Ingersoll, now deceased, late of Dobbs Ferry, State of New York, in his lifetime?

Ans. I was.

Int. 4. How long had you been personally acquainted with said Robert G. Ingersoll prior to his decease?

Ans. It must have been thirty to thirty-five years since I first met him.

Int. 5. How was said Robert G. Ingersoll usually addressed and referred to in conversation and correspondence?

Ans. Either Colonel Ingersoll or Colonel Robert G. Ingersoll.

Int. 6. Did you meet said Robert G. Ingersoll in Butte, Montana? If so, please state when.

Ans. I did: I met him either in the summer or the fall of 1891, during the progress of the trial of the contest of the will of Andrew J. Davis, deceased.

Int. 7. Have you knowledge of what Mr. Robert G. Ingersoll was engaged about at the time you say you met him in Butte, Montana, in 1891?

Ans. Yes, sir.

Int. 8. What was he engaged about at that time.

Counsel for defendants objects upon the ground that the testimony called for is not in rebuttal.

Counsel for complainant states on the record that the foregoing and other questions put to this witness as to his knowledge of Colonel Ingersoll are for the purpose of showing the knowledge of the witness as to Colonel Ingersoll's action in and about the matters inquired of, to show that the witness is qualified to testify in respect to the matters which will be inquired of.

Ans. He was engaged in the contest of the will to secure the interests of Mr. Henry A. Root and those associated with him, his sister, Mrs. Ellen S. Corinne, his aunt, Mrs. Maria Cummings, Mrs. Elizabeth S. Ladd and her husband, Miss Mary Louise Dunbar and Mr. Joseph A. Coram.

Int. 9. Are you personally acquainted with Henry A. Root and Joseph A. Coram, defendants in this action?

Ans. I am.

Int. 10. Are you personally acquainted with Walter S. Logan, an attorney and counsellor at law of New York City, State of New York?

Ans. I am.

Int. 11. How long have you know him?

Ans. Since the April of 1897.

Int. 12. State whether or not said Walter S. Logan, as attorney and counsellor at law, represented certain heirs of Andrew J. Davis, deceased.

Ans. Yes, sir, he did.

Int. 13. About what time did said Walter S. Logan, to your knowledge, have charge of interests of certain heirs of Andrew J. Davis, deceased?

Counsel for defendants objects upon the ground that the testimony called for is not in rebuttal.

Ans. I know that he had charge in April, 1897, when I met him.

Int. 14. State whether or not he has continued since that time to represent certain heirs of Andrew J. Davis, deceased, and mention what heirs he represented.

Same objection.

Ans. He continues and represents the Harriet Wood interest at the present time, but Calvin P. Davis and Elizabeth S. Bowdoin have attempted to withdraw from him and employ other counsel.

Int. 15. State briefly about how long Walter S. Logan represented said heirs you have last mentioned, just giving about the period of time.

Same objection.

Ans. From 1897 to about 1901.

Int. 16. Do you recall where you were during the period from and including September 29, 1897, to and including the Monday next following, October 2d, 1897? If so, please state.

Same objection.

Ans. I do; I was in and about Boston, Massachusetts.

Int. 17. Did you receive a written communication from Henry A. Root, one of the defendants in this action, dated September 29, 1897, requesting you to meet Colonel Robert G. Ingersoll and others at his office in New York City on the next Friday following September 29, 1897?

[*Same objection.*]

Ans. Yes, sir.

Int. 18. Where did you receive that communication and how was it brought to you?

[*Same objection.*]

Ans. It came by mail, and I received it at the office of Horace G. Allen, my counsel in Boston.

Int. 19. Will you please produce that letter?

[*Same objection.*]

Ans. Yes, sir, I will. [*Letter produced.*]

Int. 20. Are you acquainted with the handwriting and signature of Henry A. Root?

Ans. Yes, sir.

Int. 21. Have you seen him write?

Ans. Yes, sir.

Int. 22. State in whose handwriting is the written portion of said last mentioned letter and whose signature is subscribed thereto, if you know.

Ans. It was written and signed by Mr. Henry A. Root.

Int. 23. State whether or not all of said letter, except the words "Law Office Robert G. Ingersoll, 253 Broadway, Rooms 813-814, New York", and the figures "189" was written by Henry A. Root.

Ans. Yes, sir, it is in his handwriting.

[*Counsel for complainant offers and puts in evidence the letter last mentioned by the witness on behalf of complainant in rebuttal, and requests the special examiner herein to mark the same with the title and number of this case and thereunder the words "Complainant's Exhibit L.N., in Rebuttal".*

Counsel for defendants objects to the same as irrelevant, immaterial and incompetent and not in rebuttal.]

Int. 24. In the last mentioned letter you were requested to meet

Colonel Ingersoll, Mr. Logan, Mr. Demond and the writer of the letter "at Col. Ingersoll's office on Friday, at 2 P.M.": please state whether or not you attended any meeting at the time and place mentioned in said letter.

Same objection.

Ans. No, sir, I did not.

Int. 25. Where were you on Friday following September 29, 1897?

Same objection.

Ans. I was in and about Boston, Massachusetts.

Int. 26. Where was the law office of Colonel Ingersoll's, mentioned in said letter?

Same objection.

Ans. It was in New York City.

Int. 27. Did you receive another communication, dated October 2d, 1897, from defendant Joseph A. Coram requesting you to meet with Colonel Ingersoll, Joseph A. Coram, Henry A. Root and Walter S. Logan at the Adams House, in Boston, Massachusetts, on the next Monday following October 2d, 1897?

Same objection.

Ans. Yes, sir, I did.

Int. 28. How was the last mentioned communication brought to you?

Same objection.

Ans. It was a telegram.

Int. 29. Whose name is subscribed to that telegram?

Same objection.

Ans. J. A. Coram's.

Int. 30. Have you the last mentioned telegram in your hand?

Same objection.

Ans. Yes, sir.

Int. 31. Will you please produce it so that it can be introduced and marked in evidence in this case?

Ans. Yes, sir, here it is.

Int. 32. Where were you when you received said telegram?

Same objection.

Ans. I was in Waltham, Massachusetts.

[*Counsel for complainant offers and puts in evidence the telegram last mentioned by the witness, on behalf of complainant in rebuttal, and requests the special examiner herein to mark the same with the number and title of this cause and thereunder the words "Complainant's Exhibit LXI., in Rebuttal".*

Counsel for defendants objects upon the ground that it is immaterial, irrelevant and incompetent and not in rebuttal, and that it has not been proved that J. A. Coram sent this telegram, and that the paper offered in evidence is but secondary evidence: that the original is not accounted for.]

Int. 33. In the last mentioned telegram, introduced and marked in evidence "Complainant's Exhibit LXI., in Rebuttal", it is stated "Root wants you to meet Logan, Ingersoll him and me at Adams House, Boston, Monday twelve, J. A. Coram": please state whether or not you met wit Colonel Ingersoll and other persons mentioned in said telegram as requested therein.

[*Objected to as immaterial, irrelevant and incompetent and not in rebuttal.*]

Ans. Yes, sir, I met them according to the request, but it was two o'clock instead of twelve.

Int. 34. Where was that meeting?

[*Same objection.*]

Ans. In Colonel Ingersoll's room at the Adams House, Boston, Massachusetts.

Int. 35. Who were present at that meeting?

[*Same objection.*]

Ans. Colonel Ingersoll, Mr. Logan, Mr. Coram, Mr. Root and I.

Int. 36. Was there talk or discussion at said meeting by the parties you have mentioned upon some subject?

[*Same objection.*]

Ans. Yes, sir, there was talk.

Int. 37. What subject-matter or affairs was discussed or talked of at that meeting?

[*Same objection.*]

Ans. The affairs and interests of the estate of A. J. Davis, deceased.

Int. 38. State whether or not Colonel Ingersoll took part in the discussion of the matters or affairs which you have mentioned at the meeting last mentioned.

[*Same objection.*]

Ans. Yes, sir, he did.

Int. 39. State who or whose interests Colonel Ingersoll represented at said meeting.

[*Same objection.*]

Ans. All the interests he ever represented, Mr. Root, Mr. Coram, Mrs. Cornue, Mrs. Cummings, Mrs. Ladd and Miss Dunbar.

[*Counsel for defendants moves to strike out the testimony of this witness upon the ground that it calls for evidence as to transactions subsequent to the entry of the decree of August 24th, 1897, when it is claimed that the complainant's cause of action accrued.*]

Int. 40. State whether or not Colonel Ingersoll at that meeting, on behalf of the heirs of Andrew J. Davis, deceased, and others whom he represented, urged you to take certain action as administrator of Andrew J. Davis, deceased.

[*Objected to as immaterial, irrelevant and incompetent and not in rebuttal.*]

Ans. Yes, sir, he did.

Int. 41. I will ask you to state some particular thing that Colonel Ingersoll, at that time, especially urged you to do as such administrator.

[*Objected to on the same ground, and on the further ground that it calls for personal communication with Colonel Ingersoll, who is deceased.*]

Ans. He urged me to sue out a writ of error in the First National Bank stock case in Butte, Montana.

Int. 42. In what court did Colonel Ingersoll urge you to sue out such writ of error?

[*Same objection.*]

Ans. In the Supreme Court of the United States.

Int. 43. Please state whether or not the heirs of Andrew J. Davis,

deceased, after his death, up to that time and thereafter claimed that nine hundred and fifty shares of the capital stock of the First National Bank of Butte, Montana, belonged to the estate of Andrew J. Davis, deceased, and controverted a claim of Andrew J. Davis, Jr., to the same stock.

[*Objected to as immaterial, irrelevant and incompetent and not in rebuttal.*]

Ans. Yes, sir, there was such a controversy.

Int. 44. Had that contention been litigated in the courts of Montana?

[*Same objection.*]

Ans. Yes, sir.

Int. 45. For what reason, or purpose, did Colonel Ingersoll and others desire you to sue out said writ of error in said bank stock case?

[*Same objection. It also calls for a conclusion.*]

Ans. To acquire possession of the bank stock as an asset of the estate.

Int. 46. Did Colonel Ingersoll and others, at that meeting, state to you anything about what decision they wanted to get reviewed or considered by the Supreme Court of the United States by suing out a writ of error as you have mentioned?

[*Objected to as immaterial, irrelevant and incompetent, not in rebuttal and calling for personal transactions with Colonel Ingersoll, now deceased.*]

Ans. Yes, sir, the decision of the State of Montana in the bank stock case.

Int. 47. Was such writ of error from the Supreme Court of the United States sued out in that matter in your name after the meeting with Colonel Ingersoll and others at the Adams House in Boston, Massachusetts, at the time you have just mentioned?

[*Objected to as immaterial, irrelevant and incompetent, and not in rebuttal.*]

Ans. Yes, sir.

[*Counsel for complainant introduces in evidence in this case in rebuttal by reference the opinion and decision of the Supreme Court*

of the United States in the case of Leyson v. Davis, reported at pages 36, et seq., of Volume 170 of the Reports of the Decisions of the Supreme Court of the United States, showing the consideration and determination of said case upon writ of error, merely for the purpose of showing the time when the same was submitted and determined by the Supreme Court of the United States in the year 1898, and that Robert G. Ingersoll appeared therein for plaintiffs in error.

Counsel for defendants objects upon the ground that it is immaterial, irrelevant and incompetent and not in rebuttal, and that the facts sought to be proved cannot be proved in this way.

Int. 48. Did you ever hear Henry A. Root, one of the defendants in this action, say anything about Colonel Ingersoll having gone to Washington, D. C., and taken certain action, or doing something in reference to applying for, or suing out, a writ of error to review said bank stock case?

Objected to as immaterial, irrelevant and incompetent, not in rebuttal, calling for hearsay testimony and with reference to matters long after the entry of the decree of August 21, 1897, when it is claimed that the complainant's cause of action became perfect and accrued.

Ans. Yes, sir, I did.

Int. 49. What did Henry A. Root state to you, or in your hearing, in reference to Colonel Ingersoll going to Washington, D. C., in regard to suing out said writ of error?

Same objection.

Ans. I heard him say that Colonel Ingersoll, Mr. Logan and he went on to Washington and called on Justice Brewer to sue out this writ of error.

Int. 50. You have heretofore stated that the meeting at the Adams House with Colonel Ingersoll and others occurred on Monday next following October 2d, 1897; can you state on what date in October, 1897, said meeting occurred? If so, please state.

Same objection.

Ans. It was October 4th.

Int. 51. Had any writ of error been sued out up to that time

from the Supreme Court of the United States to review said bank stock case?

[*Same objection.*]

Ans. No, sir, there had not.

Int. 52. How long after that meeting did Henry A. Root tell you about Colonel Ingersoll going to Washington to sue out said writ of error?

[*Same objection.*]

Ans. It was the latter part of March, 1898.

Int. 53. Did he state to you when, or about when, he went to Washington to sue out that writ of error?

[*Same objection.*]

Ans. I don't remember.

Int. 54. In your testimony heretofore given before the special examiner you stated that you are the administrator of the estate of Andrew J. Davis, deceased, in Montana and in the Commonwealth of Massachusetts; please state how long, or about how long, you have been administrator of said estate in each of said States.

[*Objected to as immaterial, irrelevant and incompetent and not in rebuttal and not the best evidence.*]

Ans. I was appointed in Montana in 1895, and in Massachusetts in 1898.

Int. 55. You stated in your former testimony before the special examiner in this cause that you distributed six hundred and seventy thousand dollars in money belonging to the estate of Andrew J. Davis, deceased, in your custody in Montana after the same was ordered distributed by the District Court of Silver Bow County, Montana, by an order, a certified copy of which has been introduced in evidence in this case and marked "Complainant's Exhibit L"; please state whether or not you distributed or delivered any portion of said six hundred and seventy thousand dollars to Elizabeth S. Ladd or her husband, Charles H. Ladd, or Mary L. Dunbar, or either of them.

[*Objected to as immaterial, irrelevant and incompetent and not in rebuttal.*]

Ans. No, I did not distribute to either Ladd or Dunbar.

Int. 56. To whom did you distribute and deliver the portions of said six hundred and seventy thousand dollars to which said Elizabeth S. Ladd and Mary L. Dunbar were entitled, according to the decree of said District Court of Montana of August 24th, 1897, determining the contest of the will of Andrew J. Davis, deceased, that is to say, after one-third of their shares which had been assigned to Henry A. Root to aid in the will contest was deducted to him?

[*Objected to as immaterial, irrelevant and incompetent and not in rebuttal.*]

Ans. To Joseph A. Coram. I did not know about any deduction: I delivered the entire amount to Mr. Coram.

Int. 57. Did Joseph A. Coram, at the time you delivered to him the shares of Elizabeth S. Ladd and Mary L. Dunbar of said six hundred and seventy thousand dollars, show you a deed of conveyance and assignment of the interest of said Ladd and Dunbar in the property of the estate of Andrew J. Davis, deceased, to Joseph A. Coram?

[*Same objection.*]

Ans. He did.

Int. 58. Where were you and Joseph A. Coram when he showed you said deed of conveyance and assignment and when you delivered to him the portions of said six hundred and seventy thousand dollars going to said Ladd and Dunbar?

[*Same objection.*]

Ans. At the First National Bank of Butte, Montana. I have a desk there and he came in.

Int. 59. Did you ever distribute or deliver to said Ladd or Dunbar, or either of them, any portion of the property of the estate of Andrew J. Davis, deceased, real or personal?

[*Same objection.*]

Ans. No, sir.

Int. 60. To whom have you distributed and delivered the portions of each and all distribution of the property of the estate of Andrew J. Davis, deceased, to which said Elizabeth S. Ladd and her husband, Charles H. Ladd, and Mary L. Dunbar were entitled under the decree of said District Court of Montana entered August 24th,

1897, determining contests of the will of Andrew J. Davis, deceased, and orders of distribution pursuant thereto?

Same objection.

Ans. I have delivered it to Joseph A. Coram.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

Counsel for complainant here announced that the direct examination of this witness, John H. Leyson, on the part of complainant in rebuttal is finished.

Counsel for defendants announces that he has no cross-examination of this witness. He gives notice that he will move to strike out and suppress the whole of this deposition, on the ground that it is not rebuttal and is incompetent, immaterial and irrelevant; the witness when on the stand before should have been examined at that time as to these questions, if at all. It was not proper to deter this examination until this time when the respondents have no opportunity to meet and answer the testimony now given by this witness.

Counsel for complainant states upon the record that all testimony given by this witness, John H. Leyson, at this hearing, as a witness called by complainant in rebuttal, is directly in rebuttal of statements made by Simon H. Stern, a witness whose deposition defendants took in defence in the city of New York, and have caused the same to be filed in the clerk's office of this court and called the same to the attention of the special examiner herein, except possibly a few words of testimony given by John H. Leyson at this hearing which were called out in explanation of certain testimony given by Mr. Leyson when he first testified before the special examiner in this cause in respect to distributions of the estate of Andrew J. Davis, deceased, and to whom he actually and personally delivered the same; and counsel for complainant here and now offers to stipulate and agree upon the record with counsel for defendants as to the introduction by defendants of any testimony they wish to produce to contradict the statement of this witness, John H. Leyson, given at this hearing in rebuttal; and counsel for complainant now and here asks counsel for defendants whether he wishes to stipulate upon the record for an opportunity to call witnesses before the special examiner to contradict the testimony of this witness, John H. Leyson, or to stipulate for the taking of any depositions to contradict the testimony of said John H. Leyson given at this hearing in rebuttal.

Counsel for defendants in answer desires to stand upon his legal rights and insists that the complainant has no right by putting in

testimony that is not rebuttal to force the respondents to incur the expense of calling witnesses out of due order.

Adjourned.

BOSTON, MASS., Sept. 3, 1901.

Counsel for complainant offers and puts in evidence on behalf of complainant in rebuttal a duly certified and authenticated copy of certain records of the Probate Court of Suffolk County, Massachusetts, viz.: a certain petition of defendants Joseph A. Coram, Henry A. Root and others to said Probate Court, signed by said Joseph A. Coram and Henry A. Root and other petitioners, and verified by the affidavit of said Henry A. Root, and filed in said Probate Court of Suffolk County since the commencement of this action, praying said Probate Court to order certain funds and effects of the estate of Andrew J. Davis, deceased, to which said petitioners are entitled, removed out of the Commonwealth of Massachusetts to the State of Montana by defendant John H. Leyson, as administrator of said estate; together with Exhibits A and B, annexed to said petition, the same being copies, respectively, of the decrees of the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow determining contests of the alleged will of Andrew J. Davis, deceased, offered for admission to probate in said District Court of Montana, which decrees are mentioned in complainant's bill of complaint in this action; and which petition, and exhibits thereto annexed, is introduced in evidence herein to show declarations of said defendants Joseph A. Coram and Henry A. Root therein set forth as to the rights and interests of themselves and others in the property of said estate of Andrew J. Davis, deceased, situate in the Commonwealth of Massachusetts.

Counsel for complainant also offers in evidence along with said petition a duly certified copy of a certain decree of the Supreme Judicial Court of Suffolk County, Massachusetts, in the matter of the estate of Andrew J. Davis, deceased, with certain endorsements appearing thereon to the effect that said decree was entered by agreement of the parties to the appeal therein mentioned and without controversy, or adversary contest, before said Supreme Judicial Court.

Counsel for complainant also offers in evidence with the papers above mentioned in this offer the certificates of the proper officers authenticating the same, all which are attached together. And counsel for complainant requests the special examiner to mark said papers mentioned in this offer "Complainant's Exhibit LXII., in Rebuttal", for use in evidence in this case.

Counsel for defendants objects to the admission in evidence of

the petition and exhibits thereto annexed upon the ground that they are immaterial, irrelevant and incompetent and not in rebuttal.

He also objects to the admission in evidence of the authenticated copy of the decree of the Supreme Judicial Court of Massachusetts dismissing the appeal to that court from the Probate Court of Suffolk County from the decree of said Probate Court admitting to probate the will of Andrew J. Davis, and appointing John H. Leyson administrator, and bases his objection upon the same ground.

Counsel for complainant offers and puts in evidence on behalf of complainant in rebuttal a duly authenticated copy of a certain petition and affidavit filed and of record in the Probate Court within and for the County of Suffolk, Commonwealth of Massachusetts, viz.:

The petition of John E. Davis, the administrator of John A. Davis, deceased, and of Andrew J. Davis, Jr., trustee, signed and verified by said petitioners as persons interested in the property of the estate of Andrew J. Davis, deceased, situate in the Commonwealth of Massachusetts and elsewhere, filed in said Probate Court in and for Suffolk County, Massachusetts, on February 20, 1901, in the matter of the estate of Andrew J. Davis, deceased, together with exhibits annexed to said petition: and also a duly certified copy of an affidavit of said John E. Davis, with certain exhibits thereto annexed, also filed in said Probate Court of Suffolk County, Massachusetts, on August 25th, 1904, in support of the last above mentioned petition, together with certificates of the proper officers annexed to said last mentioned petition and affidavit authenticating the same; and counsel for complainant requests the special examiner herein to mark said papers mentioned in this offer, all attached together, "Complainant's Exhibit LXIII., in Rebuttal", for use in evidence in this case to show the solemn declarations of said John E. Davis and Andrew J. Davis, Jr., as persons interested in the property of said estate of Andrew J. Davis, deceased, situate in the Commonwealth of Massachusetts and elsewhere, touching their rights and interests therein, and the rights and interests of others therein, and other declarations set forth in said last mentioned papers.

Counsel for defendants objects to the admission in evidence of said documents and each of them on the ground that they are immaterial, irrelevant and incompetent to prove the solemn declarations of John E. Davis and Andrew J. Davis, Jr., or for any other purpose, and that they are not proper rebuttal.

Counsel for complainant offers and puts in evidence, on behalf of complainant in rebuttal, a duly authenticated transcript of all papers and records filed in the Supreme Judicial Court in and for Suffolk County, Commonwealth of Massachusetts, in a certain probate appeal taken by one Erwin Davis from a certain order or decree of

the Probate Court in and for Suffolk County, Massachusetts, appointing John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, and allowing a certain paper, designated as the will of Andrew J. Davis, deceased, together with a decree, thereto attached, of the District Court of the Second Judicial District of the State of Montana referring to said will as having been admitted to probate in the last mentioned court, and adjudging that the estate of the testator, mentioned in said will, should be parcelled out and distributed to distributees contrary to the terms of said will, to be received and filed in said Probate Court of Suffolk County, Massachusetts, together with the decree of said Supreme Judicial Court determining said appeal, with endorsements on said decree showing that the same was made and entered by agreement of the parties to said appeal without controversy or contest, calling for the judgment of the court upon controverted questions, and counsel for complainant also offers in evidence the certificates of the proper officers certifying and authenticating the transcript of record mentioned in this last offer all attached together, and requests the special examiner to mark the papers mentioned in this offer "Complainant's Exhibit LXV., in Rebuttal", for use in evidence in this case for the purpose of showing all papers and records before said Supreme Judicial Court on said appeal to which its decision on said appeal applies; and the papers and records before the Probate Court of Suffolk County, Massachusetts, to which its order appointing John H. Leyson administrator of the estate of Andrew J. Davis, deceased, in Massachusetts, and receiving said so-called will with decrees of said District Court of the State of Montana, touching said will, related in making its order from which said appeal was taken.

Counsel for defendants objects to the admission in evidence of the papers just offered upon the ground that they are immaterial, irrelevant and incompetent and are not rebuttal.

Counsel for complainant offers and puts in evidence in rebuttal a certain opinion and decision of the Supreme Court of the State of Montana determining a certain appeal thereto from an order of distribution of property of the estate of Andrew J. Davis, deceased, made and entered by the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, on December 3, 1901 (of which order of distribution a duly authenticated copy has been heretofore put in evidence before the special examiner herein and by him marked "Complainant's Exhibit LIII."), which opinion and decision of the Supreme Court of the State of Montana, determining said appeal from said order of distribution, is reported and published by authority of the State of Montana in Volume 27 of Montana Reports of Supreme Court deci-

sions and opinions, commencing at page 190, under the title "In re Davis Estate, Leyson et al., Appellant, *v.* Root et al., Respondents", and the same is offered in evidence by reference to said official report of said opinion and decision.

Counsel for defendants objects to the admission in evidence of the papers last offered upon the ground that they are immaterial, irrelevant and incompetent, and inadmissible under the issues in this action, and are not rebuttal, and it is not the proper way to prove them by referring to a volume of reports not produced; the proper way of proving them is to have them duly authenticated, as required by the United States Revised Statutes.

Counsel for complainant states upon the record that said opinion and decision is introduced by reference under the rule of law that this court takes judicial notice of such decisions rendered by the highest courts of the States of this Union, as duly published under the authority of the State.

Counsel for defendants gives notice to counsel for complainant that he will move the court to strike out each and all of the documents offered and put in evidence today, upon the ground that they are immaterial and irrelevant and not admissible under any of the issues in this case and are not proper rebuttal, and that he will also move to have the expense charged the complainant.

Counsel for complainant here announces that complainant rests in the introduction of testimony and other proofs in rebuttal before the special examiner herein.

CERTIFICATE OF CLERK OF CIRCUIT COURT.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the four volumes, entitled as follows:

Volume I., Record for Complainant (pages 1 to 165);

Volume II., Record for Complainant (pages 1001 to 1291);

Volume III., Record for Defendants (pages 1501 to 1682);

Volume IV., Proceedings in said Circuit Court with References to Volumes I., II., and III. (pages 2001 [1701] to 2058 [1741]);

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings of said Circuit Court in the cause in equity entitled,

No. 1757.

EVA A. INGERSOLL, ADMINISTRATRIX, COMPLAINANT,

v.

JOSEPH A. CORAM ET AL., DEFENDANTS,

in said Circuit Court determined, the Opinion of the Circuit Court of March 22, 1905, the Petition for Appeal, the Assignment of Errors, the Summons and Severance, and the Bond to Party on Appeal, and also the original Citation issued upon the appeal of the defendants, Joseph A. Coram, Henry A. Root and Charles H. Palmer, trustee, in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this thirtieth day of August, A.D. 1905.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD.

FILED IN CIRCUIT COURT OF APPEALS JULY 29, 1905.

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Friday, September 1, 1905.

FRANCIS C. LOWELL,

U. S. Circuit Judge.

CERTIFICATE OF CLERK OF CIRCUIT COURT OF APPEALS.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,

v.

EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

CLERK'S CERTIFICATE.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the four volumes, entitled in the above cause, namely:

Volume I., Record for Complainant, — Pleadings, Court Records, Proofs, etc.;

Volume II., Complainant's Exhibits;

Volume III., Record for Defendants;

Volume IV., Transcript of Record of Circuit Court and Proceedings in Circuit Court of Appeals;

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of November, A.D. 1906.

[SEAL] JOHN G. STETSON, *Clerk*

COMPLAINANT'S EXHIBITS.

COMPLAINANT'S EXHIBIT A.

[Put in Evidence, page 130.]

NOTE BY CLERK. — A correct copy of Complainant's Exhibit A, as appears from the original introduced in evidence and marked by the special examiner, is annexed to and printed with her bill of complaint, marked "Exhibit A", and is, therefore, not printed here.

COMPLAINANT'S EXHIBIT B.

[Put in Evidence, page 131.]

NOTE BY CLERK.— A correct copy of Complainant's Exhibit B, as appears from the original introduced in evidence and marked "Complainant's Exhibit B and H." by the special examiner, is annexed to and printed with complainant's bill as "Exhibit B"; the same is also printed with complainant's exhibits below, marked "Complainant's Exhibit B and H."

COMPLAINANT'S EXHIBIT C.

[Put in Evidence, page 305.]

NOTE BY CLERK. — A correct copy of Complainant's Exhibit C, as appears from a duly authenticated copy of a decree of the District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, made and entered August 24, 1897, introduced in evidence and marked by the special examiner "Complainant's Exhibit XLIX, and C", is annexed to and printed with complainant's bill. The same is also printed among other duly authenticated copies of records of said District Court of Montana, introduced in evidence before the special examiner in this cause, for final hearing.

COMPLAINANT'S EXHIBIT I.

[Put in Evidence, page 136.]

NEW YORK CLUB. Fifth Avenue & 35th Street.

Dear Colonel Ingersoll — I have the very great personal satisfaction to say to you that I have arranged everything and you are retained to defend us in the Davis case — I will call on you Monday.

Your most obd't Svt.

HENRY A. ROOT

January 17 – 1891

COMPLAINANT'S EXHIBIT B AND H.

[Put in Evidence, page 131.]

BUTTE CITY, MONT., August 17, 1891.

R. G. Ingersoll, Esq., Butte City, Montana.

Sir: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred ($100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cormue and Henry A. Root.

HENRY A. ROOT
J. A. CORAM.

COMPLAINANT'S EXHIBIT III.

[Put in Evidence, page 136.]

THE HELENA.

HELENA, MONTANA, Dec. 17, 1891.

Dear Col. Ingersoll Your very kind letter came yesterday and I was glad indeed to hear from you.

Well things here are not altogether encouraging. I think that Harwood is keeping the decision off to help the other side but that when it comes it will be encouraging to us. Of course this is a surmise only. The other side have asked for a conference and Mr. Coram is talking with them but of course no settlement can be made without me and likewise of course none can be made without you. I shall take the situation to you about New Year's and then we will decide whether to settle or not. Meanwhile it is to me anything but agreeable to wait on these Judges. I hope for a decision next Monday. Will you make my most polite greeting to your side partner Miss Maud and also to Mrs. Ingersoll and believe me to be

Always your devoted servant,

HENRY A. ROOT

COMPLAINANT'S EXHIBIT IV.

[Put in Evidence, page 136.]

McCONNELL & CLAYBERG,
Attorneys-at Law,
Merchants Bank Building, Helena, Montana.

HELENA, MONTANA, October 12th., 1891.

Col. R. G. Ingersoll, 45 Wall Street, New York City.

My dear Col.:— I enclose to you testimony of the experts and Mr. Myers, which please have signed and sworn to before a notary, with County Clerk's certificate attached and return here as speedily as possible.

The other side have refused to allow us to read this testimony except after it has been signed and sworn to. Of course, we may not want to use it, but we must have it. Yours truly,

H A ROOT

COMPLAINANT'S EXHIBIT V.

[Put in Evidence, page 136.]

HELENA, MONTANA, Oct. 27th, 1891.

Col. R. G. Ingersoll, 45 Wall St., New York City.

Dear Col. Ingersoll: — I suppose you are very greatly disappointed at the action of Judge McHatton in continuing the case for so long a time, or is it a fact that you are not surprised at any thing that that Judas does? I confess that we did not think that he would have quite so much impudence as, against our earnest protest, to continue the case beyond a term of Court. We thought he might make excuses and continue the case until next term, which would be the first Monday in January, but none of us imagined he would so far gratify the other side as to continue the case for six months. However, it is done, and it seems that we have no remedy. I don't know exactly how it strikes the other people connected with the case, but I know it strikes me as an indication that they don't intend at all to try the case again, for it certainly would be policy, if they did so intend to try the case, to press it on as quickly as they could, and not give us a long period of time to investigate in Iowa. Warren Toole, however, thinks that it is possible that the reason why they continued the case over this term is because there was a very fine jury in attendance before McHatton. I don't agree with this view, for I am perfectly certain that none of the jurymen who are on the panel would be accepted by the Court, and I think the course of the judge in continuing the case this great length of time is pretty clear proof that they won't try it at all. Of course I need not say to you that although nothing was said by the other side in open Court, the Judge acted as they wanted him to act: that is, such is my opinion.

Now, with regard to the Supreme Court decision: Judge Harwood is away in the East, and the Court has adjourned until November 15th, when they will meet and go on with the hearing of further cases. Of course, I don't know whether or not they will decide our case then: I presume, however, they will. It is my own theory that they have hitherto felt that as long as there was a contest pend-

ing with a prospect of an immediate trial, they would leave the estate in the hands of the special administrator until such trial. I don't think they will be apt to take that view of it any longer, inasmuch as they now see, as everybody else does, that we are not having any show at all, even as to the day of trial in Butte, and I have not myself the slightest idea that the other side will not come in in April with some excuse, and get the case continued to any time they may please. So there is one reflection you can have which may be an agreeable one, and that is that you and your good wife and daughter will not be obliged to endure the Butte smoke this winter.

I am going a short distance West, but shall be near at hand in November, so that if there is a decision and it is in my favor, I shall be ready to act.

I am, dear sir, Very truly yours,

HENRY A. ROOT

COMPLAINANT'S EXHIBIT VI.

[Put in Evidence, page 136.]

BUTTE CITY, MONT., 4th April, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York, N. Y.

My dear Col. Ingersoll: — My despatch recently sent you was in part true; but I lied when I told you I would at the time send a letter apprising you of the exact situation here. My excuse for the lie is, that the situation has changed so often that I might have telegraphed you the next day, "Situation changed: see Arkansaw".

Friend Toole and I have been floundering about here with old John, who has, unfortunately for us, been through the bi-chloride of gold treatment, and has a very large head, and would not and cannot be caught at any time under the influence of ardent spirits. Still, something has been done, and just what he has agreed to do is now on paper. As soon as copies of same can be made, I will send you a copy of it.

The arrangement now is to have a meeting of all of the learned counsel at some convenient point at an early day, and then to determine whether or not we can carry through this arrangement, if per-

fected with John A., and, if we can, to do it, if it is considered wise, and if we cannot, to say what we will do. Mr. Toole will start for either Chicago or St. Paul to meet you, whenever I give the word: Mr. Coram will start East very soon; and Mr. Clayberg will leave Liverpool day after tomorrow. I think we can all meet in Chicago, this meeting to include Bailey and our friend Paine, of Iowa — that is, if we can induce your royal highness to so far condescend as to meet us at Chicago. Of course, if we cannot, the whole bar of Montana will have to "go to the mountain".

I also enclose you copy of "Stipulation for Continuance", which has been signed and will be filed.

Please answer this letter, addressing me at the Auditorium Hotel, Chicago, where I shall probably be about the time you receive it.

Yours faithfully,

HENRY A. ROOT.

"Dear old Butte"

Regards to the family including your partner Miss Maud.

COMPLAINANT'S EXHIBIT VII.

[Put in Evidence, page 136.]

AUDITORIUM HOTEL, Chicago, Ill.,

April 19th, 1892.

Colonel Robert G. Ingersoll, 45 Wall Street, New York City.

My dear Colonel Ingersoll: — I reached here last night and found your despatch. I will give you all the notice you will want of the meeting that we have expected to have here. It certainly will not be within a fortnight, and it may not take place until considerably later, owing to the change in situation which has occurred to-day. I suppose you know that the Smelter of the Butte & Boston Company burned down a week ago to-night. This may prove somewhat serious. It certainly will stop all talk at least for the present in my judgment, of our settling by accepting the stock of that Company and the Helena Bank. A meeting of the directors has been called for next Thursday and will be held in Boston. Just what will be done I don't know, but I understand they contemplate possibly

rebuilding their Smelter at Great Falls instead of Butte, although I do not much think they will decide to do this. Mr. Coram is on his way from Montana, and as soon as anything is settled about that matter I will let you know of course. Mr. Coram and Connell have been talking very considerably with old John about the terms of the settlement, and old John has been putting on more airs than an educated pig at an agnostic conference, is that smart? saying what he will do and what he will do it only by what I choose to characterize principle. As we have been actuated I think by principle from the beginning down to the present time, I do not want to peter out in company with that imp of Satan, Woolworth. Of course Mr. Coram who is on the way here, does not know this, and it may be necessary for me to go back to Montana in about a week to get all the bearings, although I presume they will be communicated here by Mr. Toole and Coram. In any case I will, as I have always tried to do, keep you posted, and shall never sign a paper of any moment except by and with the advice and consent of yourself.

Yours very truly

HENRY A. ROOT

With regards to the good ladies of your household

COMPLAINANT'S EXHIBIT VIII.

[Put in Evidence, page 136.]

BOSTON, July 29, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York, N.Y.

My Dear Col. Ingersoll,— You have not heard from me for sometime, because there has been nothing new to report. But I have been following your instructions, which were to "keep on negotiating." Without going into details, which I will do in a few days, and after I have a little further information, I will write you all of the particulars. Suffice it to say that at this point, the outlook is a possibility is of another trial, and I would like to know if you would be willing to have me apply to have it set for about the first of Oct.? Of course I cannot at all tell what that learned Judge will do, because I do not know what the other side may wish him to do.

Mr. Connell will be in New York in a few days, and unless I receive word very shortly to go to Montana to receive a proposition de novo from the other side, I shall wish to confer with you in connection with the details of the new trial. I suggest and hope it will meet with your approval that in ample time we make the assignment of labor in the trial. Of course Myers will be conspicuous by his absence. And I can say further that assignments by me amount to little: but I have hitherto had influence with you and therefore make bold to make a suggestion, which I would like to have come from you,—and that is, that the preparation of testimony as to what witnesses we shall call should be left in the first instance to Clayberg and Payne: after they have made up their minds, I would like to have their labors submitted to you, and of course our friend Toole. Would this arrangement suit you? My second inquiry is, are you going to be away from New York and Dobb's Ferry, next week or week after? If so, and it should transpire that I must consult you at this point, I will go wherever you may be. If you could drop me an answer to this at the Gendower Hotel, Springfield, Mass., I shall be there next Tuesday, and I have no doubt at that time I shall send you a communication of considerable importance, and I should like to know of course, then, where I could find you.

Yours very truly,

H A Root

COMPLAINANT'S EXHIBIT IX.

[Put in Evidence, page 137.]

Boston, Aug. 9, 1892.

Messrs R. G. Ingersoll, E. W. Toole, J. B. Clayberg and G. W. Stapleton.

Dear Sirs:—The situation of affairs in our case at the present time is exactly this: After the meeting of the B. & B. Directors in Montana, Mr. Coram came here and was of course much disappointed that Mr. Talbot did not vote for the issuing of the mortgage bonds on the property of the company. As far as any attempts to negotiate for a settlement of our matter were concerned, he declined to

have anything further to do with the subject, but stated to me that I could do so if I wished. This was at Chicago. Thereupon I immediately proceeded to St. Paul, where I conferred with Mr. Connell, and after such conference I sent word to Mr. Irvin of Butte, who as you know was sent to me directly from Talbot to attempt to negotiate for a settlement of the case. My word to Irvin was that if the other side proposed to negotiate or to settle they must do so at once and upon lines entirely different from those talked of heretofore and of course I had in mind at the time the advice I received from Col. Ingersoll and associates in Chicago.

It so happens that Talbot, to whom this word was sent through Irvin, has been for several weeks and still is at a long distance from Butte, in the Flathead Country, and I suppose the reason why I have not heard is that Mr. Irvin has not seen him. Of course, it is very uncertain when, if at all, he does; and it looks to us now as though we must face the situation as if no possible settlement according to us our rights could be effected; and the only questions that I have now to submit to you are with reference to the future conduct of the case.

The question now is, shall we at once give a notice of trial, or rather of a motion to set the case for trial which cannot be set until thirty days after the expiration of the service of the notice, which must be for ten days? Whether that motion shall be made now or we shall delay it for a short time depends, and it depends upon this—what is the advice of our friends in Montana with reference to the political situation there? We all know, of course, that Judge McHatton's term of office will expire with this year, and of course we all know that it is very desirable, if possible, that the case should be tried before some other judge. At the same time, if we from this point we neglect to be diligent in asserting our rights some result may flow from that inaction on our part which may not be advantageous.

So the question that we wish to submit to Messrs. Toole, Clayberg & Stapleton, is this: is there a fair prospect that McHatton will not be re-elected? Is there a fair prospect, in case you think he will not be re-elected, probably, that the other side cannot get the cause up

before him, should they decide that they so wish to do, this autumn? Of course, as to the political situation out there in Butte Stapleton will be the best judge.

Captain Palmer, Frank Shaw and William Kenyon will be most ready to give any advice they may possess on that subject, and I have also had a long talk while in Chicago with Gov. Toole, and he has promised me to look into the political situation and if anything can be evolved from it to let me know. I think that you gentlemen now in Montana should confer together and reach a result quite promptly, if possible, and notify me of that result so as to reach me at the Auditorium Hotel, Chicago, where I will promply answer you.

My own idea, and also that of Mr. Coram and of Capt. Palmer, is that without regard to the political situation we almost ought at once to give a notice to the other side asking that the case be set for trial for as early a day as possible. Of course, the court may set it for trial for a year hence or at any other time. Nobody knows, nor can anyone know unless they know what the other side want, when it would be easy to know. We think here — that is, Mr. Coram and I do — that the other side if confronted with the trial would be willing to make terms which we would consider fair all around. We know that when a settlement was talked before old John was willing to concede everything, down to the time when he got a stipulation from us continuing the case. Mr. Toole will recall this and our information was direct that such was the case; but the moment after the cause was continued he was most arbitrary and nothing could be done with him.

Personally I do not believe that the other side themselves think that they can, against to what is now opposed to them and what knowledge we must have and be able to acquire of the personnel of a new jury, be able to buy them. Of course, this jury business is by far the most important that is to be considered, and I know of no one who can handle that branch of the business or know about it so well as Mr. Stapleton, and Shaw, Kenyon and Palmer will do everything they can to enlighten him on the subject. I think you will find that Gould and Heilig, and the others who were on the last

panel, will be very glad to give any advice they may possess with reference to men who may be hereafter drawn on the jury; and I would think that the business of looking after the jury should be entrusted to Judge Stapleton in case there was a trial hereafter.

Will you except Col. Ingersoll please confer together as promptly as you can and advise me at the Auditorium in Chicago what you think under the circumstances should be done at once, and I will answer you promptly. There is only one reason I have for being disposed to entertain the thought of delaying in giving a notice of application for an immediate trial, and that is that the other side, of course, being in possession and making no end of money out of the property, would hardly be apt to give us a notice, and if there was a respectable candidate against McHatton whom we could try to help, and he should prevail against McHatton, after election there would be hardly time for the other side to give us a notice of trial and bring the case on during McHatton's term. I need not, of course, impress upon your mind the necessity for absolute secrecy in reference to this whole business, so far as the political outlook is concerned.

Very truly,

H A Root

COMPLAINANT'S EXHIBIT X.

(Put in Evidence, page 137.)

Auditorium Hotel, Chicago,

August 12, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York.

My dear Colonel Ingersoll: — I reached here this morning and shall at once proceed to Iowa and have our best witnesses ready to go to Montana on demand, and I will at much length write you about them personally and shall want your advice as to which ones we shall take. I shall meet Mr. Payne in Bloomfield.

Will you kindly send me by express, upon receipt of this letter, to the Auditorium Hotel, the package of testimony which was sent to you last spring by Mr. Clayberg for safe keeping?

I will report to you as soon as there is anything new. I am full

of belief that if we can get the case set for any time within the near future, we will get a prompt settlement from the other side and on terms that will be satisfactory to us all. Yours truly,

Ansd Aug 15. H. A. Root

COMPLAINANT'S EXHIBIT XI.

[Put in Evidence, page 137.]

AUDITORIUM HOTEL, CHICAGO,
August 19, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York.

Dear Colonel Ingersoll:— I received your letter yesterday morning, and thank you for writing to Clayburg approving the "circular letter."

I have not been notified of the arrival here of the testimony which I wrote you several days ago, asking you to send me by express to the Auditorium Hotel. You will remember that it was sent to you for safe keeping and you put it in your safe. I am a little bit worried about that.

I have received two answers from Montana to my "circular letter": one from Mr. Toole yesterday, in which he says that the question of the selection of the capital of Montana is to be submitted to the people at the election in November, and that Butte is standing out for itself, and that he fears that if we bring on the case for trial before the election, the silly idea which was at one time talked somewhat, that the money of the estate was made in Butte and ought to stay in Butte, and by admitting the will to probate would result in keeping it in Butte, may have some weight against us. I wrote to him promptly, protesting against that idea and saying that, in my opinion, it was so silly that we ought not to notice it, and further telling him that I believed we should act promptly by giving the other side notice that we would bring up the case, which would spur the Iowa outfit of thieves to demand of old John that he settle, as they are more anxious for a settlement than even ourselves, and I think we can rely upon their making a demand on old John which he can-

not resist, and which will be, of course, that the case be disposed of, & settled at once.

However, I received a letter this morning from Mr. Stapleton, also in answer to the "circular letter", and a copy of it I send you. I would like to know from you, as soon as you can conveniently advise me, what you think of it. It almost persuades me that perhaps we had better delay for a little time — but not altogether. I would like you, if you will, on receipt of this, to send a note to M. J. Connell, in care of H. B. Claflin & Co., and ask him to call on you and show him this letter and Stapleton's and see what you two think on the subject. Connell is by far superior to all of us in the matter of deciding this question, in my opinion, because he has lived a great while in Butte and he knows the political temperament there.

I wrote Stapleton, who is pretty keen in politics, asking him to see Quinn, of the Miner, and use whatever influence he had with him to keep the Butte Miner independent as to candidates for judgeship there for the present. In the meantime, Dwyer will reach the "burnt district" tomorrow and see our witnesses and tell them to prepare to be ready to go to Montana to a new trial which is coming on: this course having been decided on by Mr. Coram and me and approved by Major Bailey, and we think the effect of this will be important. We know the other side will find out that we are getting ready for this trial and of course we know that Trimble and Carruthers will learn of it very soon.

I shall anxiously await advice from you.

I remain, Faithfully yours, H. A. Root

COMPLAINANT'S EXHIBIT XII.

[Put in Evidence, page 137.]

Auditorium Hotel, Chicago,
August 22, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York.

Dear Colonel Ingersoll: — As I telegraphed you this morning, nothing can be done for the present, or until October 3d. I send you a copy of Capt. Palmer's letter, which came this morning, which

will give you a very fair idea of the political situation out there. I cannot believe but that Talbot and that outfit who own that judge, will get him to run for the judgeship in Silver Bow County and that Marcus Daly will help elect him and that he will be elected, and that his talk about not wanting the position is rot; but when it comes to being elected over Judge Blake to the Chief Justiceship of Montana, we can beat him without any trouble. In fact, he can be beaten anywhere except in Silver Bow County, and nobody can be beaten there that Marcus Daly supports, as has been shown in recent elections. However, we will "lay low" for three or four weeks and see what we shall see.

Yours very truly,

H. A. Root

(Copy)

BUTTE CITY, MONTANA, Aug. 18, 1892.

H. A. Root, Esq., Auditorium Hotel, Chicago.

My dear Sir: — I found that missing check you gave me amongst my papers. You will not, therefore, be compelled to issue another to take its place.

Regarding the will case, Judge McHatton has adjourned his court until first Monday in October and that therefore nothing can be done until after that date, except that you may give the other side notice of your intentions as per your agreement.

Judge McHatton, I learn, is fishing for the nomination of Chief Justice and his friends say will not accept nomination for district judge. Mr. Stapleton thinks that if Mr. Daly wants McHatton nominated for Supreme Justice that the nomination will be made and his election almost assured. In this I cannot agree, as such nomination would antagonize the interests of all Montana, except Mr. Daly's interests. For the first reason, I would myself like to see the nomination made, as I believe McHatton would be snowed under beyond redemption. Pemberton has accepted the nomination for Chief Justice from the Labor Ticket or party, and hopes to have such nomination confirmed by the democrats, which might possibly elect him. For district judges I have not learned who the democrats propose nominating. On the Republican side the following are

mentioned: Wines, Leonard, Cotter and Spear. Scanlon was entertained, I learn, but declined entering for the race. It will be some little time yet before nominations are made. The Republicans hold their convention August 29th; the Democrats early in September; but I think both parties will hold off until later in order to have a short campaign.

Pretty much all the lawyers and, in fact, nearly all the business men of the town are taking their vacations, so that it is not an easy matter to know or learn what is likely to take place before the conventions.

Trusting that you are enjoying the usual "Turkish" weather, I remain,

Very truly yours,

C. H. PALMER.

Will post you if anything new.

COMPLAINANT'S EXHIBIT XIII.

[Put in Evidence, page 137.]

AUDITORIUM HOTEL, CHICAGO.

September 7, 1892.

Col. Robert G. Ingersoll, Dobb's Ferry, N. Y.

My dear Colonel Ingersoll:— Accept my thanks for your most comprehensive letter of the 30th. I am very glad you do not agree with Brother Clayburg. I have written to him and to Mr. Toole at much length, giving them my views of the situation, should they be considered of any value, and I quote from my letter to Mr. Toole that you may know what I think on that particular subject.

"I note your remarks with reference to your opinion about John A. and his indisposition to settle our matter, and also what you say about our prospects in trying the case before a Butte jury, with especial interest. While it may be of no value to you to have my views on those subjects, still, as they are not exactly like yours, and it may do no harm, I will present you what I think on those two subjects. I do not agree with you that John A. is not disposed to avoid another trial, and I entirely disagree with Mr. Clayburg, who, in a similar strain, said to me in his last letter that he believed John A. was entrenched behind a conviction that he could pro-

bate that will. I think, if entrenched anywhere, he is entrenched behind the position that he can delay us and practically prevent us from getting a decision upon the will question, owing to the course that he expects the trial judge in Butte will take. But I do know that he has been and will be strongly urged not to allow this case to come to a trial again, and it is the opinion of our friends, the lawyers in Iowa, that it will not come to another trial; and it is very doubtful whether the other side can get the witnesses who were there before to go there again, and in that case they would be obliged to rely upon their depositions, and as against witnesses whom we will produce, such depositions could have little or no weight before a jury, provided that jury was impartial.

Now upon the jury question I have much to say. If we had taken that care which should have been taken in selecting the former jury, I have no doubt in my mind but that the result reached would have been very different. I am satisfied that as good jurymen can be gotten in the city of Butte as anywhere else, and it is greatly to be deplored that we were so poorly posted about the former jurymen as we were. I do not blame you at all for this, nor do I blame any one, except, probably, I ought to blame myself. I wrote to Mr. Coram several days before the trial asking him to see Stapleton and look out for and investigate the men who were on the panel, but he neglected to do so, because of other engagements, and the consequence was that at twenty minutes to ten of the morning of the trial there was not a man on our side who knew one single name of a juryman on the panel. There were no data to go by in the examining of jurymen, and, in fact, in my opinion, they were examined most superficially, but probably as well as anyone could do without knowing something about them. Had we known what we should have known, we never would have allowed Adams or Jencks or Pascoe or Newkirk on that jury. Mr. Elderkin, one of the jurymen, told me recently, while in Butte, that he and the others of our eight were perfectly paralysed with astonishment when they saw us allow the four men above named to sit on the jury, because, as he said, it was well known to almost everybody that they were all being at that time carried by the First National Bank, except Pascoe, of whom you know. Challenging either one of these men would undoubtedly have secured for us a verdict. While there are men in Montana who can be bought outright, exactly as these men were bought, they are, as I believe, principally old timers. Look at the young men who were on that jury and the temptations that were offered them and how they withstood them! Mr. Heilig himself told me he was offered inducements to go on the other side and Mr. Gould told me that he was offered the contract for the plumbing in the Owsley Building by the agents of the other side, and both of these gentlemen, as well as one or two other jurymen who were of

out eight, have told me that we cannot lose our case, provided we have a square deal. The other side were never more surprised in their lives than they were when they found Scaddon and Farrell on our side, and they (the other side) have found out that, while it may be very simple, as Talbot says, to buy one or two men, they do not see any way clear to buy eight, or even five, out of another panel. I take, *besides, that the next jury will be locked up from the start*, as I understand McHatton announced, after the trial of that mining case between Clark and Daly, he should do in important cases hereafter, and as he did do, as I understand, in the case involving a question of forgery of a will which was recently tried by Stapleton against Corbett. And I believe if we take proper precautions the next time, we will get a verdict.

I will blame myself for not knowing who these jurymen were, and it was my misfortune that after the jury went out the last time, all my counsel left, and even Stapleton went to ride, so that I could not reach him, when I saw right before my own eyes jurymen approached and negotiated with by the other side. And, indeed, had you and Clayburg been in court when the jury did finally come in and we wanted them to render a verdict on Knight's testimony, and McHatton would not receive it unless they agreed on the other, you might have been able to have suggested some way by which we could have compelled Judge McHatton — by means of mandamus, or otherwise — to have returned a verdict.

I state these things to you because I want the situation to be different when it comes to the next trial, for which we must now, of course, prepare.

Now the first thing to be done is to learn something about the way jurymen will be selected for our trial. I suppose they are drawn by the Commissioners, and I do not suppose, even if it is true, as Mr. Talbot says, and said to Coram, Connell and myself, that McHatton will do anything he wants him to do, even then I do not suppose that it is possible for a body of corrupt men selected by the other side to be drawn on the jury, because there are certainly some of the jury commissioners who are straightforward people. I even hope that you are right with regard to McHatton and that he is not as prejudiced as he was and would not lend himself to any scheme that might be conceived by the other side to pack the box before the jurymen were drawn. If this is not done, I think we can get a fair jury.

Just for the immediate present, in view of what you advise with reference to not bringing on the trial until after election, I have directed our man Dwyer, who was to be in the "burnt district" of Iowa and look for further testimony, not to go, as I do not wish to stir the subject up until I hear from you; and you can be assured, in my judgment, that if the other side have any notion that they

can, or if they intend to try to, probate that will, we will hear from them very shortly. I back up my assertion that I do not believe they so intend with this: Mr. Talbot himself told me, at the Holland House last winter, that they did not intend to do it, and that they were disposed to withdraw the will or let us take a verdict on Mr. Knight's testimony, provided we would abandon the forgery end of it and would make some reasonable terms, allowing something to A. J. D., etc. I am convinced that if we had managed the matter more shreadly at that time, Talbot would still have been left in the negotiations and had considerable to say, John A. to the contrary notwithstanding; and I am still of the opinion that when confronted with a trial, the attorneys in Iowa, as well as those in Montana, on the other side, will take such a position with John A. that the matter will be settled. Of course, if they can postpone the trial of the case indefinitely and thus wear us out, I don't suppose there will be any settlement about it, but I doubt very much whether the counsel on the other side will want this done. There is no one in the case — I don't care who it is, except John A., Talbot and Andy — who doesn't want the matter disposed of. All the lawyers want their money; certainly those in Iowa do, and I presume that Dixon, Kirkpatrick and Forbis do; and I am not at all certain but that Talbot himself will want the matter settled pretty soon."

I further quote from a letter I sent Clayburg of the same date, as follows:

"My letter to Mr. Toole, of this date, a copy of which I send you, will answer some suggestions made by you, and, in fact, I think perhaps all of them. I think you take a little too gloomy a view of the case upon its merits. I think we can try the case in Butte and win it. And even if McHatton still sits on the bench, after we have won our case in Butte, it seems to me that some time during the course of human events, Colonel Ingersoll, you and Toole can devise some scheme for getting the estate into experienced hands who can distribute it according to law. If this be so, then I say as soon as it is definitely ascertained that there will be no candidate for the judgeship in the First Department in Butte as against McHatton and that we can do nothing on that subject, and he is sure to be re-elected, we should give the other side notice, as soon as it can safely be done, of an application to set the case for trial; provided, of course, that the trial cannot be fixed by the court for a day before the election in Butte. I understand you to suggest that perhaps if we gave a notice ourselves, the court could set it down immediately. Under such circumstances, of course, if you feel that way, we won't give notice until after election. And then, again, it has occurred to me, per-

haps if we gave the notice before election, and the other side should come in and say that Mr. Dixon was going to be engaged in Congress after December 1st, and it must be tried immediately or wait till next April, the court might then see a reasonable excuse for postponing such trial till April; whereas, if we make the motion after election and ask that it be set for the earliest day possible under the stipulation, it seems to me that it would be set for an early date. Of course I am very doubtful myself whether even Dixon wants it postponed indefinitely. Doesn't he want his money? As near as I can find out, all the lawyers, witnesses, parties and everybody in the case wants his or her money right off, with the possible exception of yourself; but of course the reason why you do not care for your money is because of your great wealth, which none of the rest of us possess."

I hear from Captain Palmer and from advices from Mr. Toole that are just in, that the Democrats have nominated McHatton for his old position and left the judgeship in the other part of the court vacant, to enable the Republicans to nominate a candidate whom all parties will support. I do not take it that we could in any way — at least, which I can think of now — do anything which will help ourselves with regard to this judgeship. Of course, if the People's Party should name a judge for the first department in Silver Bow County, we could get our friends in Butte to help this candidate, but I don't think we can count on that, and we must face the situation exactly as it is and prepare to try the case before Mr. McHatton.

Do you agree to these views and will you authorize me to direct Toole and Clayburg to move to have the cause set for trial at a day as early after the election as possible? As I have suggested in my letters to Montana, I do not feel at all discouraged at the prospect of winning in Butte before a Butte jury, provided, of course, the other side do not pack the venire or do not select the names of the men who are panelled before our examination on that jury, and I do not think the other side can do this now anything like as well as they could before, because we have an army of friends in Butte and we will be just as much on the alert as they will be. And, besides, the whole population in Butte is terribly down on the Davis-Talbot outfit, for the outrageous course they have pursued in endeavoring to wreck the Butte & Boston Company. They have even gone so

far as to throw out checks drawn by Captain Palmer on the bank, upon technical grounds, and I am told by people who come direct from Butte that the whole community there is almost prejudiced in our favor.

If you approve of what I propose to do, please drop me a line and say so, and I will then write to Clayburg, telling them to blaze away and give the notice. I am Faithfully yours,

H. A. Root

COMPLAINANT'S EXHIBIT XIV.

[Put in Evidence, page 137.]

Chicago, October 24, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York City.

My dear Colonel Ingersoll: — I reached Chicago from Montana on Saturday. I marched up the hill to Montana — and then I marched down again. Didn't have the pluck of a mosquito when I got there and served no notice; did nothing. Now I hope you will not scold me because I did this. My reason for doing it was absolutely sublime.

When I reached there I discovered that by some "accident" it had occurred that of the twenty-four men on the jury sitting in His Honor's court this term, nineteen were depositors in the First National Bank. They had tried a case there where there was no evidence whatever to speak of in favor of the bank and had promptly found a verdict in that bank's favor. And I said to myself, "The eloquence of the leading counsel in this case shall never be wasted on that material," and I did not serve the notice. We will certainly wait until the January term and I hope you will approve of this. If you don't I shall go and blow my brains out, and that is all there is about it.

In the meantime, there are two or three of us who believe that the other side are in earnest about wanting to settle the case. Mr. Talbott says that old John last spring had a very bad case of large head and would not do anything that he said and now old John will do whatever Talbott says and Talbott says that they want to settle

and sent a party to me and wants to meet me with that view, and of course if they do want to settle, we want to settle, but I told the man sent to me by Talbott that we would not settle now or at any time hereafter unless we got our shares. Talbott was away in Columbia Falls and I presume immediately after election they will send for me to go out there, and I think we can get a settlement through.

In case it doesn't go through, wouldn't you rather have the cause set for April then in January in Butte? It seems to me that it would be better for us, although I dislike exceedingly so much of a delay as it would be until April. Still you know Butte is likely to be very cold in January, very bad weather: April generally is quite a good month there. Very truly yours,

H. A. Root

COMPLAINANT'S EXHIBIT XV.

[Put in Evidence, page 137.]

Until further notice my address will be
Care King & Co., 142 S. Water St

Chicago, November 16, 1892.

Col. Robt. G. Ingersoll, 45 Wall St., New York.

Dear Col. Ingersoll: Well, the election in Montana is over: Butte beaten for the capital: McHatton re-elected: and our good friend Judge Blake relegated to private life and Pemberton elected Chief Justice in his place. Pemberton is a very reliable, square fellow and has only one fault, which is not a fault to me, but would be to you, and that is, he is a Democrat. I consider Democrats far superior to Republicans, especially since election.

But the object of this letter is this: Clayburg has written me that he wants to know right off whether we are going to try to bring on our cause in January. Of course trying don't amount to anything, because McHatton will set it down for whatever time the other side wish. Now do you want to have the motion made to have the trial fixed as early as possible next year or not until April. You know it is very cold out there in Butte sometimes in January and I don't know whether you want to come out there and take all our witnesses out when the mercury may be fifty or a hundred below zero. Still,

I want to hear from you on this subject. Of course, as you will know when you have heard from Mr. Coram, and you probably have by this time, there a great many new things recently developed to the mysterious Coombs which I believe will have the effect of preventing any future trial of the case. Still, that is not certain. I am expecting hourly now to hear from Butte in regard to the settlement, which I talked to you about, and will at once let you know what, if anything, is done in that direction, but in the meantion, the nervous Clayburg I must write to. What say you?

Yours very truly,

H. A. Root

COMPLAINANT'S EXHIBIT XVI.

[Put in Evidence, page 137.]

AUDITORIUM HOTEL, CHICAGO,

November 23, 1892.

Col. Robert G. Ingersoll, 45 Wall St., New York City.

Dear Colonel Ingersoll: I have not heard from you in reply to my last two letters but as I feel anxious to move at once, I bank on what you said the other day to me and always have said, which was that you were at our service any time and place, and I have written Mr. Connell to see the lawyers on the other side and see if they will consent to set the case for trial on the first Monday in January, and have further stated that we will be ready to try the case at that time and that we wish to try it as speedily as possible. If this is not satisfactory, to you, will you not kindly, on receipt of this letter, wire me here, so that I can make a change before the letter reaches Montana.

Yours very truly,

H A Root

Until further notice my address will be Care King & Co., 112 S. Water St.

(Copy letter to Mr. Connell.)

CHICAGO, November 23, 1892.

Mr. M. J. Connell, Butte, Montana.

My dear Mr. Connell: — On reflection, I decided not to go East for Thanksgiving. On receipt of your letter I wrote to Mr. Coram

and also to Colonel Ingersoll. Coram telegraphed back he thought the sooner we gave the notice to bring on the trial, the better, and Colonel Ingersoll is annoyed because we do not attempt to bring on the trial immediately, and is at our service at any time and place. We are situated in regard to witnesses and evidence, etc., so favorably at the present time that I should doubt if the hardiest would undertake to stand up against what we will be able to produce on the next trial. I saw Mr. Dixon at Great Falls and he said to me he thought we might as well bring on the case to trial very soon and have it disposed of.

Of course you know the reasons which prevented our giving the notice for the present term of the court, and I was myself much impressed, as I always have been, with the sincerity of George Irwin in what he said to me at the club, but if, as I assume from what you say, there is nothing yet in the way of a settlement that has taken any definite shape, we ought not to wait any longer and I wish you would, unless you see something in the matter which dissuades you from doing so, see Forbis or Dixon at once, and find out from them how soon they will consent to set the case for trial. Our side will consent to set it for any date after January 1st, 1893. Of course we could not have it earlier, because there would not be time to try the case. If they will agree to try the case about January 5th, it will suit us. If they won't, then find out how soon a date they will consent to. They might take, say, March 10th, which would give Mr. Dixon time to get back from Congress. If they will not agree to set it on either of these dates, but will on a date, say, in April, please telegraph me at the Auditorium what date they will agree to, and I will confer with Col. Ingersoll and the others and see whether we will accept that date or make our motion and be given whatever date the court may name. I have sent a copy of this letter to Mr. Toole and Mr. Clayburg.

Of course I want you present in Montana when the cause is tried. Will you let me hear from you as soon as possible?

Yours truly,

H A Reed

COMPLAINANT'S EXHIBIT XVII.

[Put in Evidence, page 137.]

Until further notice my address will be
Care King & Co., 125 S. Water St.
Must Dec 24

CHICAGO, December 19, 1899.

Col. Robt. G. Ingersoll, 45 Wall St., New York.

My dear Col. Ingersoll: I suppose you have seen by the papers that our case was set for May 8th. We felt that we could not get it down for any period prior to that which the other side would consent to, and we were fearful that if it was left to the court, we might not get even so favorable a date as that.

You will be called upon this week by Judge Wells, of Springfield, and he will tell you that our old friend Erwin Davis has become disgruntled at the prospect of his recovering anything from John Davis outfit and has, through Robert M. Morse, of Boston, whom you know by reputation and who is a gentleman, (which cannot be said of Woolworth, who has been discarded) proposed and is anxious to unite the old sisters and himself with the contestants in the case, and have the estate divided "as God intended." Well, I believe you said to me in Butte that if our side could be helped by anything or anybody, however disreputable, to take the helping hand. I want you to talk the thing over pretty well with Wells and I think you better say to him that we ought to have a definite proposition in writing from them and see what it contains. I have written to Clayburg and Toole about it and Clayburg will come here and go to Iowa to see some new witnesses whom we can get and who will absolutely paralyse the proponent. After doing so, he and I will go to New York and see you. I have given up all idea of having anything in the form of a compromise with the other side.

Yours truly,

H. A. Reed

COMPLAINANT'S EXHIBIT XVIII.

[Put in Evidence, page 137.]

Until further notice my address will be
care King & Co., 142 S. Water st.

Chicago, March 27, 1893.

Col. Robert G. Ingersoll, 20 Nassau St., New York.

My dear Colonel: — Mr. Coram and I will start for Butte tomorrow night and there meet Clayburg and Toole. I do not know whether we will be able to effect the arrangement which you and I have discussed and which also Mr. Clayburg has talked over with you. We told Mr. Talbot last week exactly the position we would take, which was just the one you and I talked over at your house, and told him that unless they would carry it out, we did not propose to go to Butte to talk about it. He replied that if we would go there, he would see it, or something satisfactory to us, was carried out. The scheme on our part involves the allowance to us from the body of the estate for all of our expenses. When we reach Butte we will see what we will see. I think we shall probably return within two or three days, and will see you in New York about the matter.

Mr. Coombs, who has become recently exceedingly amiable, has now really got hold of an amount of evidence in our favor on the trial of the main case against which nobody could stand, under any circumstances, in my judgment.

I suppose you have seen the accounts in the New York journals of the utter depravity of myself. Of course, it goes almost without saying that the reason for this attack is that Erwin is convinced, or is afraid, that we are going to do him up in this Davis Case. Immediately after the publication of the Dixon matter in New York, Mr. Woolworth called to see me at the Auditorium twice. I should have, if I had met him, insulted him, but, perhaps fortunately, I was able to avoid him, which I did by telling the clerk to tell him, after he had made his first call on me, that I would not be back that day, which was last Friday. At the same time, Erwin sends to our people word that he will be and is ready to look after their interests in the Davis estate and protect them against the machinations of the "wicked nephew."

Now it is but fair to you to say a single word about this Dixon business, which is, of course, all gotten up by Erwin, and really does present quite a plausible story against me. Every single word in it that reflects in the slightest degree on me is ridiculously false, and while perhaps I may have been unwise in some things, there is nothing in the whole matter which can in the slightest degree reflect upon my integrity or honor, as will appear whenever the case is brought on for trial here, and, in this connection, I wish to ask a favor, which is this: the case is brought in the U. S. Circuit Court here: a summons has been served on me, which occurred day before yesterday — the "facts" of the case having been indicated to me through the press — and I would like to have you recommend to me some very distinguished lawyer, of the greatest amount of standing, whom I should retain. You know the Court is the successor of Judge Gresham. I want to, when my day comes, go into court with a man of great standing and take a position which will be to the highest extent honorable and straightforward. There is nothing in the charge against me at all. It is cunningly devised as was the "will." I think even more so, because I do not think the "will" was particularly cunning and its whole object was to break our people down — that is, my clients and yours — but this policy will not work with them. I would like, if you could, to have this letter, here on my return from Montana, which will be in about ten days.

My only regret about this Dixon business is that people like Sister Ellen and your family and others who have always respected me and have no reason now not to do it, may be troubled about the miserable and contemptible publications that have appeared and all of which, as I said before, are entirely false and susceptible of disproof in a minute.

Yours very truly,

H. A. Root

COMPLAINANT'S EXHIBIT XIX.

[Put in Evidence, page 137.]

BUTTE, CITY, MONTANA, April 10-'93.

Col. Robert Ingersol, 20 Nassau St., New York.

Dear Col. Ingersol:—I should have written you before about this—these infamous libels in reference to my connection with Henry W. Dixon, but I have just learned of their full extent, and have been, as you know, trying to make some settlement of the Davis case, which I think demands my first attention. To-day there is little prospect of affecting a settlement, though the other side are considering the matter, and we think the prospect will become much better when they send to Iowa to prepare to get their witnesses for a new trial. We generally think that when Trimble is told to prepare for a new trial, he will tell the people here, that they must settle. However, you will know more about this by the time you receive this letter, as I shall telegraph you.

Now with regard to the Dixon business. I have no doubt, in my mind, that Jim Dixon and Erwin Davis have put up this whole job, and if you want to know anything about the character of Jim Dixon, I wish you would ask Judge W. D. Shipman. I do not know that Judge Shipman thinks particularly well of me, and the reason why I think he does not, is because I think he imagines I have not done exactly as I should do with regard to the Dixon affairs. If he does think so, it is simply because he does not know anything about it.

The particular point to which I wish to call your attention, is one entirely outside of this subject. On the 29th or 30th, of March, I am informed that the New York Times published a special despatch, from Pomona, Calif. I have sent word to have this article sent to me. It is entitled "Root in California" You will be able to find it.

Now the facts are that H. W. Dixon sent word to me in December asking if I was willing for him to go to some place in the South for the Winter: to which I replied, I was, and he came to Chicago, and I went with him to Pomona, Calif., and we both went to and registered at the largest Hotel there. I introduced him to some friends there, and he told me that he would like to have a room with a

private family, rather than live at the hotel. Thereupon I was recommended by Mr. M. M. Dewey to a friend of his there, and hired the best room in his house, which was right in the centre of the village of Pomona. I asked him, in Mr. Dewey's presence, how much he would like to be allowed a week for his expenses, he said fifteen dollars, I told him he better have twenty. I provided Mr. Dewey with ample money for him, and he has been receiving all he has asked for ever since. Every single word in the article differing from this is a lie, and so is all the balance of the article.

Now I think in this country there is a remedy for such cases, and I also think that it ought to be a substantial one, and I would like to know if you do not think I should sue them at once for libel. If so, please draw a complaint against them, and I will allege my damages at $100,000, and please have this sent to me at Chicago, and upon my arrival there I will verify it and return it to you. It seems to me absolutely necessary that I should take this course. The people and the Press here in Mont. make very light of the whole matter, and everybody says here, and I believe everyone believes as they say, that there is nothing in the whole story. I shall send to a former Clerk of mine Mr. Codding, a copy of this letter, and ask him to call upon you.

I may add in reference to the Davis case, that we are now in a most magnificent shape for trial, and that all the testimony that you wish sent, can be got, and Mr. Clayberg knows its details, has made a great study of it, and is prepared to advise you on the testimony from beginning to end. Faithfully yours,

H A Root

P. S. In Davis case. Since writing you the above, the special administrator has informed me that the other side have now reached a point where they cannot take a step, until after consulting Mr. W. W. Dixon, for whom they have telegraphed, and tell us at the same time to go right on with our preparations for trial. I construe it as meaning six of one and half a dozen of the other, whether the case is settled or tried May 8th. Yours,

H. A. R.

COMPLAINANT'S EXHIBIT XX.

[Put in Evidence, page 137.]

My address until further notice will be
Care King & Co., 142 S. Water St.

Chicago, May 2, 1893.

Col. Robert G. Ingersoll, 400 5th Ave., New York.

My dear Col. Ingersoll: — I have just arrived in Chicago. The Davis case, so far as I am personally concerned and the heirs of John A. Davis, provided you approve of the contract, is ended. I felt obliged to and did make some important concessions to the family of John A. Davis and did it because it was perfectly apparent that, as Andy said, they would be in red ink unless it was done, and if the plan which you approved in New York goes through, which I have no doubt it will, it will be wisdom. The contract was signed by Andy and John E. individually and as administrator of the estate of John A. It is now in Clayburg's hands and will be forwarded here in a day or two, when I shall send it to you. We made an allowance in settlement of $500,000 on each side for expenses. I suppose that will make you mad. Of course if you don't approve of it, it don't go. If you do approve of it, I wish you would write to Ellen Cornue and have her come down and talk it over with you. Of course we think it is absolutely vital to the success of the settlement that Erwin and his crowd should know nothing whatever about it.

The plan is to have the contest of Maria Cummings and me set for July 17, which no doubt has been done by this time, and also bring up and set for the same time the Asa children contest. Now it so happens — which perhaps you may have forgotten or may never have been told — that the Asa children contest admits the genuineness of the will and alleges that it was procured by undue influence and does not set up the Knight will. Now the plan is to have the three contests set for July 17 and just prior to July 17, have ours adjourned, the Erwin crowd of course thinking, as they always have thought, that we are and will continue to be just such idiots as to go on and fight their battle, when we will retire, adjourn our contest and theirs will be brought on and if they can do anything with that

kind of a contest, they are welcome to do it. Knowing the situation as well as you do, you can probably have a judgment as to whether, at that particular time, that particular court and judge will allow them to amend their contest by setting up that the will is a forgery. Clayburg says and so does Toole and they all think there is a statute in Montana which prevents them from setting this up in any form after the lapse of a year. So much for the Davis case.

DIXON MATTER.

Dear Colonel: This Dixon business, while it has had no effect whatever in Montana and in fact all the papers and all the people have treated it as absurd and the result when I got there was that I was joshed about it, is still to my own mind a very painful matter. I do not think that it is wise to begin any action against the Times at the moment, but I do want to find out — and we will do that hereafter, who the scoundrel was in Pomona who sent that series of lies regarding me. I think, and think you will agree with me, the best way for me to do is to put in my answer two weeks from to-day when it is due and then consider suing these papers afterwards. I want you to call and see W. D. Shipman, as I wrote you before, and ask him what kind of a man Jim Dixon is. I find that he is a reporter for a Flushing paper and New York correspondence and have no doubt that that is the way he gets in all this nasty stuff about me.

The action against me is brought in the Cook County Circuit Court. I want to know whether you would not think it wise for me to remove it into the U. S. Court, where it would come before Judge Grasham's successor. Do you know him and is he a man whom you would prefer to have my case go before above the Circuit Court judges here in Cook County.

I am advised here by one or two friends that Mr. Trude is a very able and high-toned lawyer and would be the best man for me to retain. Do you know him. What do you think of him? Do you approve of him or can you suggest some one you would prefer to have me retain? If so, please send me a letter of introduction to such person, and if not and you know Mr. Trude, please write a

letter to Mr. Trude, stating what you please about me, and let me know to whom to go.

Will you also please write me what your movements in the near future are to be, as if you are not going to be in New York City, I will meet you wherever you shall happen to be when I get the papers from Montana. Very truly yours,

H. A. Root

Col. R. G. I. – 2 – DAVIS CASE.

We reached an agreement (oral) last night on the terms we talked over in New York. If they carry it out all right: The trial will not take place May 8th. In case the other side back out of the agreement, we have a stipulation from them that they will not ask for a continuance beyond July 1st, 1893. Yours very truly

H A Root

COMPLAINANT'S EXHIBIT XXI.

[Put in Evidence, page 137.]

AUDITORIUM HOTEL.

Chicago, May 12th, 1893.

Col. Robert G. Ingersoll, No. 20 Wall St., New York.

My dear Col. Ingersoll:—I shall send you in a day or two a copy of the paper which I submitted to you at the Grand Pacific. There is no hurry about this matter as I think it will take a week or ten days before the last of the Davis tribe sign it. There is one Davis here who is the last of their set and the other side sent a messenger to interview him here and he will probably go to Butte or Andy will come here, then we will get our people into line. So much for the Davis case back number.

Now I would like to have you do something for me in the Dixon business. Please call on W. D. Shipman, of Larocques firm and ask him what he knows of Jim Dixon,—son of the late Senator Dixon of Connecticut. You might tell him if you please, that you have entered an appearance for me here, which was done yesterday, and are going to try the case for me and that I have referred you to him to ascertain about the character of Jim Dixon. Among other

things I am charged with having influenced the father and mother of Jim Dixon to make their wills in favor of the daughters and against him. Now it so happens that Judge Shipman drew both wills, was executor of both wills and neither the Senator nor Mrs. Dixon ever consulted me or spoke upon the subject to me and in point of fact, I was at the time about eighteen years old. Now I have an impression that Judge Shipman has got an idea that I have in some way taken advantage of or over-reached Henry W. Dixon, the lunatic. Now, as far as that is concerned, if he has that opinion he has nothing to found it on and if he knew the facts, he would not have it. If he knew the number of suits, actions and proceedings that have been taken in the last ten years by Jim Dixon against Henry W. Dixon, and which I was obliged to defend for him, and the judgments which I had to pay to Jim he would believe that I had acted most faithfully in the matter, and besides all that if it should so happen that an accounting should be ordered by this court by me in favor of Jim Dixon or a suitable person, I should be able to respond without the slightest difficulty. However, your inquiry is not as to what Judge Shipman thinks of me; I will take care of that myself. All I want Judge Shipman to do is, as an honorable gentleman to tell you what he knows of the infamous career of James W. Dixon and I want him to tell you all he knows. If he did he would tell you that James Dixon was from the time he was sixteen years old, a drunkard, a dangerous character on the streets of Hartford; that he was at certain times under police surveillance; that he abused even used violence towards his father; that he robbed his father; that he stole the diamonds from his mother's wedding ring; that he was in the habit of coming home when the family had company and at dinner parties stealing the wine and being drunk; that he was consequently sent to New York in my care; that he continued to be down to the time when Judge Shipman last heard of him, a common drunkard; that on the death of Senator Dixon, Jim Dixon started and kept up for years fraudulent and fictitious claims and suits against his sisters and that he is a miserable, common blackmailer anyway.

Now if you will draw Judge Shipman out on these points and let

me know in a general way what he says, you will do me just as you always have done, service and a great service.

Yours very truly,

H. A. Root

COMPLAINANT'S EXHIBIT XXII.

[Put in Evidence, page 137.]

Chicago, June 6, 1893.

Col. Robert G. Ingersoll, 20 Nassau Street, New York, N.Y.

My dear Col. Ingersoll: Your letter saying Mrs. Cornue inquires whether the contract with the heirs of John A. annulls the contract she made with me, giving me one-third for expenses, is received, and in my opinion it does not affect that contract at all on the part of Mrs. Cornue, and that her share must be diminished in any contingency by one-third of her interest in the estate. Whether the money allowed for counsel fees shall be apportioned to her share before the one-third is deducted or not, is a question which will be left to be determined in the end probably by yourself. Mrs. Cornue's position, as you remember, is different from that of the rest of our people. The rest of them have agreed to take $150,000 per full share in any contingency. Mrs. Cornue has not made this agreement. Of course we have not agreed to pay to any of the heirs the $150,000, but they have agreed to accept it and not ask for anything more. Should it turn out when we come to a final adjustment that we cannot pay our expenses and have left so much as $150,000 per full share, of course all of our people will be obliged to accept, and will be very glad to do so, whatever will be coming to them after the expenses have been paid. In other words, just exactly the same as if they had placed in our hands a judgment against somebody and we had prosecuted it successfully, and then we would of course be entitled to deduct from the amount collected the fair and proper compensation for expenses; and the reason why we asked them to make the agreement to take $150,000 in any contingency was to give us a basis upon which we could figure in a settlement. This is all the answer I can think of.

Dear Colonel, I wish to thank you for having gone to see Judge

Shipman about my hypnotising case, and I am very glad to learn from Mr. Codding that not only Judge Shipman but the lawyers in Hartford and people there, appreciate fully the party who is suing me, and I find that we shall be able to get more testimony than we shall want, and really when it comes to looking the records over, and the whole business, I have got a better case than even I thought I had. I shall probably not ask you to do anything in the case until it comes to a trial here, which they say cannot be reached for two or three years, except that I shall want you to take Judge Shipman's testimony. I will have Mr. Codding see you when we are ready to do that, which may be in about twenty days, and post you fully on the subject.

With renewed assurances of my distinguished consideration, I remain,

Always your devoted slave,

H A Root

COMPLAINANT'S EXHIBIT XXIII.

[Put in Evidence, page 137.]

AUDITORIUM HOTEL.

CHICAGO, July 10, 1893.

Col. Robert G. Ingersoll, No. 20 Nassau St., New York City.

My dear Colonel:—I shall leave Wednesday night for "Dear old Butte." Notwithstanding the fact that the paper which I thought was in existence, and do still think is, cannot be discovered, it is still my opinion that we ought to take the position that under any circumstances except after all parties are settled with, notwithstanding our agreement, we should not consent to place ourselves in a position where by any possibility we can be compelled to withdraw our contest — because as I feel, we will make a mistake under any circumstances by doing so, and I propose to take that position when I get to Montana. I really believe that everybody there will agree to it.

If you will justify me in this position, please, on receipt of this, on Wednesday telegraph me "all right:" I will then say to them in Montana that I will not deliver to them the paper which has been

signed by all the parties until and unless they agree to amend it by a supplemental agreement which shall be to the effect that the contests of Maria Cummings and Henry A. Root shall not be withdrawn except upon your consent that that shall be done. While this may be a plucky position for our side to take, I am inclined to take it, but shall only do so upon being advised by you by telegram that I should.

I know that Toole & Clayburg will be governed entirely by what you say, and I feel at the present time that there is but a single chance of our being worsted, which is that by some means or other, owing to some action or other on our part, our contests may be withdrawn, and the other side might be able to take some advantage of that position.

Yours very truly,

H. A. Root

COMPLAINANT'S EXHIBIT XXIV.

[Put in Evidence, page 137.]

Auditorium Hotel, Balbo & Southgate.

Chicago, August 5, 1893.

Col. Robert G. Ingersoll, 20 Nassau Street, New York City.

My Dear Col. Ingersoll: — I arrived here yesterday morning from Butte. I never have known anything in my life to proceed with such absolute clock work ease and certainty as all the proceedings we have taken there. Everything on our side, by which, of course, you know I mean the proponents and contestants' side, is absolutely satisfactory.

The Asa children contest, which was the only lingering hope that Erwin had, was easily and irretrievably knocked out. The disposition of the other side, or thought of probating the will was instantly dissipated upon the production by me of the paper of which I enclose you a copy. You can see the cunning of old Erwin, however; the paper was probably drawn by Woodworth, and the lines that I have underscored will absolutely, I know amuse you.

Dixon and Forbis were perfectly carried away with delight when I brought to light this paper, which was undoubtedly presented to John for no purpose other than to authorize Erwin to go to Massa-

chusetts and represent him to fight us, but which, in fact, is an acknowledgment of a construction of what we call the "nefarious agreement," which construction it could not possibly bear except by this admission. The moment this was seen by the other side they said of course we cannot under any circumstances contemplate probating the will, and they saw at once the effect if the will was probated and this construction was enforced would be that the proponents would be far worse off than any of us.

Now, there is a single change I want you to consent to in the original agreement. It is provided in that, as you will doubtless remember, that in the event one side or the other of us, that is the proponents and contestants, should deem it advisable that the contests should be withdrawn and the other side not agreeing, the question should be left to a man by the name of Barrett in Butte. I objected to this, because Barrett is not a lawyer, and that is a question which should be decided in the possible event of a difference by a very good lawyer who could see all sides of the case.

We wanted one of the best lawyers of the State, and Mr. Clayburg suggested a Judge Armstrong whom he and I know very well, and who is an excellent man, to become such arbitrator. Do you approve of this course, and, upon the other side agreeing to it on our side, will you consent that the contract be delivered?

Please let me know immediately upon receipt of this.

Faithfully yours,

HENRY A. ROOT

COMPLAINANT'S EXHIBIT XXV.

(Put in Evidence, page 137.)

AUDITORIUM HOTEL.

CHICAGO, August 12, 1893.

Col. Robert G. Ingersoll, 20 Nassau Street, New York City.

My dear Col. Ingersoll:—I see by the morning Tribune that Mrs. Harriet R. Sheffield has filed a petition in New York for letters of administration on the estate of the late A. J. Davis. In view of the fact that there is no property in the City of New York that

belongs to his estate, you will no doubt reach a conclusion which I reached at once, which is that Erwin's position is absolutely desparate, and that he has caused this petition to be filed in order to continue to keep his people blindfolded: he of course has heard by this time, and well knows that he has no living chance of any kind in Montana, and I suppose he thought if he instituted some proceeding in New York he could continue to say to his people that he was going to acquire their rights and to pretend to them that they were not already lost.

Yours very truly,

H. A. Root

COMPLAINANT'S EXHIBIT XXVI.

[Put in Evidence, page 137.]

Hotel Reynolds, Boston, Sept. 1, 1893.

Col. Robert G. Ingersoll, 20 Nassau St. New York City

My dear Col. Ingersoll: It has occurred to me that it would be wisdom on your part if you would send Mr. Griffin up to see the clerk of Surrogate and suggest to him that the petition filed by Mrs. Sheffield did not contain a sufficient statement of facts to give to the Surrogate even jurisdiction to grant an order issuing citation, in that it does not state that A. J. Davis lived in New York City but it does state that he lived and died in Montana. It does not state anything whatever with reference to any proceedings in Montana, and is upon its face a paper which I do not think the Surrogate would grant citations on if his attention was called to these facts. I would like to have that done, if you will, and perhaps it would be well to have it done, tomorrow (Saturday) as I am informed that the Surrogate and his assistant will not return until the 1st of Sept., which I presume means next Tuesday. I want as soon as I can if the citations are issued, your appearance put in for me, and I also wish if it can be possible be done, and the citations are issued that the hearing should come up before Surrogate Ransom himself, because he knows me and he also knows Erwin Davis.

The silly efforts of old Erwin to do something to keep up his appearance of an end practically culminated today when Mr. Morse,

his Boston representative, told one of our friends that the old man Erwin wanted to know if there wasn't somebody on earth that he could see and talk to having in view some kind of a settlement.

I wish to thank you most cordially for your able and very successful efforts with my friend Mr. Cammack, which brought early and successful fruit.

Yours very truly,

H A Root

COMPLAINANT'S EXHIBIT XXVII.

[Put in Evidence, page 138.]

European Plan
HOTEL REYNOLDS
John F. Reynolds, Prop.
13 & 15 Boylston St.
623 Washington St.
Boston.

BOSTON Sept 6 1893

My dear Col Ingersoll: Will you kindly confer with Shearman & Sterling who will represent the First Nat'l of Butte in the Sheffield business.

Knock them out as you always do. Everything is lovely.

Faithfully yours

H. A. Root

COMPLAINANT'S EXHIBIT XXVIII.

[Put in Evidence, page 138.]

AUDITORIUM HOTEL,

CHICAGO, ILL., Oct. 24th, 1893.

Rob. H. Griffin, Esq., No. 20 Nassau St., New York.

Dear Sir: — I enclose you a copy of a citation, etc., which has been served by mail on me. The matter will require attention on Nov. 10th. I will see Col. Ingersoll when he comes in, and I enclose this to you so that the matter will not be overlooked. The idea is for me to enter objection and opposition in connection and harmony with Shearman & Sterling who represent the 1st. Nat. Bank, of Butte, Montana.

Yrs

H A Root

COMPLAINANT'S EXHIBIT XXIX.

[Put in Evidence, page 138.]

AUDITORIUM HOTEL. Breslin & Southgate.

CHICAGO, Apl 20 1894

Dear Col. Ingersoll — I wrote you today stating fully the situation and hope you approve of our position. I may need some money May 1st to keep me moving till we get through. If I should want $1,000 — will you lend me that amount till Fall or we get to the division which must be soon. I shall not ask you for it if things pan out as I expect. If they do not I shall need the above amount to keep my end up just at present.

Won't you drop me an answer. Yrs

H. A. Root

COMPLAINANT'S EXHIBIT XXX.

[Put in Evidence, page 138.]

AUDITORIUM HOTEL, CHICAGO, ILL.

CHICAGO, ILLINOIS, May 8, 1894.

Col. R. G. Ingersol, 20 Nassau Street, New York City.

Dear Col. Ingersol, — I find from a synopsis of the testimony which I have just received from Mr. Toole and a copy which I enclose to you that the fact is not as I supposed it was with reference to the voting of the stock of the First National Bank of Butte by Judge Davis after the pretended gift, but that it was voted, as you will find upon page 4, [1042] of what is enclosed to you. Do you think that this is a material fact of which advantage can be taken by the other side? I am leaving this afternoon for Butte, "Dear Old Butte", and if you have any suggestions to make, which you think would be of value to our people on the 15th, please send them to me at the Silver Bow Club in Butte.

Faithfully yours,

H. A. Root

Synopsis of Testimony.

In re Talbott v. Davis, et al.

Andrew J. Davis testified in substance that the deceased had a tin box in which he kept his most private papers. "Within the last few years he has been dropping his large transactions and leaving them to me to look after. The box containing these valuable papers has been kept in the vaults of the safe ever since the death of Judge Davis, and under my control. I do not think anyone else has had access to this box for the reason that I have had his bundles of keys locked in another box, and the keys to that box have been on my ring in my pocket and the box is in good shape. It has been under a combination and no one working at the bank knew the combination but myself. I have been through the box any number of times with the Judge and know what there is in it. I have been advised not to open it, and have brought it into court for the purpose of having it opened. In this box is also cattle company stock, which stands in the name of Judge Davis. The stock ledger shows that the bank stock may have been in the bank's vaults at the time of his death. I have some doubt about where they were, they may have been in my pocket at the time of his death. I am sure they were in the bank's vaults last night. He called for the tin box and took out the certificates of stock and gave them to me and told me to keep them. He told me to take those certificates and we had quite a talk. It was a very affecting talk. He gave me to understand that he was just carrying out his promise to me."

When interrogated and asked to tell precisely what he said to the best of his memory, the witness stated:

"He was preparing to go away and he asked me to bring his little tin box down (that is this one here in court) he opened and he started through the box. He had been talking two or three days before about going away, and he picked out some of the certificates and he asked me how many shares were represented in those. I told him. I do not know how many I told him. I figured it up and told him how many there were, and I told him there was more in his name. He asked me if that was all, and I said there are so many shares

more and he started through the box again and found them. I put them all back and folded them up and handed them back to him and he took them and handed them right back to me and he told me that that stock he wanted me to take and keep it. He told me that he was going away and that he did not know as he should ever return. He gave me to understand that life was uncertain: he might meet with an accident, and that he had promised it to me and that I had worked for it and deserved it. That is all what he said on that occasion. I may have missed words, for I cannot repeat it exactly word for word, but he told me that he wanted me to take it and keep it and it was mine in case anything should happen to him. He was starting, intending to go to California first and he started by way of the Northern Pacific to Tacoma. I am sure he said it was mine if anything happened to him. He referred to different things, railroad accident and death: and he was not feeling well when he left. He never endorsed any of the certificates in writing. I cannot assign any reason for him not doing so unless it was he intended as long as he was alive that he wanted to have that stock for himself."

Being asked this question he replied as follows:

"Q. So that if he had endorsed them they would have been no less in his control than they were without his endorsement, is not that so? A. Really so far as I go, but not so far as he goes. I would have considered them safe in my hands if came back alive.

He also asked this question: "Why not so far as he goes if he trusted you? A. Because he was a man who was very suspicious of any person. Q. He was not suspicious of you in the least? A. I never thought so. He never showed it, and it was a very important matter and he may have thought that I would have immediately transferred it on the books. Q. Even if he had instructed you not to? A. Well, he might have thought of such a thing. Q. Of course you did not suppose he did think so? A. I did not know what he thought. Q. Do you mean that he gave it to you? — in common phrase — with a string to it? A. You might call it that way, Yes sir. Q. That he gave it to you and yet retained ownership in it himself? A. I suppose he wanted it to stand in his own name, and wanted no other person to know of it until after his death.

(It will appear in this connection that John E. Davis a brother of Andrew D. Davis Jr. had a power of attorney or proxy from Judge Davis and voted his stock at a stockholders' meeting and that after the pretended gift and before Judge Davis's death at a stockholders' meeting so held, and said John E. Davis voted the said stock as agent or proxy of the deceased.

The testimony of Talbott is substantially or was substantially the same as that of Andrew J. Davis.

COMPLAINANT'S EXHIBIT XXXI.

[Put in Evidence, page 138.]

WELLINGTON HOTEL, CHICAGO.

CHICAGO, ILL., Aug. 9th, 1894.

Col. Robt. G. Ingersoll, No. 20 Nassau St., New York City.

Dear Col. Ingersoll: — The time has now arrived when we must decide upon the decree to be entered in our case, if one is to be entered, or to decide not to enter one at present. It is certainly a matter of much moment to us all, this decision we must now reach. I have been requested by our people to take hold of the subject and get the opinions of our advisers on this particular point, and of course I go first to you.

You will remember that you have said a number of times to me that when this decree was entered, you wished to be in Montana and that you wished, if not to prepare in its details, at least to supervise it, and your wish is shared by all of the people, counsel and client-interested upon our side of the case, and I therefore want from you as prompt an expression of your views as your other engagements will permit.

The appeal of the Asa children, all about which you know, was advanced upon the calendar and either has been actually heard, or will be heard this week, and no doubt will be disposed of with much promptness, inasmuch as the Supreme Court considered it of sufficient importance to give it the preference upon its calendar. Should that appeal be decided in favor of the Asa children, which I do not anticipate, they will certainly be called upon to try their case with

great promptness. In view of the fact that we all think the probabilities very strong that the order of Judge McHatton dismissing their appeal will be sustained in the Supreme Court, and upon established precedents there, and in view of the fact that should this happen we should be prepared to act with much promptness in entering a decree, and also inasmuch as the question of the advisability of the entry of this decree must infallibly be decided by us soon, I ask your attention to the subject. You have heretofore considered the questions and heard the opinions of our advisers located in Montana on the subject of the right of any heir to enter a contest within one year after the decree probating the will. I am inclined to think that there is a reasonable chance that the Supreme Court of Montana will hold, notwithstanding what we have heretofore thought, that this right to so enter a contest does not exist where an actual contention has been had, and that the provisions of the statute are only applicable to a case where there has been actually no contest against the probating of the will.

I have to-day written to Messrs. Toole & Clayberg on this subject. Mr. Toole has expressed the opinion that this right existed on the part of any of the heirs, and Mr. Clayberg has expressed a different view. I have requested that there should be a conference upon this certainly very important subject. I shall doubtless, soon receive an answer and shall promptly forward it to you. Even should they decide that this right exists, why should we not, notwithstanding it, now enter our decree of distribution? Certain it is that we must do something, and it seems to me to be equally certain that we cannot do anything else but this. Therefore, I say why not do this? Assuming that you agree with me, as to the entry of this decree, what should be the decree? Inasmuch as you may not have at hand the agreement between the heirs of John A. Davis, and those represented by you, I send with this letter a copy of that agreement. You will see that, as I take it, we will all be entitled to have expressed in the decree the terms of the agreement, and it certainly is not a reflection upon us of any kind, nor is it an admission of the genuineness of the will, if we consent to an entry of the decree, giv-

509¼

ing to the contestants such shares in the estate as the agreement provides for.

Now, will you prepare the material parts of this decree? As to the formal parts, we must rely upon our Montana counsel. In the event that the representatives of the John A. heirs should agree to the material parts of the decree, as drawn by you, or if you do not wish to draw it yourself and prefer to have the draft made in Helena subject to your approval, I should not think that it would be necessary to ask you to go to Montana at the time of its entry. Of course, should there be much opposition to what we will ask to have incorporated in the decree, I should feel differently.

I have not as yet received an answer to a letter I wrote you recently relative to the appeal to the Supreme Court of the U. S. in the Montana case.

Yours very truly,

H. A. Root

COMPLAINANT'S EXHIBIT XXXII.

[Put in Evidence, page 416.]

May 1st 1.

My dear Root. Do not know whether I can get the money, but feel sure I can raise $25000 — have already secured $13000 —

Now, there is another thing: I suppose it is best for you and I to have a specific and definite understanding in regard to my fee. Of course, if you should lose the case you could not pay. We can raise money enough to pay expenses and of course I shall want expenses — but the real question is as to what I am to have in case of success and how that is to be secured — *i.e.* what papers are necessary, etc.

Let me hear from you

Yours,

R. G. Ingersoll

COMPLAINANT'S EXHIBIT XXXIII.

[Put in Evidence, page 143.]

July 14. 3.

My dear Mr. Root. I agree exactly with you. Do not deliver the contract of settlement without the supplemental agreement you speak of in your letter.

We must not tie the grass over our path. Give my best regards to all your friends. Yours always.

R. G. INGERSOLL.

COMPLAINANT'S EXHIBIT XXXIV.

[Put in Evidence, page 145.]

July 17th 4.

Henry A. Root Esq

My dear Friend: Is there any news? When will that case come up in the Supreme Court at Helena? Do you want me to argue it? You know I am always ready to do my part in any and every way and at all times and places. Yours always.

R G INGERSOLL

COMPLAINANT'S EXHIBIT XXXV.

[Put in Evidence, page 146.]

Aug. 23. 4.

Dear Root. On my return from the East found your letter about the proposed decree. My idea is that the decree should be by agreement of the parties — there can be no danger in this because it will be agreed to by all the parties in Court, and all that have a right to be in Court. Then I think the decree should set forth the interest that each party is to have in thes estate, and the costs to be paid by each party.

In other words I want it so that everything will be settled by the decree, leaving no loophole for future trouble to creep in.

I think the agreement should be substantially followed. I do not suppose that it will be necessary to set out the agreement in the decree, but divide the estate according to its provisions. The real point being to fix in the decree the amount to which is entitled —

Now, my dear Root, this is all I have to say. There is no need for me to write out the decree. Yours always,

R. G. INGERSOLL.

COMPLAINANT'S EXHIBIT XXXVI.

[Put in Evidence, page 148.]

Apl. 3, 5.

My dear Root. Thanks for the telegram. I congratulate you and I congratulate myself that the will case is over.

Now the next question is:— When can I realize?— Let me know just how the matter stands. I want it all settled in accordance with our contract and so do you. No doubt about that.

Yours always,

R. G. INGERSOLL.

COMPLAINANT'S EXHIBIT LIV.

[Put in Evidence, page 149.]

NEW YORK Jan. 25, '96

My Dear Clayberg. Please consider this as confidential.

I am somewhat fearful about my fee in the Davis will case.

Now, can I file any paper in Court, or with the administrator that will prevent a distribution until my lien is passed upon?—

Will you do anything of a like nature?

Of course I want to act with you.

Yours truly,

R. G. INGERSOLL.

COMPLAINANT'S EXHIBIT VERIFIED STENOGRAPHIC REPORT OF THE ARGUMENT OF COL. ROBERT G. INGERSOLL TO JURY, IN TRIAL OF DAVIS WILL CONTEST. DELIVERED SEPT. 3, 1891.

Offered in support of complainant's motion for Temporary Injunction.

[Put in Evidence, page 417.]

COLONEL INGERSOLL SPEAKS.

During the time occupied by Senator Sanders, the crowd had constantly been growing larger, and when he finished the court-room and corridors were filled as they never had been before. Not only was the court-room packed to the windows, but the judge's room was in a like condition, and at the doors the spectators were standing on each other's shoulders. When Colonel Ingersoll rose to make his argument, there was a movement among his auditors which indicated that at last the treat, toward which all had been looking throughout the trial, had come. It is needless to say that not one of them was disappointed, as Ingersoll never disappoints his hearers. Any report of his speech must be inadequate, as nothing can reproduce the charm of his presence and manner: that can be enjoyed only by those who were present. What Mr. Ingersoll said was as follows:

May it please the Court: Gentlemen of the Jury, waiving congratulations, reminiscences and animadversions, I will proceed to the business in hand.

There are two principal and important questions to be decided by you. *First*, is the will sought to be probated, the will of Andrew J. Davis? Is it genuine? Is it honest? And, *second*, did Andrew J. Davis make a will after 1866, revoking all former wills, or were the provisions such that they were inconsistent with the provisions of the will of 1866? These are the questions, and as we examine them, other questions arise that have to be answered. The first question then is: who wrote the will of 1866? Whose work is it? When, where, and by whom was it done? And I don't want you, gentlemen, to pay any attention to what I say unless it appeals to your reason and to your good sense. Don't be afraid of me because

I am a sinner. I admit that I am. I am not like the other gentleman who thanked God that he was not as other men.

I have the faults and frailties common to the human race, but, in spite of being a sinner, I strive to be at least a good-natured one, and I am such a sinner that if there is any good in any other world, I am willing to share it with all the children of men. To that extent, at least, I am a sinner: and I hope, gentlemen, that you will not be prejudiced against me on that account, or decide for the proponent simply upon the perfections of Senator Sanders. Now, I say the question is:

WHO WROTE THIS WILL?

The testimony offered by the proponent is that it was written by Job Davis. We have heard a great deal, gentlemen, of the difference between fact and opinion. There is a difference between fact and opinion: but sometimes when we have to establish a fact by persons, we are hardly as certain that the fact ever existed as we are of the opinion, and although one swears that he saw a thing, or heard a thing, we all know that the accuracy of that statement must be decided by something besides his word. There is this beautiful peculiarity in nature,—a lie never fits a fact, never. You only fit a lie with another lie, made for the express purpose, because you can change lies, but you can't change a fact: and after a while the time comes when the last lie you tell has to be fitted to a fact, and right there is a bad joint: consequently, you must test the statements of people who say they saw, not by what they say, but by other facts, by the surroundings, by what are called probabilities: by the naturalness of the statement.

If we only had to hear what witnesses say, jurymen would need nothing but ears, their brains could be dispensed with: but after you hear what they say, you call a council in your brain, and make up your mind whether the statement, in view of all circumstances, is true or false. Did Job Davis write this will? I would be willing to risk this entire case on that one proposition. Did Job Davis write this will? And I propose to demonstrate to you by the evidence on both sides, that Job Davis did not write that will.

Why do I say so? First, the evidence of all the parties is that

Job Davis wrote a very good hand; that his letters were even. He wrote a good hand; a kind of schoolmaster, copy-book hand. Is this will written in that kind of hand? I ask Judge Woolworth to tell you whether that is written in a clerkly hand; whether it was written by a man who wrote an even hand; whether it was written by one who closed his "a's" and "o's"; whether it was written by one who made his "h's" and "b's" different. Job Davis was a good scholar. No good penman ever wrote the body of that will. If there were nothing else, I would be satisfied, and, in my judgment, you would be, that it is not the writing of Job Davis. It is the writing of a poor penman; it is the writing of a careless penman, who, for that time, endeavored to write a little smaller than usual, and why? When people forge a will they write the names first on the blank paper. They will not write the body of the will and then forge the names to it, because if they are not successful in the forgery of the name they would have to write the whole business over again; so the first thing they would do would be to write the name, and the next thing that they would do would be to write the will so as to bring it out within the space that was left; and here they wrote it a little shorter even than was necessary and quit there [*indicating*] and made those six or seven marks and then turned over, and on the other side they were a little crowded before they got to the name of A. J. Davis."

Mr. DIXON. Colonel Ingersoll, allow me to interrupt you a moment. I call the attention of the court to the fact that when Mr. Myers was speaking he was not allowed to exhibit that photograph to the jury.

Mr. INGERSOLL. I am not exhibiting it to the jury.

Mr. DIXON. I only desire to call the attention of the court to it.

Mr. INGERSOLL. I don't want the original, because I will tear it all to pieces. I don't wonder that you are afraid for them to see anything.

Mr. DIXON. Well, that is your customary brag. Go on with it.

Mr. INGERSOLL. No brag about it. We want the truth, and you have dodged it from the first. I am not showing this to the jury, but I do think that the photograph will give the relation of the

names to the writing. I am not calling your attention, gentlemen, to any shadows or stains that do not appear on the original will. I am simply using this for convenience, and I hope you will not be misled by it.

Now, the next question is, was Job Davis a good speller? Now, let's be honest about it. How they would have been delighted to have shown that he was an ignorant booby. But their witnesses and our witnesses both swear that he was the best speller in that neighborhood, and when they brought men from other communities at a spelling match, after all had fallen on the field, after the floor was covered with dead and wounded, Job Davis stood proudly up, not having missed a word. He was the best speller in that county, and not only so, but at sixteen years of age he wasn't simply arithmetic, but he was in algebra, and not only so, after he had finished what you may call this common school education in Salt Creek Township, he went to the normal school of Iowa and prepared himself to be a teacher, and came back and taught a school. Now,

Did Job Davis Write This Will?

My friend, the senator, says there are three or four words misspelt in this document, and that shows that the senator has paid about the same attention to the will that he has to the case. In that document there are twenty words misspelled — clearly, absolutely. And what kind of words are misspelled? Some of the easiest and most common in the English language. Will you say upon your oaths that Job Davis, having the reputation of the champion speller of the neighborhood — will you upon your oaths say that when he wrote this will (probably the only document of any importance, if he did write it, that he ever wrote) he spelt "shall" "shal" every time it occurs in the will? Will you say that this champion speller spelt the word "whether" with two "r's" and made it "wherther", making two mistakes, first as to the word itself and second as to the spelling? Will you say that this champion speller could not spell the word "dispose" but wrote it "depose"? And will you say that the ordinary "give" was spelled by this educated young man "gnive"? And it seems that Senator Sanders has ransacked the misspelt world

to find somebody idiotic enough to twist a "u" in the word give, and even in the Century Dictionary — I suppose they call it the Century Dictionary because they looked a hundred years to find that peculiarity of spelling — even there, although "give" is spelled four ways besides the right way, no "u" is there. And will you say that Job Davis did not know the word "administrators"? Now, let us be honest about this matter — let's be fair. It is not a personal quarrel between lawyers. I never quarrel with anybody: my philosophy being that everybody does as he must, and if he is in bad luck and does wrong, why let's pity him, and if we happen to have good luck and take the path where roses bloom, why let's be joyful. That is my doctrine: no need fighting about these little things. They are all over in a little while, anyway. Do you believe that Job Davis spelt "sheet"—a sheet of paper "sheat"? That is the way he spells it in this document. Now, let's be honor bright with each other, and do not let the lawyers on the other side treat you as if you were twelve imbeciles. You had better be misled by a sensible sinner than by the most pious absurdities that ever floated out from the lips of man. Let us have some good, hard sense, like we would in ordinary business of life. Do you believe that Job Davis, the educated young man, the school teacher, the one who attended the normal school, would put periods in the middle of sentences and none at the end? That he would put a period on one side of an "n", and then fearing the "n" might get away put one on the other, and then when he got the sentence done be out of periods, so that he would not put one there, and put so many periods in the writing that it looked as if it had broken out with some kind of punctuation measles? Job Davis, an educated man! And you are going to tell this jury that that man wrote that will! I think your cheeks will get a little red while you are doing it. This man, when he comes to the little word "is", in the middle of a sentence, his desire for equality is so great that he wishes to put that word on a level with others and starts it with a capital, so that it won't be ashamed to appear with longer words. And yet the will was written by Job Davis, and Sconce saw him write it, and Mrs. Downey saw him write it! If there were one million Sconces, and a million Mrs. Downeys,

and they held their hands up high and swore that they did. I know that they did not, unless all the witnesses who have testified to the education of Job Davis have testified lies. There is where I told you a little while ago that when a lies comes in contact with a fact, it won't fit. These other people in Salt Creek Township that have come here and sworn to that didn't know whether it was spelt right or wrong. They did not take that into consideration. Now, it seems to me utterly, absolutely, infinitely impossible that this will was written by a good speller. I know it was not. So do you. There is not a man on the jury that does not know it wasn't written by a good speller — not a man. And you cannot, upon your oaths, say that you believe two things, first, that Job Davis was a good speller, and secondly, that he wrote this will. Utterly impossible. There is another word here, "worldly"—"All my worldly goods." "Worldly" it ought to be, but this Job Davis, this scholar, didn't know that there was such a word as "worldly" he left out the "l" and called it "wordly".

"ALL MY WORDLY GOODS",

and they want you to find on your oath that it was written by a good speller. There are twenty words misspelt in the short will, and the most common words, some of them, in the English language. Now, I say that these twenty misspelt words are twenty witnesses — twenty witnesses that tell the truth without being on their oath, and that you cannot mix by cross examination. Twenty witnesses! Every misspelled word holds up its maimed and mutilated hand and swears that Job Davis did not write the will — every one. Suppose witnesses had sworn that Judge Woolworth wrote this will. How many Salt Creekers do you think it would take to convince that you were around spelling "sheet" "sheat"?

Mr. WOOLWORTH. I have done worse than that a great many times.

Mr. INGERSOLL. You have acted worse than that, but have never spelt worse than that.

Now, this Job Davis died in 1868. Nobody has seen him write for twenty-three years, but everybody, their witnesses and ours, posi-

tively swear that he was a good speller. Now comes another question: Who wrote this will? Senator Sanders tells us that it is immaterial whether Job Davis wrote it or not. To me that is a very strange remark. If Job Davis did not write it, Mr. Sconce has sworn falsely. If Job Davis did not write it, then there was no will on the 20th of July, 1866, and all the Glasgows and Quigleys and Downeys and the rest are mistaken — not one word of truth in their testimony unless Job Davis wrote that will.

And yet a learned counsel, who says that his object is to assist you in finding a correct verdict, says it don't make any difference whether Job wrote the will or not. I don't think it will in this case. Who wrote the will? I am going to tell you, and I am going to demonstrate it, so that you need not think anything about it — so that you will know it; that is to say, it will be a moral certainty. Who wrote this will? I will tell you who, and I have not the slightest hesitation in saying it.

JAMES R. EDDY WROTE THIS WILL.

And why do I say it? Many witnesses have sworn that they were well acquainted with Mr. Eddy's handwriting — many. Several of the witnesses there had the writing of Eddy with them. That writing was handed to the counsel on the other side, so that they might frame questions for cross examination. Those witnesses founded their answers as to peculiarities upon the writings given to the other side, and not on the writing in this will — just on the writings of letters and documents they had in their possession, and that we handed to the opposite counsel. Now, what do they say? Every witness who has testified on that subject said that Eddy had this peculiarity: first, that whenever a word ended with the letter "d", he made that "d" separate from the rest of the word. And, gentlemen, there are twenty-eight words in this short will ending with the letter "d"; clearly, unequivocably in twenty-seven of the words ending in "d", the "d" is separate from the rest of the word. I do not include the twenty-eighth, because there is a little doubt about it. The testimony is by everybody, except the writing that Eddy has done since he has been found out to be the forger of that will — nobody

has sworn that he had a letter from him in which that is not the fact, unless the letter was written since the institution of this suit. Twenty-seven of these words end "d" and the "d" is made separate from the rest of the word. Will Judge Woolworth please tell the jury whether any witness testified that Job Davis made these separate from the rest of the word? Poor Job, dead, and his tombstone is being ornamented with "guive" and he is now made to appear as an ignorant nobody. Twenty-eight words ending with "d." Now, if that is all, I would say that might be an accident, a coincidence, and that we could not build upon that as a rock. I would say we must go further; we must find whether any more peculiarities exist in Eddy's writing that also exist in the will. We must be honest with him. Now, let us see. He always had the peculiarity of terminating that "d" abruptly, down just above the line, or at the line, lifting his pen suddenly, making no mark to the right. Everyone of the "d's" in the will are made exactly that way. Corroboration number two. These twenty-seven witnesses, the "d's," swear that Eddy is their father, that they are the children of his hand; that he made them. Another peculiarity. They say that Eddy always made a double "l" in a peculiar manner. The last "l" came down to the line of the up-stroke, and that "l" as a rule stopped there. It did not go on to the right — a peculiarity. Now, let's see. In this will there are nine words that end with a double "l" (and I want you to look at that when you go out), each one is made exactly that way — each one. Nine more witnesses that take the stand and swear to the authorship of this will. Has anybody shown that that was Job Davis' habit? Poor dead dust cannot swear; nobody has said that.

Another peculiarity is that Eddy makes a "p" without making any loop to the right in the middle of it. Now and then he makes one with a loop, but his habit is to make one without. Moses Downing swore that Job Davis made a "p" with three loops, a loop at the top, a loop at the bottom and a loop in the middle. That is exactly what he swore, and he was the one who taught Job to write; and he said he made his letters carefully, he closed his "a's" at the top, he made his "o's" round, he made his "h's" after the or-

thodox pattern, he was all right on the "b's" — your witness. Now, gentlemen, you remember how that "p" looks, without any loop: and there are twenty-one "p's" that have no loop to the right — twenty-one in this will. Twenty-one more witnesses, and every one of them is worth a hundred Scoones, with his sheep and hogs floating in the air. Twenty-one witnesses that swear to the paternity of this will. Moses Downing, your own witness, swears that Job made a "p" with three loops. There is not a "p" in the will with three loops, and there are twenty-one without any: and the evidence of all the witnesses on our side was that it was his habit to make "p's" without any loop, and they were given the papers that they might cross-examine — every one. Now, do you see, we are getting along on the edge of demonstration. These things cannot conspire and happen. They may in Omaha but they can't in Butte, nor even in Salt Creek Township. Nature is substantially the same everywhere, and I believe her laws are substantially the same everywhere, from a grain of sand to the blazing Arcturus, everywhere, the probabilities are the same.

LET US TAKE ANOTHER STEP.

It is also sworn by intelligent men who have the writing of Eddy in their possession [*writing shown to the other side*] that it was his habit to use "a's", "o's" and "u's" indiscriminately. For instance, — "thut", that you all remember, in the will. When you go out you will see it. He often uses an "o" where an "a" should be, an "a" where a "u" should be, a "u" where an "a" or "o" should be; in other words he uses them interchangeably or indiscriminately. How many cases of that occur in this will? Twenty-two — twenty-two instances in this will, in which one of these vowels is used where another ought to have been used. Twenty-two more witnesses that James R. Eddy wrote this will. Twenty-two more. They have taken the stand: they won't have to be sworn, because they can't lie. It would be splendid if all witnesses were under that disability, — that they had to tell the truth. That cannot be answered by logwood ink. Eddy made "p's" just the same, whether he used logwood or nigrasin, and he used his "a's" and

"o's" and "u's" indiscriminately, no matter whether he was writing in ink,—red, blue, brown, iron, Carter's, Arnold's, Stafford's, or anybody's else. Another witness testified that he used "r" where he ought to use "s", and he used "s" where he ought to use "r", or that he made his "r's" and "s's" the same. Many instances of that kind occur in this will, and every "r" says to Eddy, "You are the man"—every one. Every "s" swears that your will is a poor, ignorant, dirty, impudent forgery. That is what it is,—the dirtiest and most ignorant forgery every presented in a court of justice since the art of writing was invented. It comes in covered with the earmarks of fraud. And yet I am told that it requires audacity to say that it is a forgery. What on earth does it require to say that it is genuine? Audacity, in comparison with what is essential to say that it is genuine, is rank meekness and cowardice. Words lose their meaning. All swear that Eddy scattered his periods with a liberal hand, like a farmer sowing his grain. Now, we will take the twenty-third line of the will: "To their use [period], and [period] benefit [another period] forever" [another period].

Twenty-fifth line: "Davis [period] and [another period] Job [another period] Davis [another period] of [another period] Davis [another period] County" [another period]. What a spendthrift of punctuation this man was! And yet he was well educated, studying algebra, going to the normal school in Iowa, champion speller of the neighborhood. Every period certifies and swears that Job Davis did not write the will. He had studied grammar. Punctuation is a part of grammar, and no one but the most arrant, blundering, stumbling ignorants would think of putting six to eight periods along in a sentence, and then leaving the end of that sentence naked without anything. Another peculiarity is, Mr. Eddy uses "b" and "h" interchangeably. He makes a "b" exactly like an "h", makes an "h" exactly like a "b". You can see that all through the will. There are several instances of it, and each one says that Job Davis did not write it. Downing says he did not write that way, and each one says that Mr. Eddy did write it, and nobody else. I am not through yet. The testimony is that

EDDY WAS A POOR SPELLER.

Now, the learned counsel, Mr. Dixon, says that in this case we must be governed by the probable, by the natural, by the reasonable — three splendid words, and they should be in the mind of every juror when examining this testimony. Is it natural, is it probable, is it reasonable? We have shown that Eddy was the poorest speller in the business. Whenever they went to a spelling match, at the first fire he dropped: never outlived, I think, the first volley. And one man by the name of Sharp distinctly recollects that they gave out a sentence to be spelled: "Give alms to the poor", and Eddy had to spell the first word, give: and he lugged in his "u" with both ears — "guive", and he dropped dead the first fire. The man remembers it because it is such a curious spelling of give: and if I had heard anybody spell give with a "u" when I was six years old, it would linger in my memory yet. Now, let us take Judge Dixon's test. It is a good one, well stated, and it is for you to decide whether the misspelled words were misspelled by a good speller or a poor speller. If you say Job Davis wrote it, then you are unnatural, unreasonable and improbable. Isn't it altogether more natural, more reasonable, more probable to say that a bad speller misspelled the words than that a good speller did? Let us stick to his standard, and see if Eddy spelled give "guive" — and, gentlemen, you cannot find in all the writings of James R. Eddy, written before he was charged with this forgery, where the word "give" appears, that it is not written with a "u" — I defy you to find a line in the world — and "given" is "guivin". Now, let us go another word. Everybody admits that he was a poor speller, and isn't it more reasonable to say that he wrote the will, on the spelling, than that the champion speller did? Now, we have some more evidence on Mr. Eddy, as good as anything I have stated. Now, don't be misled because I am a sinner. Let us stick to the facts. William H. Davis testified to the spelling of Eddy, and while he testified held in his hand a will that he had seen James R. Eddy write. In this will there were twenty words misspelt: shall "shal", and in the James Davis will, shall "shal". Good. Whether, in our will, "wherther": in the other will "whertther" —

just the same. Sheet of paper, "sheat" in our will: "sheat" in the other will. In our will "guive," in that, "guive". Did Job Davis rise from the dead and write another will? Was one copied from the other, and the copies so slavish that it was misspelt exactly the same? You cannot say it was entirely copied, for now and then a word by accident is right. Judge Dixon tells you that Eddy did not disguise his spelling. Good Lord! How could he disguise his spelling? He spelled as he thought was right. No man of his education would think of disguising his spelling. He knows how to spell give: he believes it is with a "u" yet. There is a prejudice against "u" since he was charged with forgery, and so he has dropped it: but he thinks it is right, nevertheless. Now, isn't it perfectly wonderful, is it not a miracle, that James R. Eddy made exactly the same mistakes in spelling and writing one will that Job Davis did in writing another? Isn't it wonderful beyond the circumference of belief, that a good speller and bad speller happened to misspell the same words? It won't do. There is something rotten about this deal, and the rotten thing about it is that James R. Eddy wrote it: and he wrote it about March, 1890. That's when he wrote it: and he let the proponent in this case have it. We will get to that shortly. So, gentlemen, I tell you that every misspelled word is a witness in our favor.

There is something more. Eddy uses the character "&" in writing, instead of writing "and". The will is full of them; and it is stated that sometimes when he endeavored to write out the word "and" he only gets "an", and that peculiarity is in this will. "An" for "and"; that you will find in the seventeenth line in the last word of the line. Colonel Jaques swore that one of Eddy's misspelled words was the word "judgment": that he put in a superfluous "e", and in this case here is "judgement"—shall give the annuity that in the judgment of the executors shall be final: there is the superfluous "e"—judgement. Now, there is another. Their witnesses swore that as a rule he turns the bottom of the "y's" and "g's" to the left. Now, you will find the same peculiarity in this will, and the amusing peculiarity that he turns the "g's" a little more than he does the "y's". I don't want these things answered by an essay on

immutable justice. I want to say how this is. Another thing, how he makes a "t", with a little pothook at the top, and that hook has caught Mr. Eddy. You will find them made in the will exactly, where the "t" commences a word, where it is what we call the initial letter. And what else? When he makes a small "e" commencing a word, he always makes it like a capital "E", only smaller. That is the testimony and that happens in this will and it happens in the papers and letters. Now, I say that all these peculiarities taken together, the same words misspelt, the same letters used interchangeably, the same mistakes in punctuation, the same mistakes in the words themselves — all these things amount to an actual demonstration. So I told you, he uses the capital "I" with the word "is", and that he does twice in this will. Here are hundreds, almost, of witnesses that take the stand and swear that Eddy is the author of that will. He wrote it, every word of it. He negotiated with John A. Davis for it: and I will come to that after a little. And,

How do They Support This Will,

that has in it the internal evidence that it was written by James R. Eddy? Why do I say it is impossible that he should have written it, and the will should be genuine? Because at the date of that will, or the date it purports to bear, Eddy was only eight years old. And we don't know the real date, gentlemen, of that will yet. My opinion is, that it was dated by mistake, so that it came on a date that Davis was not there, or came on a day that was Sunday, and then they folded up that will, and scratched it and rubbed it until the date is absolutely illegible, and nobody can say whether it is June, July or January. There was a purpose. The day may have been Sunday, or they may have afterwards ascertained that he was not there. It is a suspicious circumstance that the day is left loose so that they can have a month to play on, maybe more. Now, they say, can you impeach Sconce? Every misspelt word in the will impeaches Sconce, every period impeaches Sconce, every "a" that is used as "o" impeaches him, and "o" as "u": every "b" that is made like an "h" impeaches him, every "h" that is made like a "b" impeaches him. In other words, every peculiarity of James R.

Eddy that appears in that will impeaches Mr. J. S. Sconce, Sr., — Captain Sconce.

Now, there is a thing about this will, which to my mind is a demonstration. It may be that it is because I am a sinner, but I find, and so do you find it (you have all looked at this), in the second initial of Sconce, in the letter C there are two punctures and you will find that exactly where the punctures are, there is a little spatter in the ink — a disturbance of the line: in the capital first, in the small "c" there is another puncture and another disturbance of the line. Now, Mr. Professor Ewell says that those holes were made afterwards. Now, let's see. There is a hole, and there is a spatter and a change of the line. There is another hole and another change. There is another hole and there is another change. What is natural? What is reasonable? What is probable? It is that the hole being there, interrupted the pen, and accounts for the diversion of the line, and for the spatter. That is natural, isn't it? But they take the unnatural side. They say that these holes were made after the writing. Would it not be a miracle that just three holes would happen to strike just the three places where there had been a division of the line, and a little spatter of the ink? Take up your table of logarithms, and figure away until you are blind, and such an accident could not happen in as many thousand, billion, trillion, quintillion years as you can express by figures. Three holes by accident hitting just the three places where the pen was impeded, and where the spatters were. Never such a thing in the world. It might happen once. Nobody would make me believe that it happened twice — that is, a hole might happen to get where the pen was interrupted once: as to the second hole, I would bet all I had in the earth: as to the third hole, I know it didn't. I just know it didn't. And yet Mr. Ewell says that those holes were made afterwards, and he goes still further, and says that there isn't any trouble in the line. If anybody will look at it, even with the natural eye, they can see that there is: and, in a kind of derision, they called Professor Hagan, when he called attention to it, Professor Pinholes and pinhole expert. He might have replied that that was a pin-head objection. Professor Ewell accounts for all the dirt on this will by perspiration, all on one side

and made by the thumb, and although there were four fingers under it at the same time the fingers were so contrary that they wouldn't perspire. This left the thumb to do all the sweating. I need not call him a professor of perspiration, for that throws no light on the subject: but I say to you, gentlemen, that those marks, those punctures were in that paper when Sconce wrote his name. Sconce says they were not — he remembered. He has got a magnificent memory. I say that even that shows that he is not telling the facts.

Now, what else? We went around among the neighbors. He was charged with passing counterfeit money, with stealing sheep, with stealing hogs, with stealing cattle and with stealing harness.

Mr. WOOLWORTH (*interrupting*). It was not proved that this man was accused of counterfeiting, of passing counterfeit money.

Mr. INGERSOLL. I tell you how I prove it. A man by the name of Lanman was on the stand. He swore he was acquainted with Sconce's reputation. Senator Sanders asked him who he had ever heard say anything about it. He said Louis Miller and Abraham Miller and a man by the name of Hopkins and several others. What did they say? I asked them afterwards: and among other things I recollect he was charged with passing counterfeit money, stealing hogs, stealing sheep, stealing harness, killing another man's heifer in the woods. I don't think I am mistaken, but if I am I will take counterfeit money back. I won't try to pass counterfeit money myself, although a sinner.

Mr. WOOLWORTH (*interrupting*). He was not charged with killing a heifer.

Mr. INGERSOLL. No, no: the heifer was there: I have a very good memory, I suppose it comes from the habit of taking no notes. Lanman was the man, and while we are on Sconce there was a thing almost too good to be passed. Mr. Jackson was on the stand, Senator Sanders after him. "Whoever told you anything against him," he said. "Well," Jackson answered, "I asked Hopkins —" "Who else?" "Well," he said, "I had a private conversation, I don't like to tell." "You have got to tell." Mr. Jackson said to the court, "Must I tell? It was a private conversation." "You must tell." "Well," he said, "It was with Mr. Carruthers, one of the counsel

for proponent": and he said that what Mr. Carruthers said had more influence upon him than anything else, because Carruthers was in a position to know.

Mr. SANDERS (*interrupting*). Were those his exact words?

Mr. INGERSOLL. Yes: that he was an attorney. I tell you that was a deadener: that came like thunder out of a clear sky when you haven't seen a cloud for a month.

We will leave out the counterfeit money then, if I am mistaken: besides that, they said he was impeached in open court. What else? The witnesses that came to the rescue of Sconce: how did they rescue him? They lived down there and never heard anything against him. All these rumors thick in the air, the bleating of sheep following him wherever he went: the low of cattle, and yet these people never heard it. Tried for stealing harness, they never heard of it. They were not acquainted with him. They said that they had some personal dealings with him and he was all right, and one man endeavored to draw a distinction between truth and honesty. A man could be a very truthful man and a very dishonest man. Just think of that distinction, a man of truth but dishonest. That won't do. Even Senator Sanders said, "Some accusations, probably a dozen," to use his excellent language — what memories we have. Let me read the exact words: "Some accusations, probably a dozen or more, of stealing sheep and hogs lit on Sconce."

Mr. SANDERS. I didn't say that.

Mr. INGERSOLL. I don't insist, but those are the exact words I took down. And don't you remember that he went into a kind of homily on neighborhood gossip, — that hardly anybody escaped? I believe a good many of this jury have escaped and a good many in this audience have escaped. You can pick out a great many men that a dozen accusations of stealing hogs and sheep and heifers have not lit on. No.

Then, there is another thing about Sconce that I don't like, gentlemen. Sconce, in giving the history of the affair in Arkansas, was asked if he didn't say, "Did I say that Davis' name was on it when I signed it", and right there he skulked and stated under oath that when he said that he alluded to the photograph. No. Could he by

any possibility have alluded to the photograph when he said: "Did I say that Davis' name was on it when I signed it?" Did he ever sign the photograph? No: he never signed the photograph. Davis never signed the photograph, and if he ever said those words he said them with reference to the original will, and he knows it. And yet, in your presence, under oath, he pretended that when he made that remark he alluded to the photograph. I wish somebody would reply to that and tell us whether, as a matter of fact, he alluded to the photograph.

IN DEFENCE OF MEYERS.

And there is another thing. Judge Dixon (and I don't think he was very generous about it; though, had it been myself, I never should have mentioned it) said, or at least conveyed the impression that Mr. Meyers did something wrong, when he took the stand, and he was rather seconded in that idea by Senator Sanders. Gentlemen, if in the conduct of this case someone had stood up and said that I had said something or done something improper I should instantly have taken the stand, if it was not true, and sworn that it was not, where it was personal to myself. Of course, I would not take the stand and swear to something in favor of my client; but I would protect myself, and so would you, Judge Woolworth.

Mr. WOOLWORTH. Yes, sir; yes, sir.

Mr. INGERSOLL. Of course you would. Now, then, it was charged in some way, I have forgotten just how it came around, that Mr. Meyers was guilty of a trick, of showing Mr. Sconce a photograph with the name of A. J. Davis left off. Well, I thought that was a horrible charge. I would just as lief be charged with cheating at cards. I would just as lief be charged with any other little, nasty, crawling action, as that I would get up a photograph and leave off the name so as to impose upon somebody else. It would be a very low and infamous trick. I said to Mr. Meyers, "You must take the stand and deny that." He did not see it, but I insisted upon it. He said: "Nobody will believe that I played a trick of that kind." "No matter what they believe, you owe it to yourself to say that you did not do it," and Mr. Meyers simply took the stand and said that the photograph he showed was an exact copy of the will

here. At that time Sconce had sworn to a certain conversation with Meyers, that Meyers was seeking and afterwards called other witnesses to show it was not true. Mr. Meyers did not swear to anything about that conversation, did he? No, sir: he was too much of a gentleman to begin to try to make out his client's case. All he did in the world was to say: "I acted honorably and honestly about that photograph." I should have done it, and I don't think that fault should be found that he did. Now, Mr. Sconce, as you know, has a most peculiar memory in the world, and that was illustrated admirably by Mr. Meyers. He remembers things that had nothing to do whatever with the subject, photographed in all details everywhere: and yet, gentlemen, your knowledge of human nature is sufficient to tell you that that kind of memory is not the possession of any human being. Thousands of people imagine that detail in memory is evidence of truth. I don't think it: if there is something in the details that is striking, then there is: but naturalness, above all probability, is the test of truth. Probability is the torch that every juryman should hold, and by the light of that torch he should march to his verdict. Probability. Now, let us take that for a text.

PROBABILITY IS THE TEST OF TRUTH.

Let us follow the natural: let us follow the reasonable: let us take the first one. At the time they say this will was made, Andrew J. Davis had removed from Iowa years before: had settled, I believe, in Gallatin County. His interests in Iowa were nothing compared with his interests in this territory at that time. From the time he left Iowa he began to make money: I mean money of some account. He began to amass wealth. He was a man, I think, sagacious. Judge Dixon says that he was a man of great business sagacity. I am thankful for that admission. In a little while he became worth several hundreds of thousands of dollars. Afterwards he acquired millions. Now, during all that time, from the 20th of July, 1866, up to the day of his death, he never inquired after the James Davis will. It is a little curious, he never wrote a letter to James Davis and said, "Where is the will? Have you got it?" Not once. They have not shown a letter of that kind, not a word.

Threw it in the waste basket of forgetfulness and turned his face to Montana. Years rolled by: he never wrote about it, never inquired after it. They have brought no witnesses to show that A. J. Davis ever spoke of the will: not a word. Gentlemen, let us be controlled by the natural, by the reasonable, by the probable. Let's go ahead. In '68 one of the executors died—Job Davis. I think Colonel Sanders said that if a man of Judge Davis' intelligence, knowing what a difficult thing a will is to write, should have allowed Mr. Knight, a Kentucky lawyer, to draw his will, who had not had much practice, why he is astonished at that, and in the next breath tells you that Andrew J. Davis employed a twenty-two-year old boy who couldn't spell "give" to draw up his will in 1866. Isn't it wonderful what strange things people can swallow and then find fault with others? Now remember. In 1868 Job Davis died: then there was only one executor to that will. A. J. Davis went on piling up his money, thousands on thousands. Greed grows with age, as it generally does. "Gold is spurned by the youth and loved by the old." There is something magnificent, after all, about the extravagance of youth, and there is something pitiful about the greed of old age. But he kept getting money more and more, and in '85 he had sold the Lexington Mine. He was then a millionaire. In '85, I think. They say he sold that mine in '81: maybe he was then a millionaire. There was the will of '66 down in Salt Creek Township, used as a model for other wills, for the purpose of teaching the neighbors spelling and elocution, to say nothing of punctuation. They got up little will soirées down there—will parties,—and all the neighbors came in, and Mrs. Downey read it aloud and wept when she thought it was the writing of her brother Job. That accounts for the tear drops, I suppose, the round spots on the will. 1885. Andrew J. Davis worth millions. Then what happened? Then James Davis, the other executor, died. See? Then there was a will floating around down in Salt Creek Township, sometimes in a trunk, sometimes in a box, other times in an old envelope, other times in a wrapper: and when I think of the shadowy adventures of that document, it makes me lonesome. James is dead: poor Job nothing but dust: a will down there with no executors at

all: and A. J. Davis did not know in whose possession it was, and never wrote to find out. Let us be governed by the natural, gentlemen, by the probable. Never found out, never inquired; and after James Davis died he lived four years more. I think James Davis died on the 5th of December, '85; then he lived a little more than three years after he knew that both executors were dead and didn't know whether the will existed or not. Judge Dixon tells us, perhaps if he had made a will before he died, it would have been different than this. I think perhaps it would. What makes him think that it would have been different? If that will existed in Salt Creek Township, he knew it, and he knew it in '85, 6, 7, 8, 9, and when death touched with his icy finger his heart, he knew it then, and if he made that will in '66 it was his will when he died unless it had been revoked. He knew what he was doing. I tell you there was no will down in Salt Creek Township at all; there wasn't any here; there have been a good many since. Now, where is the evidence that he ever thought of this will, that he ever spoke of it?

"What else?" He appointed three executors of his will, that is, in '66, if he made it, and in that he provided that a like maintenance should be given to Thomas Jefferson, Pet Davis, and Miss Bergett, all three of them of Van Buren County, State of Iowa. What else did he say? That the executors should have the right of fixing that amount, and whatever amount in their judgment should be fixed should be final. What is the legal effect of that? The legal effect of that is that the estate could not have passed to John A. Davis until the last who had a life interest was dead. The proceeds could have been taken, every cent of them, from that estate and given to the three persons for life maintenance, and the youngest of those persons was four years old. John A. Davis would have had to wait seventeen years. And do you think that A. J. Davis ever made a will like that, putting it into the power of two executors to divert the entire income to certain persons, and that there could be no division until they were all dead?

Now, another improbability. Recollect, all the time, that we are to be governed by reason and naturalness. Now, then, it was

claimed that Judge Davis held certain relations with a certain Miss Caroline Bergett. It was claimed that a daughter known as Pet Davis was his. It was also claimed that a boy, Thomas Jefferson Davis, was his son. Nobody tells the truth in this will, although it has been alluded to and argued as well, I think, as could be. We have proved that Jeff Davis was never in Van Buren County until he was ten years old. That he was not in Van Buren until six years after this will is dated, and yet the supposed father describes him as of Van Buren County.

Next, Miss Caroline Bergett had married a man by the name of William V. Smith in 1853, and in 1858 William V. Smith took his wife and children and moved to Texas. Eight years before this will was made, and yet Mr. A. J. Davis forgot her name, forgot her residence, forgot the residence of the boy that was imputed to him; that of itself is enough to show that he was not present when that will was made. If there is anything on earth that he would remember, this is it, and you know it; although Mrs. Downey doesn't remember her first marriage or when her son was born, but she does remember the time it took her to dust the room where there were a bed, a table, a press and three or four chairs. She recollects that.

ANOTHER IMPROBABILITY.

John A. Davis, the proponent, had charge of the Davis farm down in Iowa, and stayed there for six years after this will was made, cheek by jowl with Hanshaw, I suppose, and with the Quigleys and the Dotsons and the Sconces, and all the aristocracy of the neighborhood. And yet he never heard of the will. What a place for keeping secrets! Senator Sanders says that the reason Judge Davis made his will in Salt Creek Township was because in that township they knew about this woman, or these women and these children, and he didn't want to go into any other community and make his will. Any need of publishing his will? Any need of reading any more than the attesting clause to the attesting witnesses? Any need to divulge a line? None. Ah, but Senator Sanders said that he wanted to keep the secret. That is the reason he left the will upon that table and rode away in a debonair kind of style, on his roan

horse with the bob-tail, leaving a congregation of Salt Creek loafers to read his will. He wanted to keep it secret: hoped it would never get out. Imagine Job Davis writing the will. Mrs. Downey, with the duster tucked under her arm like the soubrette, you know, in a variety theatre. Well, when he was writing the will she was looking over his shoulder and read the will. That makes me think of the fellow who was writing a letter, and there was a man looking over his shoulder, so he said, "I would write more, but there is a dirty dog looking over my shoulder," and the fellow said, "You are a liar." Everybody read it: she read it: she read it as Job wrote it: then he read it aloud: then he went and got Sconce and read it again: then in comes Glasgow, and he read it. I think Mrs. Downey must have read this will ten or twelve times.

Mr. MEYERS. She said twenty-five.

Mr. INGERSOLL. O, yes: twenty-five, because it was in Job's handwriting: and whenever the twilight crept around the farm, bringing a little sadness, a little pathetic feeling, she would light a candle and hunt the will, and think about Job. She would find the words "guive" and "wherther", and that brought him back: and I guess she used to wonder "wherther" he was in paradise or not. Now, John A. lived down there, and knew all these people, and never heard of that will. What do you think of that? Why is it that John never got any information from Sconce? Sconce, who saw the will written and who was one of the attesting witnesses. Why didn't he hear of it from old Downey? Why didn't he hear of it from the Quigleys or the Dotsons? Why didn't he hear of it in Salt Creek Township, when it was seen and read and read and read again until I think many of them knew it by heart? And yet the only person really interested was walking around unconscious of his great good fortune, and nobody ever told him. That is another thing. For four months after Andrew J. Davis died, nobody told John about the will. Nearly four months passed away: I think he died on the 11th of March, '90, and this will came to John on the first day of July. All the neighbors knew it just as soon as A. J. died: they all said, "John is coming right into the fortune now", only, nobody mentioned it: and the first man we find with the will

is James R. Eddy, and the next man we find with the will is John A. Davis, the proponent. Now, gentlemen, I don't intend to say that the attorneys in this case knew, neither am I going to state that it is a charitable view to take that they didn't know. What I say, I say squarely, so that people know what I mean. I always thought there was a good deal of sense in a remark a man made, a little ignorant, perhaps, but he coined a good word: he said, "I hate insinuendoes." Personally, I have not the slightest doubt but that the attorneys in this case have been imposed upon: not the slightest. When John A. Davis saw this will, leaving him four or five million dollars, it did not take much to convince him that the signature was genuine. Human nature was made that way. If it was leaving four or five millions to either of us, including the sinner who addresses you, the probability is that I would say, "Well, that looks pretty genuine,— pretty genuine." And then if I could get a few other fellows to swear that it was, I would be feeling certain, and say, "That is my money."

Now, another improbability: all the evidence shows that Judge Davis was a business-like, quiet, methodical, careful, suspicious man, secretive, keeping his business to himself, keeper of his own counsels: and when he did make a will, it was sealed: it was given to one of his friends to put away, and to keep. It did not become the common property of the neighborhood. He did not mount his roan horse and ask the people of the community to look at it. He was a methodical, business-like man, and I suppose many of you, gentlemen, on the jury, knew him: and I shall rely somewhat on your knowledge of A. J. Davis, for you to say whether he made this will, whether in 1866 he left his old father naked to the world: whether he cared nothing for brothers and sisters: whether he cared nothing for the children of the sister that raised him. I leave it for you to say. You probably know something about this matter. Ah, John A. Davis, when he was a child, when all the children were gathered around the same knees, the children that have been nourished at the same tender and holy breast, he would not have done this then. If some good fortune came to one, it was divided. How beautiful the generosity, the hospitality of childhood, and as-

they grow old there comes the love of gold, and the love of gold seems to have the same effect upon the heart that it does upon the country where it is found. All the roses fade, and the beautiful green trees lose their leaves, and there is nothing in the heart but sage brush. And so it is with the land that holds, within the miserly grip of rocks, what we call the precious metals.

WILL NO. 2.

The next question in this case, gentlemen, is the Knight will. Was any such will made? And I say here to-day, say it, knowing what I am saying, I never saw upon the witness stand a man who appeared to be more candid, more anxious and desirous of telling the exact truth, than Mr. E. W. Knight. No one could look at him, no one could hear him, without saying, "There is a chivalric gentleman." That is what he is. And from what I have heard there is not a man in Montana with a better reputation than E. W. Knight has. He has no interest in this business — not the interest of a thousandth part of one penny. And it was months and months after Judge Davis was dead before we knew that any such will had ever existed — that is, on our side.

Judge Dixon, however, says it is charitable to say that he is mistaken. A very harsh remark! Either Mr. Knight was telling what he believed to be true, or he was perjuring himself. No ifs and ands about it. He is a man of intelligence, knows what he is saying, and it won't do. He needs no charity. He swears that A. J. Davis made a will. And what else does he swear to? That there was also the draft of a will. The draft of the will gave away the mine, or provided for its working, and then at the end of that draft, provided that the rest of the property should be divided in accordance with the statute. Thereupon Mr. Knight told him: "Your heirs would interfere by injunction, and you had better bequeath your whole property and fix the amount to be expended in the development of the mine." Thereupon he made another will, and that will was signed. Now, Mr. Knight knows whether it was signed or not. He don't need any charity about him. The will was signed or Mr. Knight committed perjury knowingly, wilfully and corruptly.

What does he say? That it was signed. What else? That it was attested. Then these gentlemen came forward with Mr. Talbot, who says that Knight said that when Davis came to the bank to get the will he thought he was going to execute it. That is, the idea being, it was not signed. What was it attested for, if it was not signed? That is absurd to the verge of idiocy. But they say Mr. Knight is not corroborated. Let us see. He says that Andrew J. Davis made a will. Mr. Keith swears that Andrew J. Davis made a will. Knight says that Davis went out and brought Keith in, and Keith swears that he lived next door, and Andrew J. Davis did come in there and get him, and he knows the time on account of the sickness of his child. Corroboration No. 2. Knight swears that Davis then went for another man. Keith says that he did go and get Caleb Irvine. Corroboration No. 3. Knight said one of the men who signed the will was in his working clothes. Corroboration No. 4. Knight swears that Davis read the attesting clause. He swears the same thing. Keith swears that Davis signed it, that he signed it, and then Irvine signed it. And what more? He swears that Knight wrote it, and he was writing it when he went in. And yet they have — and I will use an expression of one of the learned counsel — the audacity to say that Mr. Knight has not been corroborated. And they would have you believe that he took that will over to Helena and put it in the safe when it was not signed by A. J. Davis, and they would make you think besides that, that it was attested by two witnesses, and that two witnesses had to say that they saw A. J. Davis sign it: that he signed it in their presence, and that they attested his signature in his presence and in the presence of each other. They proved a little too much, gentlemen. They proved that by Talbot. They proved that by Andrew J. Davis, Jr., who expects to fall heir to all that is taken, and they proved it also by John A. Davis, the proponent.

Thereupon Court took a recess until 2 o'clock.

AFTERNOON SESSION.

When court was recalled the argument of Colonel Ingersoll was resumed.

May it please the Court and gentlemen: When we adjourned I

was talking about the testimony of Mr. Knight and the making of the Knight will. The evidence is, the way that will came to be made, or what started it, was as follows: A. J. Davis borrowed of the First National Bank of Helena, forty thousand dollars to put in the mines, and Governor Hauser remarked, when he got the money, "Another old man going to fool with mines until he gets broke." And that, it seems, piqued A. J. Davis, touched his vanity a little, and then he said, "That mine shall be developed whether I live or die. I am satisfied that it is a good mine, and I am going to make a will and I am going to provide in that will for the mine being developed." And thereupon he talked with Mr. Knight, and finally Knight drew a draft of a will, according to his testimony, providing for the working of that mine. And what did he say when he got through with it? "Now, as to the balance of the property, let it be divided according to law.' That makes a good will." That is what he said. Then Mr. Knight said to him: "If you make the will that way, it may be that the heirs will come in and enjoin the working of the mine on the ground that it is a waste of money. You had better make a full will and dispose of all your property as you may desire, and fix the amount to be used in the development of that mine." Now, this is either true or false. It is true if Mr. Knight can be believed; and he can be believed if any gentleman can be trusted. What more? Knight says that Andrew J. Davis made the memoranda from which to draw that will, had his manager come, and in that will it told how the shaft should be run, how much work should be done, and charged his trustees to do development work up to a certain amount. Is that all born of the fancy of this gentleman? And can you believe that a man like Mr. Knight, who has run the largest bank in Montana for twenty-five years — can you believe that such a man, who is not in any necessity, who is not in need of money, comes here and swears to what he knows to be a lie, and makes this all out of his own head, carves it out of his imagination? The second will was made, the second was signed, the second will was attested, the second will was given to Mr. Knight to keep. And they say it wasn't signed, and yet Mr. Knight swears that he only told one man about it, Mr. Kleinsmith, so that if anything happened

him, Knight, he would know that Knight had in the vault the will of A. J. Davis. Do you think he would have done that if the will had not been signed — worth only waste paper? And yet they are driven to that absurdity for the purpose of attacking the evidence of this man. It will not do.

JUDGE KNOWLES' EVIDENCE.

Judge Knowles says that in conversation at Garrison, he said that in the will the mine was left to Erwin Davis, and the reason, I believe, given for it was that Erwin was a business man. Now, the only way that can be explained is one of two. One is that Judge Knowles has gotten two matters mixed: the other is that he is absolutely mistaken. Judge Knowles, President of the First National Bank, of Butte, Judge Knowles, who had been the attorney of Andrew J. Davis, Jr., Judge Knowles had this conversation, or some conversation with Knight; and why would Knight have taken pains to have to have told him a deliberate falsehood? There is something more. After this all occurred, Andrew J. Davis, Jr., went to Mr. Knight and asked him to write out what he remembered about that will, and Knight dictated it on the spot and sent it to him.

That was a letter written long ago, a letter written before Knight imagined that there ever could be a lawsuit on the subject. Andrew J. Davis went to him and asked him to write out what he remembered about that will, and he turned, according to his own testimony, and dictated it and sent it to him like a frank, candid, honest man; and before I get through with that letter, I will read it, or if Judge Dixon does not get here in time, I ask permission afterwards to read it, and when it is read I want you to see how it harmonizes perfectly with his testimony on the stand. I will draw another distinction. Mr. Knight gave two other depositions in this case. These depositions have not been suppressed like the deposition of Sconce. Not suppressed, why? Because we are willing that the jury should read the two depositions and hear his testimony besides, and that there is not the slightest contradiction between the depositions themselves or between the depositions or either one of them, and the evidence he gave: only two that they claim, and think

what immense contradictions they are. In one deposition he says that A. J. Davis left some bequests to some aunts. Mr. Knight swears on the stand that he never said aunts, he said sisters, but if he did say aunts, he meant sisters, because he never heard of his having aunts, and yet that is held up as a contradiction and to such extent that you are to throw away the testimony of this man.

NOW HERE IS THE LETTER:

HELENA, MONTANA, July 22d, '90.

This will was filed July 24th, '90, and when he wrote this letter he did not know that A. J. Davis knew of a will or that John A. Davis knew of a will. "I beg to say that sometime in '77 or '78, I made a draft of a will for your uncle, Andrew J. Davis, which he duly executed and left the same on file with me as a special deposit for two or three years when the same was cancelled and destroyed, when I was led to believe and conclude that he had made and executed a will to supersede and take the place of that." That explains Talbott's testimony. Instead of saying to Talbott that A. J. Davis came there, as he thought, to execute the will and destroyed that will, it not being signed, what he said to him was that he destroyed the will, but from the way he acted he thought he was going to make another, that he was going to execute a will; and that is exactly what Mr. Talbott said. To execute a will, and it took a re-direct examination to swap the "a" for "the". "I cannot satisfactorily recall the considerations and provisions of said will drawn by me, but the main burden and desire was that work on the mine known as the Lexington should be continued to a certain amount of development and that the mill should be carried on under a certain arrangement, and after providing for the payment of just debts he made certain bequests, naming certain nephews and nieces, running from ten to fifteen thousand dollars each, and you were especially named for the sum of twenty-five thousand dollars, and if the estate exceeded in value the sum of $500,000, then the bequests were to be increased, and if in excess of one million dollars, a further increase was made and specified." That is the letter that he wrote before he knew there would ever be this suit; before he knew of the existence

of this will. "A certain boy named Jefferson, claimed to be his son, the sum of $20,000 to be paid him in yearly sums of $5000 for four years and the same provision as to a certain girl, claimed to be his child." Is that not exactly what he swore here on this stand? "Certain executors named, E. W. Knight, S. T. Hauser, and W. W. Dixon, each to receive the sum of $10,000 for services. Yours truly, E. W. KNIGHT."

Now, gentlemen, they were informed of the existence of that will and of its destruction and they were so informed before John A. Davis filed this will and when we plead this will John A. Davis pleaded that his had been republished, and yet no evidence was given in of any republication. They knew under the statute of Montana that when a man makes will No. one, and afterwards makes will No. two, and afterwards destroys will No. two, that will No. one is not revived: that the making of the second kills the first and the destruction of the second kills that and leaves the man intestate and without any will. Now, there is the letter of Mr. Knight. Full, free, frank, candid, honorable, like the man himself. He says there that he does not remember all the provisions, but he does remember that he provided for nephews and nieces, and that he provided for A. J. Davis, Jr., $25,000; for one Jefferson, $20,000; for a girl about the same; that he provided also for the running of the mill and that he appointed Knight, Hauser and Dixon executors. That is exactly what he says to-day. Now, was that will made? Have they impeached Mr. Keith? I tell them now that they cannot impeach him. He has sworn to the making of that will apart and separate from Mr. Knight. They say, Why didn't we bring Knight back and then prove by Mr. Knight that he then recollected Mr. Keith. What has that to do with it? Mr. Keith recollected Mr. Knight, swore that he wrote the will; was writing it when he came in; swore that he attested it; swore that Davis signed it, and that Caleb Irvine also signed it. What more do you want on that will? I say gentlemen, that

THE WILL OF 1880 ENDS THIS CASE.

There is not ingenuity enough in the world to get around it, and there never will be enough brains crammed into one head to touch it.

That will was made: every man on this jury knows it. That will was executed: A. J. Davis and every one knows it: that will was afterwards destroyed. Now, the question is, Did the second will revoke the first will? Had it a revoking clause in it? E. W. Knight swears that it had, and he swears that he copied it from a will made by an uncle of his, John Knight, and he had that will in his possession here, and in that will there are two revocation clauses, and Knight swears that he copied those clauses: and right here, may be, it is well enough to make another remark. When he read the will to A. J. Davis and it said, "Hereby revoking all former wills," Davis said, "There is no need of putting that in: I never made any other will: this is the first." Knight said: "Well, that is the way, that is the form, and I think it is safer to have it that way," and Davis said, "All right: let it go". How do you fix that? You have got to find, there is no way out of it, that the will was made in 1880, revoking all former wills. What else? The conditions of the will of 1880, with regard to working the mine, with regard to the bequests he left, with regard to the bequests to others, with regard to the $20,000 given to Jeff Davis and $20,000 to the girl: those provisions are absolutely inconsistent with the provisions of the will of '66, so on both grounds, the will of '80 destroys, cancels, and forever renders null and void the will of '66, even if it was a genuine will of A. J. Davis: and the Court will instruct you to that effect. After Keith had testified, the proponents in this case subpœnaed Mr. Knight, and if they thought he was not the man, why did they not put him on the stand? They ran no risks: he is an honest man: he will tell the truth. I never had the slightest fear of bringing on the stand an honest man, never. And I hope as long as I live, I will never win a case that I oughtn't to win on the facts. No man should wish to win a case that he knows is wrong. Now, then, I say, there is not a man on this jury but what believes in his heart and soul this minute that the will of '80 was made. You have got to throw aside the testimony of a perfectly good man, and, no matter whether about Erwin Davis to Judge Knowles or not, and I may say, I never saw a witness on the stand in my life more eager to tell his story than Judge Knowles was: never. He was bound

to get it in or die. He answered questions over objections before the court was allowed to pass upon the objections. And why? Because he is President of the First National Bank, that is why. Now, without saying that he was dishonest about it, I say he was mistaken. Knight never said one word of that kind to him. It was impossible that he could have said so. So is Mr. Talbott mistaken; so is A. J. Davis, Jr., mistaken, and so is John A. Davis mistaken. Think of the idiotic idea that a will, not signed, was given to Knight to keep, attested by two witnesses and not signed by the testator. Idiotic! Now, as I understand it, gentlemen, you will have to find that that will was made.

That Ink again.

Now, what is the next great question in this case, and a question that will be argued at some length, probably, by the other side. And why? Because it is the first and only point, so far as facts are concerned, that they have won in this case. Just one, and what's that? Our experts said they thought that ink was nigrosin, and the fact that they wanted a test proved that they were sincere. Their witnesses said they didn't think it was nigrosin. Mr. Hodges said it had too much lustre for nigrosin ink, but that there was only one way in which it could be absolutely determined, and that was by a chemical test. But, say the gentlemen, or rather said Judge Dixon, the moment that ink turned red, the whole case of the contestants was a wreck. Let us see. If there had been no logwood ink, not a particle, after the twentieth day of July, 1866; if, on the night of the 20th all the logwood ink on earth had been destroyed, and then this ink had turned out to be logwood, why of course, it would have been a demonstration that this paper was written at least as far back as the 20th of July, 1866. If it had turned out that it was written in nigrosin, and that had only been invented since 1878, it would have been a demonstration that the will was a forgery; but you must recollect that the fact that it was written in logwood ink is not only consistent with its genuineness, but consistent with its being a forgery. Why, there was plenty of logwood ink in '90, plenty of it, and if Mr. Eddy forged this will in '90, he could have written

it in logwood ink, and the fact that it is in logwood ink does not show that it was written in '66. Why? Because there was logwood every year from '66 until now.

Suppose I had said, the paper is only ten years old, and it had turned out that it was forty years old. Is that a demonstration in favor of the other side? If it turned out to be ten it is a demonstration on our side. But if it turned out to be forty, is not that consistent with the genuineness of the instrument? You can see that. There is nobody smart enough now to fool you on that — nobody. Take the whole question of ink out, and the question is still whether Eddy wrote it or not. Take the ink all out, and it is a question of whether Job Davis wrote it or not. And all the test proved was that our experts, some of them, were mistaken about it being nigrosin ink. Mr. Tolman stated that it was impossible to tell without a chemical test: that it looked like nigrosin ink, and from the manner in which some of it had run, he thought it nigrosin ink, but that it was impossible to tell without a test. Mr. Hodges, their expert, said it looked to him like logwood. It had too much lustre for nigrosin," but, he added, "It is impossible to tell without a chemical test." That is what he said. Mr. Ames said the same thing: and I appeal to you, gentlemen, if Mr. Ames did not have the appearance of an honest, of a candid, and of a fair man. Dr. Hagan said he thought it nigrosin ink, but he admitted that the only way to know was to test it. And what else? Their own expert, Mr. Hodges, said logwood ink penetrates the paper. "It penetrates the paper." If this ink has been on here twenty-five years, it penetrates the paper. Sometime accidents happen in one's favor. A piece of that will was torn off this morning *[exhibiting will to the jury]*. Do you see the edg ethere? It was torn off slanting. How much is that ink sunk into the paper? Not the millionth part of a hair.

IT LIES DEAD ON TOP OF IT.

I want you to look at that. Just on that edge, do you see? Just see how the ink went in there — not a particle. It lies right on top. I call that float. There is the other edge, there is where the ink

stops, and then not a particle. Look right on the edge, and when you go to your room, gentlemen, I want you to look at it. That ink has not penetrated a particle. And see what this witness says: "Logwood ink penetrates the paper: to determine the nature of the ink I must use hydrochloric acid," and so on. Again he says, page 1676, "Logwood ink penetrates the paper." And what else? "I think this will was written with Runge's ink and that ink was made in Germany in the neighborhood of 1840. Runge's ink penetrates the paper." And then they say we endeavor to draw a distinction between modern and ancient. Find what Mr. Hodges says about it: "On the addition of hydrochloric acid to logwood ink it will turn it bright red. If it turns a bright red it means logwood. The old-fashioned ink was manufactured by mixing a decoction of logwood with chromate of potash, and formed a blue-black solution. Logwood ink as made to-day differs from those in that the modern logwood inks contain another sort of chrome than chromate of potash. They contain chromium in the form of an acetate or chlorine." Hodges was the man that talked about ancient and modern logwood inks: and he, before the test was made, said that an ancient and old logwood would turn a bright red, a modern logwood not so bright. And after the evidence had all been in, Professor Ewell came smilingly to the post and says they have got it exactly wrong end to: the older the duller, and the newer the brighter, and he said that the moment he saw this it was kind of dull. Before the test was made Mr. Tolman swore: "I agree with Professor Hodges that if it is an old logwood ink it will turn a bright scarlet red. In the case of modern logwood inks I don't agree with him, but to that extent I think his tests are good," and he drew that distinction before the test was made.

Gentlemen, you saw the will. I want to call your attention to it again. Do you see that "J" in Sconce? That is pretty red: not so awful scarlet, though. I don't think it would affect a turkey gobbler. Do you see that in Job? That is pretty red. Do you see that in James, in the Davis, and that is brown, and not red, and not scarlet, and no flame in it. And Professor Hodges himself said that although both were logwood inks, he would not swear that Job

Davis and James Davis were written with the same ink. Do you see the red in that Job? Now, find the red on that "s" of James. He said he would not swear that they were in the same ink, but both in logwood ink. That is to say, they might be different inks. "While I would not swear that they (James Davis and the other parts) were the same inks, I would swear that both inks contain logwood." And that is all he swore: and I must say that I believe he was a perfectly honest, fair gentleman.

Now, the Ink Test.

All it proves on earth is that it is logwood instead of nigrosin: and that does not prove that Eddy did not write that will, because there was plenty of logwood ink when he did write the will: and that is the kind of ink he used: and it has no more bearing, had it turned out to be logwood — it has no more bearing to show that it is a genuine will than though it had turned out to be iron ink. Suppose the experts had been wrong on both sides, and it had turned out to be iron ink, what would have happened then? Genuine will? Nothing can be more absurd than to argue that that test settled the genuineness of this will. Hodges says another thing: that perhaps that pen went to the bottom of the ink bottle, and got a little of the settlings on it, when he wrote James Davis, and consequently that has a different color. If anything settled in the logwood ink it was logwood, and if the pen got some of the sediment on it, the more sediment the more logwood, and the more logwood the brighter the color. Instead of that it is duller. That is another trouble.

With Regard to Experts.

While undoubtedly there are some men who do not swear the exact truth whether they are paid or not, undoubtedly some men swear to the truth who are paid. I don't believe that you doubt the testimony of Hodges simply because you paid him so much a day. I don't. And certainly we have found no men philanthropic enough to go around the country swearing for nothing. I judge of the man's oath, not by what he is paid, but by the manner in which he gives his testimony, by the reason there is behind it. That is the

way I judge. And yet Senator Sanders judges otherwise, as he told you in a burst of Montana zeal: he had just left then, the State of Montana, and passed a kind of eulogy upon the whole thing. I like Montana, too, and I believe the Montana people are big enough and wide enough not to have prejudice against a man because he comes from another State. Every State in this Union is represented in Montana, and the people who left the old settled States and came out to the new territories, dropped their prejudices on the way; and sometimes I have thought that is what killed the grass. I like a good, brave, free, candid, chivalric people. I don't care where you come from, I don't care where you were born. We are all men, and we all have our rights; and as long as the old flag floats over me, I have just as many rights in Montana as I have in New York. And when you come to New York I will see that you have as many rights, if you are in my neighborhood, as though you were in Montana. That is the kind of nationality I believe in. I hate this little nasty provincial prejudice; and yet Senator Sanders invoked that prejudice. That insults you. We did not insult you when we asked you, when you went on the jury, did you care whether the money stayed in Butte or not, or whether you are interested or not, or related or not. Those are questions that are asked of every juror, and we relied absolutely on your answers when you said that you were unprejudiced, and that you would give us a fair trial; and we believe you will.

Now, I say with regard to these experts. You have got to judge each one by his testimony; and it is foolish, it seems to me, to call them vipers and pirates, as Senator Sanders did. A very strong expression. Vipers and pirates, living off, he said, the sustenance of others. And yet he had an expert on the stand, Mr. Dickinson; he had another, Mr. Ewell; he had another, Mr. Hodges; and after that he rises up before this jury and calls them three vipers and three pirates. I never will do that. If I ask a man to swear for me, and he does the best he can, I will leave the pirate out. I will drop the viper, and I will stand by him, if I think he is telling the truth; and if he is not, I won't say much about him; I don't want to hurt his feelings. But I want to call your attention again to the

fact that every expert on our side swore, knowing that they had three experts on the other side, and that if we made a mistake they could catch us in it; and we did make a mistake in that ink; and the test showed that we made a mistake, and that is all the test did show; but it didn't show that the will is genuine any more than had it turned out to be carbon ink, then both sides would have been mistaken. And yet, after all, it did turn out to be modern logwood ink, and it did turn out not to be Runge's logwood ink, made of the chromate of potassium; did turn out not to be that, and I say, on this will that there is an absolute, decided and distinct difference between the color on the name Job Davis and the name James Davis. And right here, I might as well say that that man Jackson that came from Butler, Missouri, who, when it was said that Butler was a pretty tough place, rose to his wrath, and said it was as good as New York any day — that man says, when he saw that will he does not remember of seeing the names of James Davis and Sconce on it, but he did remember seeing the name of Job Davis. I don't think he saw any.

In Regard to John A. Davis.

Now, there is another question here. I guess I have said enough about ink, so that you will have an inkling of my view. Why did not John A. Davis take the stand? That is a serious question. John A. Davis had sworn, on the 13th of March, 1890, that his brother died without a will. John A. Davis, on the twenty-fourth day of July, 1890, filed a will in which he was the legatee. That will came into his possession under suspicious circumstances. What would a perfectly frank and candid man have done? You would not have allowed yourself to remain under suspicion one minute. You would have said, "I got that will so and so". You would have let in the light, "I obtained it in such a place. It is an honest, genuine will, and here it is, and here are the witnesses to that will." But instead of that John A. Davis never opened his mouth except to file a petition swearing that it came to his possession on the first day of July. He knew he was suspected, didn't he? He knew that men in whose veins his blood flowed believed the will was a forgery. He knew that good men and women believed that he

was a robber, and that he was endeavoring to steal their portion. He knew that, and any man that loves his reputation, any man that ever felt the glow of honor in his heart one moment, would not have been willing to rest under such a suspicion or under such an imputation. He would have said, "Here is its history. Here is where I got it. It is not a forged will: it is genuine. Here are the witnesses who know all about it. Here is how I came in possession of it." No, sir. Not a word. Speechless, tongueless. And he comes into this court and gets on this chair to be a witness: and he is asked about a conversation that he had with Burchett. Then we ask him "How did you come in possession of that will?" All his lawyers leap between him and the answer of that question. They object. If he came by that will honestly he would have said to his lawyers: "I am going to tell the story." He wants you to believe that he came by it honestly, doesn't he? He wants you to believe it. He not only wants you to believe it, gentlemen, but he asks twelve men —you —to swear that he came by it honestly, doesn't he? If you give your verdict that that is a genuine will, then you give your oath that John A. Davis came by it honestly. And he wants you twelve men to swear it. And yet he dare not swear it himself. He wants you to do his swearing. He is afraid to stand in your presence and tell the history of that will. He is afraid to tell the name of the man of whom he received it. He is afraid to tell how much he gave for it. He is afraid to tell how much he promised. He is afraid to tell how they obtained witnesses to substantiate it in the way they have. Well, now, ought not you to let him tell his own story? Ought not you, gentlemen, to be clever enough to let him do his own swearing? You cannot afford to do his swearing for the price you are getting, sitting on this jury. It is enough for you to go according to the evidence as you really believe it is.

Tell the Story.

Now, I will ask you again, if he came by that will honestly, fairly, above-board, wouldn't he be glad to tell you the story? Wouldn't he be glad to make it plain to you that it was a perfectly honest will, and came to him through perfectly pure channels? Wouldn't he

want you to know it? Wouldn't he want every man and woman in the city to know it? Wouldn't he want all his neighbors to know it? And yet he is willing, when this case is being tried, and when he is on the stand and asked how he got the will, to close his mouth, willing to admit that he is afraid to tell. And I tell you to-day, gentlemen, that the silence of John A. Davis is a confession of guilt, and he knows it, and his attorneys know it. A client afraid to swear that he did not forge a will, or have it forged, and then want to hire a man to defend him, and call him honest! Well, he would have to hire him; he wouldn't get anybody for nothing. And yet he is asking you to do it. If John A. Davis came properly by it, let him say so under oath. Don't you go and swear to it for him, not one of you.

WHY DIDN'T JAMES R. EDDY TAKE THE STAND?

We charged him forging the will. We made an affidavit setting forth that he did forge the will. And in this very court Mr. Dixon arose and said he was glad that the charge had been fixed and the man had been designated. Judge Dixon stood here before this jury when this case was opened, and what did he say? He said: "The man who is charged with forging this will will be here. He will stand before this jury face to face, and he will explain his connection with the will to your satisfaction." That is what he said. Judge Dixon said it. Where is your witness? Where is your James R. Eddy? Why didn't you bring him forward? I know he is here, now, delighted with his notoriety, that the charge of forgery against him, with a moral nature that is an abyss of shallowness, delighted to be charged with it. He will probably be my friend as long as he lives, that I have added to his notoriety by saying that he is a forger. Why didn't they bring him on the stand? Mr. Dixon gives one reason, because the jury would not believe him. And that is the man that is first found in possession of this will. That is the man in whose hands it is, and it was from that man that John A. Davis received it. And the reason he is not put on the stand is that it is the deliberate opinion of the learned counsel in this case that no jury would believe him. How does that work with you? James R. Eddy here, his deposition here, and they had him here and kept

him here so that we could not read his deposition. They were bound he should not come upon the stand, and why? Because the moment he got on the stand he could be asked: Where did you find the will? Who was present when you found it? When did you first tell anybody about it? When did you first show it to John A. Davis? How much did he agree to give for it? What witnesses have you talked to in this case? What witnesses have you written to in this case? What work have you done in this case? Worse than that — What affidavits have you made in this case? What have you done with the other three wills that you had in this? Such questions might be asked him, and they were afraid to put him on the stand. Every letter that he had written would have been identified by him if he had been put upon the stand: maybe he would have been compelled to write in the presence of the jury to see whether he could spell words right. They knew the moment he went upon the stand that their case was as dead as the corpse of Julius Cæsar. They knew it and they kept him off. Only one way for them to win this case — keep out the evidence. Only one way to win the case — suppress. John Davis, keep your mouth shut, or defeat will leap out of it. Eddy, keep still: don't let anything be seen that will throw any light upon this: and I ask you, gentlemen of the jury, to take cognizance of what has been done in this case. Who is it that has tried to get the light? Who is it that has tried to get the evidence? Who is it that has objected? Who is it that wants you to try this case in the dark? Who is it that wants you to guess on your oaths? The failure of Eddy to testify is a confession of guilt. They dare not put him on the stand — dare not. Now, gentlemen, there is

LITTLE MORE EVIDENCE

in this case to which I am going to call your attention. Something has been said about a conversation in March, 1891. Sconce had his deposition taken in Bloomfield, Ia. That deposition has been suppressed. John A. Davis was there at the time it was taken. John A. Davis and Sconce went into the entry leading up into the office of Mr. Carruthers. Mr. Burchett, the sheriff of that county,

a man having no possible earthly or heavenly interest in this business, happened to stop at the corner to look at his paper as he opened it, and then and there heard John A. Davis say, "Stick to that story and I will see that you are paid all the money you have been promised." And thereupon Sconce replied, "All right, I'll do it." Sconce denies it, and that denial is not worth the breath that he wasted in forming the denial. John A. Davis denies it. Of course he denies it, but he dare not tell where he got that will. He dare not do it. He wants you to do that for him. He wants you to lift him out that gutter and wash that mud off of him; afraid to do it himself. I want to call your attention to that conversation, and that is enough of itself to impeach Sconce. That is enough of itself to show that John A. Davis was entering into a conspiracy, or rather had entered one with Mr. Sconce. Now, gentlemen, there is another thing, and we must not forget it. Curious people down in Salt Creek Township on the other side. Of course there are plenty of good men there, or the township could not exist, and we had a good many of them here, good, straight, honest, intelligent looking men; but the other side had some — all in the family, all of them.

THE FAMILY TREE.

Swain, he was not in the family, but he is a clerk in Trimble's bank, where Wallace is the cashier, where they suppress depositions; say they are not finished when they are signed by the person who swears to them. John C. Sconce, the only living witness, whose ancient but ignoble blood has crept through rascals ever since the flood, cousin to James Davis, cousin to Job Davis, cousin to Mrs. Downey, cousin to Eddy, cousin to Dr. Downey by marriage, brother to T. J. Sconce, Jr., brother-in-law to Abe Wilkinson, cousin to Tom Glasgow and Sam, cousin to Moses Davis, cousin to Alec Davis, uncle to Henshaw's daughter, and father-in-law of George Quigley. Every one of them united. Blood is thicker than water. Eddy stuck to his family. James R. Eddy, cousin to Sconce, son of Mrs. Downey (Mrs. Downey, the duster lady, who remembers that Davis asked her to remain, but didn't ask her advice, didn't have her sign the will, didn't give her any bequest,

but there she was with her duster), grandson of James Davis, nephew of Job Davis, and related by blood or marriage to both the Glasgows, Moses and Alexander Davis, to T. J. Sconce and J. C. Sconce, Jr., Abe Wilkinson, George Quigley, S. M. Henshaw (the celebrated lawyer), J. L. Hughes and Eli Dye, brother-in-law to C. O. Hughes and foster brother to John Lisle and Mrs. A. S. Bishop. And it is just lovely about John Lisle. John Lisle is one of the fellows that saw this will. "How did you come to see it, John?" "James Davis," he says, "was my guardian and he had to give a bond, and so one day when James Davis was away from home, I thought I would go and see the bond." Of course he thought he kept the bond that he gave to somebody else — to the county judge; but Mr. Lisle pretends that he thought the bond would be in the possession of the man who gave it. And so he sneaked in to look among the papers. Now, do you believe such a story, that he thought that man had the bond? Didn't he know the bond was given to somebody else? Foolish! Bishop swears the same thing: guardian, James Davis was, for his wife, and he was looking to see if James had the bond; and another fellow, by the name of Sconce, was looking for a note, and when he opened this double sheet of paper, folded four times, and happened to see Sconce's name, he says, "Here it is,"—a promissory note. Mary Ann Davis, that is to say, Mrs. Eddy, that is to say, Mrs. Downey, is the mother of J. R. Eddy, daughter of James Davis, sister to Job, second cousin to Sconce, wife of Downey, and related by blood or marriage to Tom and Sam Glasgow, Moses and Alexander Davis, Abe Wilkinson, S. M. Henshaw, J. C. Sconce, Jr., T. J. Sconce and George Quigley and C. O. Hughes. All right in there, woven together.

E. H. Downey, son-in-law of James Davis, brother-in-law of Job, husband of Mary Ann Davis-Eddy-Downey, and stepfather of Mr. Eddy; J. C. Sconce, Jr., cousin to Eddy, nephew of J. C. Sconce, Sr., cousin to Mrs. Downey, cousin of E. H. Downey, son-in-law of Henshaw, cousin to George Quigley, related to Tom and Sam Glasgow, Abe Wilkinson and Moses and Alec Davis; George Quigley, son-in-law of Sconce, Sam Glasgow, cousin of Sconce, son-

in-law of Dye, brother to Tom Glasgow, brother-in-law of Moses and Alec Davis, cousin to Abe Wilkinson, and related by marriage to J. R. Eddy. Here they are, same blood. All got the same kind of memory: it runs in the blood. Henshaw, father-in-law to J. C. Sconce, Jr.: Lisle, adopted son of James Davis, and his ward, and foster brother to Eddy: A. S. Bishop, married to Allie Lisle, ward of James Davis, foster sister of James R. Eddy: T. J. Sconce, Eddy's cousin, Sconce's brother, brother-in-law and cousin to the Glasgows, cousin to Davis, Alec and Moses, brother-in-law to Abe Wilkinson, uncle to J. C. Sconce, Jr.: Moses Davis, cousin of Sconce, brother-in-law to the Glasgows, cousin to Abe Wilkinson, brother of Alec Davis and related to Eddy and Arthur Quigley: Alec Davis, cousin to Sconce, brother of Moses Davis, brother-in-law to the Glasgows, cousin to Wilkinson, and related by marriage to Arthur Quigley: Abe Wilkinson, brother-in-law to Sconce, cousin to Alec Davis and Moses Davis, and cousin to the Glasgows. Glasgows, cousin to Sconce and Abe Wilkinson and a brother-in-law of Moses Davis, and a brother to Sam Glasgow, and related by marriage to Eddy: Arthur Quigley, brother-in-law to Alec Davis, and brother to George Quigley, who is a son-in-law of Sconce: John L. Hughes, his nephew, married Eddy's wife's sister: Eli Dye, father-in-law of Sam Glasgow. There they are, all of them related except Swain and Duckworth and Taylor: and Duckworth, he is in the tie business along with Eddy. There is the family tree, all growing on the same tree, and there is a wonderful likeness in the fruit. Why, that Glasgow has got as good a memory as Sconce. He remembers that this is the same will he saw — paper like that, and he swears — I think it is Sam Glasgow — that he did not read the contents nor see a signature. And yet he comes here, twenty-five years afterwards, and swears that it is the same paper. And then the paper was clean, and now it is covered with all kinds and sorts of stains. Now, gentlemen,

TAKE THE SIGNATURE OF A. J. DAVIS.

I say here to-day, and I want you to look at it — I say it is made of pieces. I say it is a patchwork, it is a dead signature, it has no

personality, no vitality in it, and I want you to look at it, and look at it carefully. I say it is made in pieces. Of course, every counterfeit that is worth anything looks like the original, the better the counterfeit. But all the witnesses who have sworn that it is his signature, on the side of the proponent, also swear that he wrote a rapid, firm hand, nervous, bold, free, and that he scarcely ever took his pen from the paper when he commenced his name until it was finished, and I want you to look at that name. I will risk your sense, I will risk your judgment, honest, fair and free, whether that is a made signature or whether it is the honest signature of any human being. And now, gentlemen, one word more. I contend first, that the evidence shows beyond all doubt that Job Davis did not write this will; second, that it is shown beyond all doubt that James R. Eddy did write this will, and that evidence amounts to a demonstration. I claim that the will of 1880 was made precisely as E. W. Knight and Mr. Keith swear; that that will was utterly inconsistent with the will of 1866, even if that had been genuine; that it revokes that will; that its provisions were inconsistent, and that afterwards that will was destroyed, and that there is not one particle of evidence beneath the cope of heaven to show that it was not made, and to show that it was not destroyed, and the court will instruct you that that revokes the other will, whether genuine or not. That is the end of the case. So I claim that the probabilities, the reason, the naturalness are all on the side of the contestants in this case — all. And I tell that if the evidence can be depended upon at all, A. J. Davis went to his grave with the idea that the law made a will good enough for him. Do you believe, if he were here, do you believe if he had a voice, that he would take this property and give it to John A. Davis; that he would leave out the children of the very woman that raised him; that he would leave out his other sisters; that he would leave out the children of his sisters and brothers? Do you believe it? I know that not one man on that jury believes it.

THIS CASE IS IN YOUR HANDS.

That property is in your hands. All these millions, however many they may be, are in your hands. They are to be disposed of by you

under instructions from the court as to the law. You are to do it. And do you know there is no prouder position in the world, there is no more splendid thing, than to be in a place where you can do justice? Above everybody and above everything should be the idea of justice: and whenever a man happens to sit on a jury in a case like this or in any other important case, he ought to congratulate himself that he has the opportunity of showing, first, that he is a man: second, of doing what in his judgment ought to be done; and there will never be a prouder recollection come to you hereafter than that you did your honest duty in this case. Say to this proponent, If you wanted us to say that you got the will honestly, why didn't you swear it? If you wanted us to believe that it was a genuine will, why didn't you have the nerve to take your oath that it is a genuine will? You are not bound to swear for him. You are not bound to hunt up his case. Now, you have an opportunity of doing what is right. Your prejudice has been appealed to, but I say that you have the manhood, that you have the intelligence, and that you have the honesty to do exactly what you believe to be right: and whether you agree with me or not, I shall not call in question your integrity and your manhood. I am generous enough to allow for differences of opinion. But when you come to make up your verdict, I implore you to demand of yourself the reason, to be guided by what is natural, to be guided by what is reasonable. I want you to find that this will was found in the possession of Eddy in April or March, next in the hands of John A. Davis, and that John A. Davis dare not tell how he came in possession of it. John A. Davis, on the edge of the grave, for this world but a few days, and according to the law without that will he could have had an income of $50,000 a year. He was not satisfied with that: he wanted to leave his own blood in beggary, he himself, not being satisfied with $50,000: he never saw the time in his life that he could earn $5000 a year — never. And he was not satisfied with that — wanted four and one-half millions for himself. Gentlemen, I want you to do justice between all these heirs. I want you to show to the United States that you have the method, that you are free enough from prejudice, that you are influenced only by the facts, only by the evidence, and that being so

influenced, you give a perfectly fair verdict, a verdict that you will be proud of as long as you live. How would you feel, to find a verdict here that this is a good will, and afterwards have it turn out to be what it is, an impudent, ignorant forgery? Now, all I ask you is to take this evidence into consideration.

DON'T BE MISLED,

even by a Christian, nor by a sinner for that matter. Let us be absolutely honest with each other. We have been together several weeks. We have got tolerably well acquainted. I have tried to treat everybody decently and kindly, and I have tried to do so in this address. I have had work to keep within certain limits. There would words get into my mouth and insist on coming out, but I said: "You go away, you go away." I don't want to hurt people's feelings if I can help it. I don't want any one unnecessarily humiliated, but I say whatever stands between you and justice must give way; and if you walk over reputations, if they become pavement you cannot help it. You must do exactly what is right, and let those who have done wrong bear the consequences. Now, gentlemen, I have confidence in you. I have confidence in this verdict. I think I know what it will be. It will be that the will is spurious, and that the will of 1880 revoked it, whether spurious or not. That is my judgment, and I don't think there is any man in the world smart enough or ingenious enough to get any other verdict from you, as long as John A. Davis was afraid to swear that it was an honest will, as long as J. R. Eddy, the forger, dare not take the stand; and they never will get a verdict in this world without taking the stand; and if they do take it, that is the end. There is where they are. Now, all I ask in the world is, as I said, just a fair, honest, impartial verdict at your hands. That I expect; more than that I do not ask. And now, gentlemen, I may never see you again after this trial is over, separated maybe forever; but I want to thank you from the bottom of my heart for the attention you have paid to the evidence in this case, and for the patient hearing that you have given me.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

Geo. H. Macdougall, being duly sworn according to law, deposes and says: During the times herein mentioned, and ever since, I have been and still am a stenographic reporter, skilled and experienced in the taking and recording by shorthand notes and reporting court proceedings, testimony of witnesses and oral speech of persons; that in the capacity of official stenographer of the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, I attended during the trial of the contest interposed in said court by Henry A. Root in opposition to the admission to probate of the alleged last will and testament of Andrew J. Davis deceased, offered and propounded by John A. Davis for admission to probate in and by said court, which trial took place in the year A. D. 1891, and occupied parts of July, August and September of said year; that with the assistance of F. E. McGurrin and another, who were employed by me in my said official capacity as official stenographer of said court, I reported the testimony of witnesses and other evidence offered and proceedings had during the said trial of said contest; that the late Robert G. Ingersoll, among other counsel, attended and took an active part as attorney and counsel for said contestant Henry A. Root and those interested with him in the prosecution and trial of said contest; that among other acts of said Robert G. Ingersoll, as attorney and counsel for and on behalf of said contestant Henry A. Root, and those interested with him in said contest, the said Robert G. Ingersoll made, on the third day of September, A. D. 1891, an argument to the jury sitting in the trial to the admission of said alleged will to probate; that affiant and said Frank E. McGurrin took down in shorthand, recorded and reported, said argument made by said Robert G. Ingersoll, on behalf of said contestants, to the jury in said case; that the said speech or argument as delivered by said Robert G. Ingersoll and taken and reported by affiant and Frank E. McGurrin as aforesaid, was on the third and fourth days of September A. D. 1891, published in the *Inter-Mountain*, a news-paper published in the city of Butte, Silver Bow County, State of Montana, in the daily issue of said paper on

said days last mentioned: that the contents of the foregoing pages, one to forty-eight inclusive, hereto annexed, embraces a substantially true, correct and complete record of said speech or argument delivered to the jury sitting in the trial of said contest, by said Robert G. Ingersoll, on Sept. 3, 1891.

GEO. H. MACDOUGALL.

Subscribed and sworn to before me on this twenty-fourth day of June, A. D. 1902.

[SEAL.]

E. N. HARWOOD,
Notary Public within and for the county of Silver Bow, State of Montana.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, John Weston, county clerk and *ex-officio* recorder, in and for the county of Silver Bow, State of Montana, do hereby certify that E. N. Harwood, Esq., whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a Notary Public, duly commissioned and sworn, and residing in said county, and was, as such, an officer of said State, duly authorized by the laws thereof to take and certify proof of, and oaths and affirmations, to affidavits and depositions, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said State, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting, and verily believe that the signature subscribed to the attached certificate is his genuine signature.

In witness whereof, I have hereunto set my hand and affixed my official seal this twenty-fifth day of June, 1903.

[SEAL.]

JOHN WESTON,
County Clerk and ex-officio Recorder,
by DAN JOHNSON, *Deputy.*

STATE OF UTAH,

COUNTY OF SALT LAKE, ss.

Frank E. McGurrin, being first duly sworn according to law, deposes and says: That during the times herein mentioned I was a stenographic reporter, skilled and experienced in the taking and recording by shorthand notes and reporting court proceedings, testimony of witnesses and oral speech of persons; that I attended the trial in the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, of the contest interposed by Henry A. Root in opposition to the admission to probate of the alleged last will and testament of Andrew J. Davis, deceased, offered and propounded by John A. Davis for admission to probate in and by said court, which trial took place during a portion of July and the month of August and extended into September of the year A. D. 1891; that I was engaged as assistant stenographer by George H. Macdougall, the official stenographer of said court, to assist him in the taking and reporting of the testimony of witnesses and other evidence offered and the proceedings had in the trial of said contest, and that I did assist the said George H. Macdougall in taking and reporting the testimony of witnesses and other evidence and the proceedings had in the trial of said contest; that the late Robert G. Ingersoll, among other counsel, attended and took an active part as attorney and counsel for said contestant Henry A. Root and others interested with him in the prosecution and trial of said contest; that among other acts of said Robert G. Ingersoll, as attorney and counsel for and on behalf of said contestant Henry A. Root and others interested with him in said contest, the said Robert G. Ingersoll made on the third day of September, A. D. 1891, an argument to the jury sitting in the trial of said contest in opposition to the admission of said alleged will to probate; that this affiant and the said George H. Macdougall took down in shorthand, recorded and reported said argument made by said Robert G. Ingersoll on behalf of said contestants to the jury in said case, that the said speech or argument as delivered by said Robert G. Ingersoll and taken and reported by affiant and said George H. Macdougall as aforesaid, was on the third and fourth days of September, A. D. 1891, published in

the *Inter-Mountain*, a newspaper published in the city of Butte, county of Silver Bow, State of Montana, in the daily issue of said paper on said days last mentioned: that the contents of the foregoing pages numbered 1 to 48 inclusive, hereto annexed, is substantially a true, correct and complete record of said speech or argument delivered to the jury sitting in the trial of said contest, by said Robert G. Ingersoll, on Sept. 3, 1891.

FRANK E. McGUERRIN.

Subscribed and sworn to before me on this twenty-sixth day of July, A. D. 1902.

EDWARD HOME,
Notary Public within and for the county of Salt Lake, State of Utah.

Dated this twenty-sixth day of June, 1902.

EDW. HOME,
Notary Public.

UNITED STATES OF AMERICA,
STATE OF UTAH, ss.

I, James T. Hammond, Secretary of State of the State of Utah, and custodian of all records showing the appointment of notaries public within said State, do hereby certify that Edward Home, whose official attestation appears to the annexed instrument, was, at the time of signing the same, an acting notary public in and for the county of Salt Lake, in said State, duly appointed, commissioned and qualified, and authorized by the laws of this State to make such attestations: that to all his official acts as such notary public, full faith and credit ought to be given in all courts of justice and elsewhere: that I am well acquainted with his handwriting, and verily believe his signature to the said attestation to be genuine, and that said instrument is executed and acknowledged in conformity to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Utah, at Salt Lake City, this twenty-sixth day of June, in the year of our Lord one thousand nine hundred and two.

J. T. HAMMOND,
Secretary of State.

[SEAL.]

COMPLAINANT'S EXHIBIT XLII.

[Put in Evidence, page 160.]

OFFICE OF BUTTE AND BOSTON MINING COMPANY.

BUTTE CITY, MONTANA, Dec. 15th, 1894.

Col. Robt. G. Ingersoll 20 Nassau St New York

Dear Sir At the request of Mr. Root I herewith hand you copy of proposed decree of distribution in Davis will case. The decision of Supreme Court in "Asa" case not yet handed down but is expected tomorrow

Yrs truly,

C. H. PALMER

COMPLAINANT'S EXHIBIT CHECK BOOK OF BANK DEPOSIT.

[Put in Evidence, page 269.]

Showing entry as follows:

"1897 Deposit Oct. 1st. H. A. Root's drft 85000." Introduced in evidence during examination of Clinton P. Farrell.

COMPLAINANT'S EXHIBIT BANK PASS BOOK ENTRY.

[Put in Evidence, page 271.]

Showing entry by "New Amsterdam Bank" of New York, of deposit of "85618.50," "Oct. 1st," introduced in evidence during examination of Clinton P. Farrell.

COMPLAINANT'S EXHIBIT XXXVII.

[Put in Evidence, page 272.]

THE WORTHY

SPRINGFIELD, MASS., Sept. 26, 1899.

Dear Mr. Farrell—I have yours of the 24th. You may be sure I shall do the very best I can for Mrs. Ingersoll as regards the Davis Estate.

When I am in New York this Fall I will explain the whole situation, to you.

We expect to get the balance of the money early next spring when the two years required by the Massachusetts law after administration here expires — the mines & real estate I am now partitioning & we hope for results about the same time. The Colonel's speech in the closing of the trial was taken down & published by all the Butte papers. I have sent for a copy for you. How we all shall appreciate his complete works. Kindly remember me to Mrs. Ingersoll & daughters.

Yours truly,

H. A. Root

COMPLAINANT'S EXHIBIT XXXVIII

(Put in Evidence, page 280.)

March 3, 1900.

Mr. Henry A. Root, Butte, Montana.

My dear Friend: As you know, I am very desirous that Mrs. Ingersoll should realize out of the Davis will case; and I am very sorry not to have seen you when you were in New York, so that I might have talked the matter over with you fully.

As I understand, Colonel Ingersoll was to have all his expenses paid and to have $100,000 as his fee. It seems to me, therefore, that you ought to make an assignment to Mrs. Ingersoll, as the administratrix of his estate; and I write you now to ask you to do so and to mail it to me. This would protect her, as I am sure is your desire as well as mine, and would make her feel that she had something assured. You know, life is uncertain in any event. The assignment, I think, ought to be worded so as to take effect upon not only your own share, but upon that portion of the estate which has been assigned by other heirs to you.

Should I not hear from you at the end of three weeks from the date of this letter, I shall take it for granted that you are unwilling to comply with this request.

I trust that things are going well with you and that the case is progressing.

Hoping to hear from you at your earliest convenience, I am as always,

Yours very truly,

C. P. Farrell.

COMPLAINANT'S EXHIBIT XXXIX.

[Put in Evidence, page 283.]

STERN & RUSHMORE, Attorneys & Counsellors,
40 Wall St, New York.
Simon H. Stern. Chas. E. Rushmore.

May 7th, 1900.

My Dear Friend: — Since seeing you I have received your letter of March 3rd, which was sent to me in Montana, and I hasten to reply to it.

With you I am also desirous that Mrs. Ingersoll should realize out of the Davis Estate as much as possible, and to that end I shall myself bend every effort in my power, regardless of any personal interest that I might sacrifice by so doing.

I want to wait until I see Mr. Coram, in Boston, where I am going the first of next week, before writing the letter to Mrs. Ingersoll which you suggested I should do, and which will cover the whole situation, but I hasten to reply to the suggestion in your letter, which is that I "make an assignment to Mrs. Ingersoll, as administratrix", and further where you say "the assignment, I think ought to be worded so as to take effect upon not only your own share, but upon that portion of the estate which has been assigned by other heirs to you."

The portion of the Estate to which you refer, and which was originally assigned to me, was, by the terms of the settlement which was made under the direction of Col. Ingersoll, and I think it was his suggestion, transferred those interests to Charles H. Palmer, as Trustee, and those interests were given to Palmer, as Trustee, in the decree of settlement. Those interests are all applicable to the expenses, and will be so utilized on all future distributions. When I write you from Boston, I will cover this point more fully, and give you everything in as much detail as you will wish.

Regarding the appeal bond on which Walter S. Logan and Col. Ingersoll were sureties, I am surprised there has been any application made to Mrs. Ingersoll. It was contemptible on the part of Leason, the administrator. Immediately on my arrival here, I heard that a claim was made on this bond for the amount you suggest, and

I immediately paid the half of it which Col. Ingersoll was bound for, and therefore Mrs. Ingersoll will not be annoyed again on that subject.

Very truly yours,

H. A. Root

Mr. C. P. Farrell, 117 East 20th Street, New York City.

COMPLAINANT'S EXHIBIT XL.

[Put in Evidence, page 285.]

STERN & RUSHMORE, Attorneys & Counsellors,
40 Wall St. New York.
Simon H. Stern. Chas. E. Rushmore.

June 8th, 1900.

My dear Mr. Farrell:—I have secured and enclose to you a copy of the agreement of settlement, and of the contract deeding the shares, and would like to have you, if you will, return them to me.

You will see, I presume, from reading these papers that I have absolutely nothing that I can transfer to Mrs. Ingersoll. As much as I would like to comply with her most reasonable suggestion, in view of the uncertainties of this sphere, I do not see how I can possible do it. If you can show me a way by which I can do so, I will be very glad to do it or anything that I can to further evidence what I have said with regard to my disposition towards Mrs. Ingersoll.

It is a very unfortunate affair all around, and I sincerely hope Mrs. Ingersoll will have somebody look into the matter for her: at the same time I am very strongly at the present time inclined to believe that we are coming out a good deal better than things might at the present time look, but we must all be patient about it.

Yours truly,

H. A. Root

C. P. Farrell, Esq., Dobb's Ferry, N. Y.

COMPLAINANT'S EXHIBIT XLI.

[Put in Evidence, page 286.]

40 WALL STREET, NEW YORK CITY.
September 25th, 1900.

C. P. Farrell, Esq., Dobb's Ferry, N. Y.

My dear Mr. Farrell: — I have your letter of September 20th, and hasten to reply.

I see I did not make myself understood to you. You say: "You stated that if an application was made to the court on Mrs. Ingersoll's behalf at the time of the distribution, there would be no objection raised", etc.

Now what I thought I said to you was this: That I would do everything I could at the time of an actual distribution of the Boston money for Mrs. Ingersoll, and all I can do is to say to you in the first place that she may rely upon it that that money, if distributed to our people, will not be distributed until after she has had an opportunity to have a hearing upon the claim of the Colonel for services rendered, and I will at that hearing do all that I can do which will tend to increase the amount to be paid to her for such services. As far as my interest is concerned, as I think I said to you, there have been claims filed against it to entire extent almost of it, but these claims will be settled in some way when we get to paying out money, and I think there will be something left for me. I certainly feel as if there ought to be as I have spent nearly eleven years on this business and represented interests other than my own in just the same capacity as the Colonel and Mr. Clayberg and Mr. Toole. Now, when you come to reaching the amount which Mrs. Ingersoll should receive, I quite agree with you that it would be the best thing if you could meet Mr. Coram, and I will see that you do, and we will all get together and do the best we can. I telegraphed today to find out where Mr. Coram was. I know he is in the West, and it is quite likely that he will come to New York before going to his home in Lowell, which I will know before he gets here, and if he should happen to do this I will telegraph you at Dobb's Ferry, and you can

come down and see him, and if you not see him now here I will see that he is here before any money is distributed.

Very truly yours,

H. A. Root

COMPLAINANT'S EXHIBIT XLIII.

[Put in Evidence, page 153.]

The Worthy

Springfield, Mass., Sept 2.

My dear Mrs. Ingersoll I have waited till now before writing you because I thought I should.

Now let me say that Davis Estate matters though moving with criminal delay are still slowly and surely reaching a conclusion that will bring substantial results to you. I wish to assure you that I shall personally look after your interests and as faithfully as would have been done by the good Colonel.

When there is anything to communicate to you I will look to it and meantime shall be happy to tell all I know of the situation to you or anyone you suggest.

Assuring you of my best wishes and deepest sympathy and with remembrance to Miss Ingersoll & Mrs. Brown,

Believe me Your faithful servant

Henry A. Root

ENVELOPE WITH COMPLAINANT'S EXHIBIT XLIII.

[Put in Evidence, page 153.]

The Worthy.
Absolutely Fire Proof.
European Plan.
William M. Kimball, Manager.
Springfield, Mass.

SPRINGFIELD SEPT 2 1899 MASS

2 Cent Postage Stamp Cancelled

Mrs. Robert G. Ingersoll,
Dobbs Ferry,
New York.

[On back of Envelope:]

COMPLAINANT'S EXHIBIT XLIV.

[Put in Evidence, page 155.]

STERN & RUSHMORE, Attorneys & Counsellors,
40 Wall St New York.
Simon H. Stern. Chas. E. Rushmore.

MAY 21st, 1900.

My dear Mrs. Ingersoll: — Mr. Farrell asked me the other day when I called at your house, if I would not write a letter to you and state just the situation of the relations between your late husband and myself in so far as the Davis Estate matter is concerned.

I wrote him that I would see Mr. Coram in a few days and talk the subject over with him, and then I would be able to say definitely and with more exactness just what the situation was then and is at this time, because I wanted to see if Mr. Coram's recollection confirmed my own.

Now, the situation is exactly this:

The original agreement with Col. Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis Estate for his services. That agreement was made at the time the will was first offered for probate. At that time the estate amounted to upwards of five million dollars, and that agreement was made on account of the magnitude of the estate, and was a very reasonable one, considering what the estate then amounted to.

As you know, Col. Ingersoll went out there, I think three or four times: the cause was tried and the result was a mis-trial. Then came attacks on the body of the estate. A. J. Davis, Jr. claimed that the First National Bank in Butte which was then worth over a million and is now worth over two million, had been given to him

by A. J. Davis, the deceased. He succeeded in this contention and the estate lost that bank.

The Butte & Boston Mining stock, amounting to 90,000 shares, was worth at the time of Judge Davis' death, about $1,500,000. That company failed, and the estate was fortunate in being able to sell that stock altogether for the sum of $180,000.

The First National Bank of Helena, one-half of the stock of which was owned by the estate, we then supposed was perfectly good, and we estimated the interest of the estate in that bank to be worth very nearly half a million dollars. That bank failed, and the estate was obliged to pay $175,000 assessment, because of its ownership of this stock, and never received a penny for the stock, and never will.

After all these things had occurred, Col. Ingersoll favored and urged a settlement in compromise with the heirs of John A. Davis, and I, after many efforts, succeeded in effecting a settlement. I had prepared a draft of the compromise settlement which was signed by all the heirs. Col. Ingersoll went over it and changed it in many respects, and thoroughly approved of it. By this compromise agreement a certain, and very considerable proportion of the shares of my aunt and sister and cousins and myself, were turned over to Captain C. H. Palmer, who was selected by us as the trustee to receive these interests, and with such interests pay off the obligations which we had incurred, including the fee to Col. Ingersoll.

A partial distribution was had and I received a certain considerable amount of money from this fund and from my own interest in the estate, and with it I came to New York, first, however, paying off a fractional part of the money which had been advanced for the litigation. There was about twenty per cent. paid to the creditors who had advanced moneys for our side. I had, as I recollect it, something like $30,000 in my possession when I came to New York.

I saw Col. Ingersoll and told him the situation. I told him that it was utterly impossible for the agreements which we had made to be carried out, because of the fact that the estate had been so depleted by the inroads made upon it and which I have here referred to.

Col. Ingersoll said that under the circumstances, of course he

would not, and could not possibly claim that the fee which I had agreed to pay him should be paid, because it was impossible to do it. He said that for my work of years, I should have some compensation, and that he was willing to do what was very reasonable and fair under the circumstances, which, of course, I knew he would do. I then said to him, "Colonel, how much do you think you should receive in this first distribution?" He said to me, "How much do you think?" I said to him, "I would rather for you to say." He then said he would rather have me say. Then I asked him if he thought it would be fair for him to receive a fee of $5,000 from this distribution. He said he thought that would be very generous. I then suggested to him that I had borrowed in Ithaca $800, from him, which I would, of course, pay, and he said all right, it would be perfectly satisfactory to him to receive this $5,000. I thereupon sent him a check for the $800 and also for $5,000.

He met Mr. Coram about the same time, and had a long talk with Mr. Coram on the subject, and told Mr. Coram that of course he could not expect to receive the $100,000 which he would have been entitled to had the estate not so much diminished, but that he was perfectly willing to take what was fair and reasonable, and that he told me so, and that was the arrangement then in existence.

There is now a substantial fund in Boston, amounting to between $400,000 and $500,000 which I am using every effort in my power to get. An application to distribute that came before the Probate Court in Boston yesterday. I was present and urged that the cause be heard, but the other side secured a postponement of it until the 5th day of September, but the Judge said then he surely would dispose of the matter, and I would suggest to you that you have somebody on your own account take an interest in that and ascertain all of the facts in regard to it; ascertain how much money will be then or whenever it is, distributed to our side; see what the claims on it are, and I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money. There is besides now in Butte belonging to the estate $100,000, and there are some bank shares in Butte, which will be distributed later, but there seems to

be a disposition on the part of the administrators and of his lawyers, to grab everything they can get hold of and distribute nothing. Still, we may get something out of that.

The portion of the estate which, in my judgment, is of very great value, and of very much more value than the money, is the mining property, and when we realize upon that, which I hope we shall do before long, I have every reason to think that there will be a very substantial amount to which you will be entitled, and I suggest that you also have that looked into, so that you may know from sources other than myself that you are fairly treated.

I make these suggestions to you as to having someone look into the subject, not because I think that you would fail to have confidence in my word, but because it would be very much more satisfactory to me if you ascertain the facts from a source entirely outside of myself.

The whole Davis estate has been a sad, unfortunate experience as far as I am concerned. I spent ten of the best years of my life in it, and I greatly regret it. Mrs. Cornue, whom you know, and who would be entitled to a very substantial sum of money, has received up to the present time only a pittance and is as anxious as I that you should receive as much as possible, and I have not up to the present time received pay enough, or anything like pay enough, out of the estate to pay the carfare which I have expended in trying to get our interests in the estate.

If I can tell you, or anyone whom you desire to have investigate the subject, anything further, I am at your service at any time.

Among the great regrets which I have is the fact that Col. Ingersoll devoted so much time to this cause and that there is so little for you out of it, but as I said before, I do really believe that from the mining properties we will, as soon as they can be properly handled, receive very large benefits. Very truly yours,

HENRY A. ROOT

Mrs. Robert G. Ingersoll, 117 East 21st Street, New York City.

COMPLAINANT'S EXHIBIT XLV.

[Put in Evidence, page 158.]

MASSASOIT HOUSE SPRINGFIELD, MASS.

Aug. 24, 1901.

My dear Mrs. Ingersoll—

I am so arranging that I can do myself the pleasure to call on you at Dobb's Ferry next Thursday afternoon and I write you way ahead so that you can have there anyone whom you may want at the time.

I want to see if we can't come to some arrangement that will be fair and right.

Sincerely yours,

HENRY A. ROOT

COMPLAINANT'S EXHIBIT LXIV.

[Put in Evidence, page 417.]

E. L. WHITMORE, Mining,
Silver Bow Block, Butte, Montana.

BUTTE, MONTANA, May 14, 1902.

Mr. John S. Harris, Administrator, Est. Robt. G. Ingersol,

My dear Sir:—In compliance with our understanding after the long talk of today with you and Judge Harwood, I have to say that I am authorized to offer you $20,000, cash, in full settlement of the claim that you have against certain of the heirs of the Davis Estate, and will ask you to submit this proposition to Mrs. Ingersol or her representatives. I am informed by Mr. Root that when he last saw the representatives in New York of Mrs. Ingersol, they were solicitous to have a cash offer made. Our people were not then in a position to do this, but they are now. I do not want you to understand that we at all underrate Col. Ingersol's services, but as you will see by the memorandum which I enclose, we are in a very bad position financially. We have compromised and settled with all the attorneys in the case on a basis lower than this offer as compared with the contracts which were made with them. These contracts were, of course, predicated upon a very large estate and assumed that we would recover very much more than will be recovered. In order that there shall be no question on this subject, I wish to say to you that there will never be made any offer of a higher figure, because it would be impossible and the figure here submitted is our best.

Will you kindly ask your people to wire you whether they will do this or not as my stay in this section of the country will be very brief. If they are not disposed to do this, we will facilitate them in getting trial of the case at once as we are as anxious as your people are to have this matter disposed of right away.

Very truly yours,

Enclosure J. A. Coram

COMPLAINANT'S EXHIBIT DEMAND TO PRODUCE CERTAIN LETTERS.

[Put in Evidence, pages 139, 279.]

In the Circuit Court of the United States,

District of Massachusetts.

In Equity.

No. 1757.

Eva A. Ingersoll, as Administratrix of the Estate of Robert G. Ingersoll, deceased, Complainant

vs.

Joseph A. Coram, et al, Defendants.

Demand to Produce Certain Writings.

Notice is hereby given that the complainant in the above entitled action hereby requests and demands of the above named defendant Henry A. Root, and each and all of said defendants and their solicitors and counsel that the said Henry A. Root or other defendants or his or their solicitors or counsel produce at the time and place stated in the notice this day served for taking proofs in the above entitled cause on the part of complainant before Benjamin H. Bradlee, Special Examiner, the original of each and all those certain letters written and sent through the United States mail, to said Henry A. Root, by Robert G. Ingersoll, a substantial copy of which are attached to the affidavit of Clinton P. Farrell heretofore filed in said action marked Exhibit "XXXII," "XXXIII," "XXXIV," "XXXV," and "XXXVI," and printed on pages 11 to 12 of the record in said case for use of the contents thereof as evidence in said cause, together with each and all other letters or written correspondence or statements of any character which the said Henry A. Root or any defend-

ant above named or their or either of their solicitors have, in possession or control, made or claimed to have been made, and delivered through the United States mail or otherwise by said Robert G. Ingersoll touching his employment or services in the prosecution of said will contests mentioned in complainant's bill of complaint in the above entitled action, or the subject of said contests, or the compensation of said Robert G. Ingersoll for said services, for inspection by complainant and her solicitors, and for use as evidence in said cause in so far as complainant or her solicitors may on inspection thereof deem the same proper for that purpose.

And further that said Henry A. Root or his solicitors, or other defendants above named or their solicitors produce at the same time and place aforesaid, the original of that certain letter signed and sent by Clinton P. Farrell through the United States mail, addressed to said Henry A. Root, dated March 3, 1900, a substantial copy of which is annexed to the affidavit of said Farrell heretofore filed in the above entitled court and cause, marked Exhibit "XXXVIII," and printed on page 42 to 43 of the record in said case.

Dated Boston, May 14, 1904.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Solicitors for Complainant.

To FREDERICK N. WIER, *Solicitor for* JOSEPH A. CORAM, HENRY A. ROOT, CHARLES H. PALMER, *Trustee*, CHARLES H. LADD, *personally and as Administrator of* ELIZABETH S. LADD, MARY LOUISE DUNBAR *and* HERBERT P. CUMMINGS, *Exec'r.*

To HORACE G. ALLEN, *Solicitor for* JOHN H. LEYSON *Adm'r, and* ANDREW J. DAVIS, Jr. *Trustee.*

Service of the foregoing on us by delivery of copy, this 14th day of May, 1904, is hereby acknowledged.

FREDERICK N. WIER,
Solicitors for defendants as above addressed.

HORACE G. ALLEN,
Solicitors for defendants as above addressed.

COMPLAINANT'S EXHIBIT XLVI.

(Put in Evidence, page 305.)

Know all men by these presents that I, A. J. Davis of the County of Van Buren & State of Iowa being in good health & of sound & desposing mind & memory do make & publish this my last will & testament & as to my worldy estate & all the propurty real personal or mixed of which I shal die seized & possessed or to which I shal be entitled at the time of my decease, I, devise bequeath an dispose thereof in the manner following to wit

My will is that, I, guive & bequeath to, Thomas, Jefferson Davis &, Pet, Davis & her mother Miss Bergett, all three of Van Buren, Co, Iowa, a life time mantainance. That Is to say they shal have the necesaries of life out of my estate during their natural life. This amount of annuity to be set apart by my executors hereinafter named, & the judgment of my executors as to the amount necessary to set apart for the support of the above named persons shal be final

Sec.·.· I guive devise, &, bequeath to my beloved brother, John, A. — Davis reversion or remainder of my propurty whether real personal or mixed to have and to, . hold, the same forever together with all the profits, &, income thereof to the said John A. Davis, his heirs, administrator or assigns to his & their use, &, benifit forever.

Third.·.· And, lastly I, do nominate and appont James Davis &, Job, Davis, of, Davis, County & State of Iowa to be the, executors of this my last will and testament.

In testimony whereof I, the said A. J. Davis have to this my last will & testament contained on one sheat of paper, I, have subscribed my name & affixed my seal this the twentieth day of July in the year of our lord one thousand eight hundred & sixty six (1866).

. . . . . .

: A J Davis :

. . . . . .

Signed sealed, published and delivered by the said, A. J. Davis as & for his last will and testament in the presence of us who at his

request and in his presence & in the presence of each other have subscribed our names as witnesses thereto

Witnessed

J. C. Sconce
James Davis
Job Davis.

Filed Jul 21, 1880

COMPLAINANT'S EXHIBIT XLVII.

[Put in Evidence, page 305.]

In the District Court of the Second Judicial District of the State of Montana, within and for the County of Silver Bow.

In the Matter of the Estate of Andrew J. Davis, deceased.

Upon the contest of Henry A. Root and Maria Cummings against the probate of the proposed will of the said deceased, wherein John E. Davis is proponent, and the said Henry A. Root, et al, contestants. And the contest of Harriet Sheffield and Harry A. Davis against the probate of said will, and wherein John E. Davis, administrator of said John A. Davis, deceased, had been substituted for said deceased.

The petition of John A. Davis, deceased heretofore filed, praying for the admission to probate of a certain document, filed in this court, purporting to be the last will and testament of Andrew J. Davis, deceased, and that letters testamentary be issued to said petitioner, this day, regularly coming on to be heard, and it appearing to the Court that John E. Davis has been duly appointed administrator of the estate of said petitioner, John A. Davis, deceased, and that letters of administration have been duly issued to him, and that he is duly qualified and acting as such, and that the said John E. Davis, administrator as aforesaid, has been duly substituted for and in place of the said John A. Davis, deceased, and said petition having, by leave of court, been amended accordingly, and it appearing that the contests of the said Henry A. Root and Maria Cummings, and of Harriet R. Sheffield, and Henry A. Davis, have been compromised and settled, and the said contests this day dismissed and withdrawn in open court, in pursuance of stipulations and agreements, and it appearing that there is no further contest or opposition to the pro-

bate of the said alleged will, and due proof having been made to the satisfaction of this court that due notice had been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served as required by the previous order of this Court: and it further appearing to this court that notice has been given according to law, to all parties interested, and after examining John C. Sconce and Mary A. Downey produced on behalf of said petitioner, whose testimony has been reduced to writing and filed herein, from which it appears that said document is the last will and testament of said Andrew J. Davis, deceased; that it was executed in all particulars as required by law, and that said testator at the time of the execution of the same was of sound and disposing mind, and not under restraint and not acting under duress, menace, fraud or undue influence; that said Andrew J. Davis, deceased, died on the 11th day of March, A. D. 1890, being a resident of the City of Butte, County of Silver Bow, State of Montana, at the time of his death, and leaving both real and personal estate in said county and State and elsewhere.

That the said estate and effects, for and in respect of which the probate of said will is applied for, as aforesaid, does not exceed the value of three millions dollars;

And all the parties hereto appearing in open Court by their respective attorneys, and in pursuance of the stipulations and agreements and consent in open Court, and the proofs aforesaid,

It is ordered that the said document heretofore filed, purporting to be the last will and testament of the said Andrew J. Davis, be admitted to probate, as the said last will and testament of the said deceased.

And it appearing by the said agreements and stipulations of the parties and by consent duly entered in open court that Harriet R. Shetfield, now of Northport, Suffolk County, State of New York, and Henry A. Davis, of the Town of Monson, State of Massachusetts, are the sole heirs at law of Asa Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive each one-fiftieth (1-50) in kind of said estate upon the distribution or distributions of said estate.

And it further appearing by said agreements and stipulations of the parties and by consent duly had in open court that Andrew J. Davis and John E. Davis, of the City of Butte, and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the City of Chicago and State of Illinois, are the sole heirs at law of John A. Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive upon final distribution of said estate nineteen forty-fourths (19-44) of the remainder of said estate after deducting one-twenty-fifth (1-25) thereof hereinbefore provided for Harriet R. Sheffield and Henry A. Davis, subject however, to the bequests of said will, no part of which bequests are to be borne by said one-twenty-fifth (1-25) of said estate belonging to said Sheffield and Davis.

And it further appearing by said agreements and stipulations of the parties, and by consent duly had in open court that Henry A. Root, of the City of Helena, State of Montana, and Ellen S. Cornue, of the town of Croton Falls and State of New York, are the children and sole heirs of Anna C. Root, deceased, a sister of said Andrew J. Davis, and that Sarah Maria Cummings, widow, of the town of Ware and State of Massachusetts, is a sister of said Andrew J. Davis, deceased, and Mary Louise Dunbar, an unmarried woman, of the City of Springfield and State of Massachusetts, is a niece of the said Andrew J. Davis, deceased, and Elizabeth S. Ladd, of the City of Springfield and State of Massachusetts, is a child and heir of Sophronia Firmin, deceased, who is also a sister of said Andrew J. Davis, deceased, and Charles H. Ladd, her husband, and Joshua G. Cornue, husband of the said Ellen S. Cornue, and are entitled to have and receive twenty-five-forty-fourths (25-44) of the remainder of said estate, after the one-twenty-fifth (1-25) thereof above provided for said Harriet R. Sheffield and Henry A. Davis, subject to said bequests made in said will.

Now Therefore, it is ordered, adjudged and decreed in pursuance thereof, that the said Harriet R. Sheffield, of the town of Northport, County of Suffolk and State of New York, and Henry A. Davis of the town of Monson, State of Massachusetts, sole heirs at law of

Asa Davis, deceased, brother of Andrew J. Davis, deceased, have and receive each one-fiftieth (1-50) of said estate in kind, on the distribution or distributions thereof: And that the said Andrew J. Davis and John E. Davis, of the City of Butte, State of Montana, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the City of Chicago, State of Illinois, have and receive nineteen-forty-fourths (19-44) of the remainder of said estate, after providing for the one-twenty-fifth (1-25) of said estate for Harriet R. Sheffield and Henry A. Davis as above, and subject to the bequests made in said will, and that said Henry A. Root of the City of Helena, State of Montana, Sarah Maria Cummings, of the town of Ware, State of Massachusetts, Mary Louise Dunbar, of the City of Springfield, State of Massachusetts, Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Charles H. Ladd, husband of the said Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Ellen S. Cornue and Joshua G. Cornue, her husband, of the town of Croton Falls, State of New York, have and receive twenty-five-forty-fourths (25-44) of the remainder of said estate in kind, after providing for the one-twenty-fifth (1-25) thereof for the said Harriet R. Sheffield and Henry A. Davis, as above, subject to the bequests of said will.

And the said stipulations and agreements of the parties in interest and to be affected by this cause and proceeding is, by consent in open court, adopted and made the basis of this order and decree, according to the terms and provisions of said stipulations and agreements.

Done in open Court this 27th day of March, 1895.

JOHN J. McHATTON,

Judge.

Filed March 27, 1895.

COMPLAINANT'S EXHIBIT XLVIII.

[Put in Evidence, page 305.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of John A. Davis, Deceased.

The petition of John E. Davis, as Administrator of the Estate of John A. Davis, deceased, coming on to be heard this day, and all parties in interest appearing in open court and consenting thereto, and waiving notice thereof:

After hearing the allegations and proofs of the petitioner in open court, and after having carefully examined and inspected the contracts of compromise and settlement mentioned in the said petition, and it appearing to the Court therefrom that it was and is for the best interests of the estate of the said John A. Davis, deceased, that such contracts of compromise and settlement be ratified and confirmed by this Court, and that said petitioner be directed, authorized and empowered to carry such contracts of compromise and settlement into effect;

And it appearing to the Court that all contracts of compromise and settlement should be satisfied and discharged from the property of the estate of Andrew J. Davis, deceased, and that such petitioner is entitled, as administrator of the Estate of John A. Davis, deceased, to such part of the Estate of Andrew J. Davis as may remain in said estate after the payment of all the debts of and claims against said estate of Andrew J. Davis, deceased, and the costs, charges and expenses of administration of said estate; the satisfaction of the specific legacies provided in the last will of Andrew J. Davis, deceased, and after fully satisfying any and all such contracts of compromise and settlement;

Now Therefore, in consideration of the premises, It is Hereby Ordered, Adjudged and Decreed as Follows:

First. That the action of John E. Davis, as Administrator of the Estate of John A. Davis, deceased, in the making, execution and delivery of those four certain contracts of compromise and settlement described and set forth in the said petition, to-wit: one bearing date April 28, 1893, with Henry A. Root, Maria Cummings,

Elizabeth S. Ladd, Ellen S. Cornue, and Elizabeth Dunbar; one bearing date March 25, 1895, with Henry A. Davis and Harriet Sheffield; one bearing date June 22, 1897, with Calvin P. Davis, Elizabeth Bowdoin and Harriet Wood; and one bearing date August 6th, 1897, with Elizabeth A. Smith, be and they severally are hereby fully ratified, approved and confirmed.

Second. That the said John E. Davis, administrator of the estate of the said John A. Davis, deceased, be and he is hereby given full power and authority as such administrator to carry each and all of said contracts of compromise and settlement into effect.

Third. That the said John E. Davis, Administrator of the Estate of the said John A. Davis, deceased, be and he is hereby authorized, directed and empowered to receive from John H. Leyson, Administrator with the Will annexed of the Estate of Andrew J. Davis, deceased, and receipt to said Leyson, Administrator as aforesaid, in full for all of the interests of the Estate of John A. Davis, deceased, in and to the property and estate of Andrew J. Davis, deceased, upon delivery or distribution to him as such administrator, of the residue and remainder of the Estate of Andrew J. Davis, deceased, after payment of all debts, claims and demands against the estate of Andrew J. Davis, deceased, and all costs, expenses and charges of administration of said estate; and after satisfaction of all legacies mentioned and provided for in said Will, and after full satisfaction of each and all of the said contracts of compromise and settlement.

Done in Open Court this 24th day of August, A. D. 1897.

JOHN LINDSAY,
Judge.

Filed August 24th 1897.

COMPLAINANT'S EXHIBIT XLIX. AND C.

[Put in Evidence, page 305.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root et al, contestants; and the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it Remembered that on the 24th day of August, 1897, the petition in the above entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the Court has been heretofore made on the 24 day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contests now pending are represented by attorneys present in Court,

It is Ordered that the contests heretofore instituted in this Court by Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith, be and the same are hereby dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this Court heretofore made on the 27th day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this Court confirming the making, executing and delivering the same, It is Ordered, Adjudged and Decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of said Andrew J. Davis, deceased, with the

will annexed, keep, retain and hold in his possession and under his control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreements, said order and the provisions thereof.

And it is Hereby Ordered, Adjudged and Decreed in pursuance of said petition, said compromise agreements and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis, deceased, and so held, retained and controlled by said administrator, and to be distributed by him, be, and the same are hereby established and declared to be as follows, to-wit: That is to say:—Subject to the bequests in said will of said Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate, the parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:

Two hundred eleven hundredths (200-1100) thereof in kind to John E. Davis, as administrator of the estate of John A. Davis, deceased, two hundred and fifty eleven hundredths (250-1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty four eleven hundredths (44-1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven hundredths (50-1100) thereof in kind to Calvin P. Davis; fifty eleven hundredths (50-1100) thereof in kind to Harriet Wood; twenty-five eleven hundredths (25-1100) thereof in kind to Elizabeth A. Smith; fifty eleven hundredths (50-1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer trustees appointed in and by the compromise agreement dated April 28, 1893, are entitled to have and receive as such trustees and for the purpose of such trust four hundred and thirty one eleven hundredths (431-1100) of said estate in kind.

It Being Further Ordered, however, that no portion of the real estate owned by said Andrew J. Davis, and situated in the State of Iowa, shall comprise any portion of said estate in estimating and

ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be affected by this cause and proceeding are, by consent in open Court, adopted and made the basis of this order and decree according to the terms and provisions of said contracts and agreements.

Done in Open Court this 24th day of August, A. D. 1897.

(Signed) JOHN LINDSAY,
Judge.

Filed August 28th, 1897.

COMPLAINANT'S EXHIBIT L.

[Put in Evidence, page 305.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

DECREE OF PARTIAL DISTRIBUTION.

Be it Remembered that on this 26th day of August, 1897, the petition of John E. Davis, as Administrator of the estate of John A. Davis, deceased, for a partial distribution of said estate, and the joint and several petition of Diana Davis, Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosine B. Root, his wife, Mary L. Dunbar, Elizabeth A. Smith and J. Howard Smith, her husband, Harriet R. Sheffield, Henry A. Davis, Elizabeth S. Ladd and Charles H. Ladd, her husband, Andrew J. Davis, Jr., and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, Edward A. Davis and Mary A. Davis, his wife, Charles G. Davis and Gertrude F. Davis, his wife, George W. Davis, Morris A. Davis and Thea Jane Davis, being all of the heirs and next of kin

of Andrew J. Davis, deceased, who are interested in his estate, for a partial distribution of said estate, coming on to be heard pursuant to orders of this Court duly made and filed on the 24th day of August, 1897, fixing this day for the hearing thereof, and pursuant to notice thereof pursuant to said orders, proof of the due posting thereof being made to the court, and upon reading and filing the answer and report of John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and upon due proofs submitted to the Court in support of said petitions, and upon due consideration, and it appearing that all of the said petitioners, and the said John H. Leyson, as such administrator, and all of the parties interested in said estate, have appeared by their respective attorneys, or otherwise, and have consented to the distribution hereinafter decreed; and it further appearing that due and proper notice to the creditors of said estate has been regularly given in pursuance of the statutes in such case made and provided, and that more than 12 months have elapsed since the appointment of said Administrator, and that more than 10 months have elapsed since the first publication of notice to the creditors of said estate, and that no claims have been proven up and allowed against said estate which have not been fully paid, and that no injury or damage whatever can accrue by the partial distribution of said estate as requested by your petitioners,—

And it further appearing that John H. Leyson, as such Administrator, has now on hand, in cash, the sum of Nine hundred and seventy-two thousand and ninety four dollars and forty-seven cents ($972094.47) besides a large amount of other property as shown by the inventory filed herein, and that the petitioners request now the distribution of the sum of Six hundred and seventy thousand dollars ($670,000), and that the same can safely be now ordered to be distributed as prayed for, without damage or injury to said estate or any person interested therein,—

And it further appearing that the rights and interests of the said parties, and of the said petitioners, in the estate of said Andrew J. Davis, deceased, are as follows, to-wit: Subject to the legacies in said will contained, to Thomas Jefferson Davis, Pet Davis, and Miss Berget, and the expenses of administration of the estate of Andrew

J. Davis, deceased; the said John E. Davis, as Administrator of the estate of John A. Davis, deceased, is entitled to have and receive two-hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue are entitled to have and receive Two Hundred and Fifty eleven hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive Forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive Fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive Twenty five Eleven hundredths (25-1100) of said estate in kind; but that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, is to comprise any portion of the said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to; nor are they to be charged with any part of the bequest given to the said Thomas Jefferson Davis in said will, but that the same shall be settled as to them as if no bequest had been made,—

And it further appearing that finally Andrew J. Davis, Jr., and Charles H. Palmer, Trustees, appointed by the compromise agreement of certain heirs of the said Andrew J. Davis, deceased, dated April 28th, 1893, are entitled to have and receive Four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind; to be held and disposed of by them pursuant to the provisions of said trust,—

It is Now Hereby Ordered, Adjudged and Decreed that the rights and the interests of the respective parties are as hereinbefore set forth,—

It is Further Ordered, Adjudged and Decreed that the prayers of said petitions be and the same are hereby granted, and that John H. Leyson, as Administrator of the estate of Andrew J. Davis, deceased, be and he hereby is ordered and directed forthwith to dis-

tribute and pay over the sum of Six hundred and seventy thousand (670,000) Dollars of the cash remaining in his hands, to the following persons or their agents or legal representatives, and in the following proportions, to-wit:

To the said Andrew J. Davis, Jr., and Charles H. Palmer, the said Trustees, the sum of Two hundred and sixty-two thousand five hundred and eighteen and eighteen one hundredths dollars ($262,518.18).

To the said Henry A. Root, Sarah M. Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue, the sum of One hundred and fifty two thousand two hundred and seventy-two and seventy three one hundredths dollars ($152,272.73).

To the said John E. Davis, as Administrator of the estate of John A. Davis, deceased, the sum of One hundred and twenty one thousand eight hundred and eighteen and nineteen one-hundredths dollars ($121,818.19).

To Charles M. Demond and C. P. Drennan, attorneys for Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood and for the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, the sum of Ninety one thousand three hundred and sixty three and sixty four one-hundredths dollars ($91,363.64).

To the said Elizabeth A. Smith or J. Howard Smith, her attorney-in-fact, the sum of Fifteen thousand two hundred and twenty seven and twenty seven one-hundredths dollars ($15,227.27), and that the sum of Twenty six thousand seven hundred and ninety-nine and ninety nine one-hundredths dollars ($26,799.99), representing the share of the said Harriet R. Shetfield and Henry A. Davis, be paid over as follows: Fifteen per cent (15) thereof to George F. Shelton, and eighty-five per cent (85) thereof to Martin J. Keogh, the attorneys for the said Harriet R. Shetfield and Henry A. Davis.

It is Further Ordered Adjudged and Decreed that John H. Leyson as Administrator aforesaid, pay to himself from the funds remaining in his hands the additional sum of twenty five thousand ($25,000) dollars on account of his fees and expenses as such administrator.

It is Further Ordered, Adjudged and Decreed that the legacy

given in said will of Andrew J. Davis, deceased, to Pet Davis, is hereby fixed at the sum of five hundred ($500.) dollars; and the legacy given in said will to Miss Berget, otherwise known as Caroline Berget Smith, be and the same is hereby fixed at the sum of four thousand five hundred (4500) dollars, and said John H. Leyson as such administrator is hereby ordered and directed to pay said five hundred dollars ($500.) to Oliver M. Hall, administrator of said Pet Davis, and to pay said sum of four thousand five hundred (4500) dollars to James M. Hinkle, he having submitted to the Court satisfactory proof of sale and transfer to him of said legacy given in said will to the said Caroline Berget Smith, prior to her death.

It is Further Ordered, Adjudged and Decreed that the legacy given in said will of Andrew J. Davis, deceased, to Thomas Jefferson Davis, be, and the same is hereby fixed at the sum of ten thousand dollars. It appearing to the satisfaction of the Court that all of the interest of said Thomas Jefferson Davis in said estate of Andrew J. Davis now belongs to Charles H. Palmer and Andrew J. Davis, as trustees, It is Therefore Further Ordered, Adjudged and Decreed that said Charles H. Palmer and Andrew J. Davis as trustees shall receive said sum.

And it further appearing to the Court that by the consent and agreement of all of the parties for whom said Charles H. Palmer and Andrew J. Davis are trustees, and the consent and agreement of said trustees, all of the interest of said Thomas Jefferson Davis as above determined shall be included in the four hundred and thirty one eleven hundredths (431-1100) of such part of the estate as is distributed hereunder to the said Charles H. Palmer and Andrew J. Davis.

It is Further Ordered, Adjudged and Decreed that the interest of the said Thomas Jefferson Davis in and to the estate of said Andrew J. Davis, deceased, fixed as above, be distributed to the said Charles H. Palmer and Andrew J. Davis, Trustees, as a part of the four hundred and thirty-one eleven-hundredths (431-1100) of that part of said estate distributed under this order to them, and upon payment to them of said four hundred and thirty one eleven-

hundredths (431-1100) of the distribution made hereunder, said Charles H. Palmer and Andrew J. Davis, shall receipt to said administrator in full for the interest of said Thomas Jefferson Davis in the estate of Andrew J. Davis, deceased.

JOHN LINDSAY,
Judge Second Judicial District Court, State of Montana, Silver Bow County.

Dated at Butte City, Montana, August 26th, 1897.

Filed August 26th, 1897.

COMPLAINANT'S EXHIBIT LI.

[Put in Evidence, page 306.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

DECREE OF PARTIAL DISTRIBUTION AND OFFER FOR DELIVERY OF REAL ESTATE.

Be it Remembered, that on this 18th day of December, 1897, the joint and several petition of Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosine B. Root his wife, Elizabeth A. Smith and J. Howard Smith, her husband, being heirs and next of kin of Andrew J. Davis, deceased, and who are interested in his estate, and Andrew J. Davis, Jr., and Charles H. Palmer, trustees under the compromise agreement, dated April 28, 1893, heretofore approved by this Court, for an order and decree that the administrator of said estate deliver to the persons entitled thereto, all and singular the real estate belonging to said estate and for a partial distribution of said estate, coming on to be heard pursuant to the order of this court duly made and filed on the 10th day of December, 1897, fixing the 16th day of December, 1897, for the hearing thereof, and said hearing having been by the court duly continued until this day, and pursuant to notice thereof pursuant to said order, proof

of the due posting of said notices and the personal service thereof on John H. Leyson, administrator with the will annexed of Andrew J. Davis, deceased as required by law and the previous order of this court, being made to the satisfaction of the court, and upon reading and filing the petition of John E. Davis, administrator of the estate of John A. Davis, deceased, joining in said petition and the petition of Harriet R. Shetfield and Henry A. Davis joining in the said petition, and the answer of said John H. Leyson, administrator with the will annexed of Andrew J. Davis deceased, and upon due proof submitted to the court, in support of said petition and upon due consideration, and it appearing that all of the said petitioners, and the said John H. Leyson, as such administrator, have appeared by their respective attorneys or otherwise, and have consented to the distribution hereinafter decreed; and it further appearing that due and proper notice to the creditors of said estate has been regularly given in pursuance of the statutes in such case made and provided, and that more than twelve months have elapsed since the appointment of said administrator, and that more than ten months have elapsed since the publication of notice to the creditors of said estate, and that no claims have been proven up and allowed against said estate which has not been fully paid; and that all taxes which have attached to or accrued against the said estate have been fully paid; that the decedent Andrew J. Davis died seized and possessed of a large amount of real estate situated in the State of Montana, of which the said administrator has been heretofore entitled to the possession; and that the rents, issues and profits of the real estate of said estate are not necessary to be received by the said administrator wherewith to pay any debts to the decedent, and that it will not be necessary to sell said real estate for the payment of such debts; and that no injury or damage whatever can accrue by the partial distribution of said estate and the delivery of the possession of all of said real estate of said Andrew J. Davis, deceased, to the persons entitled thereto as requested by your Petitioners.

And it further appearing that John H. Leyson as such administrator, has now on hand in cash the sum of Two hundred and thirty eight thousand and seventy five and fifty nine one-hundredths

($238,075.59) dollars, besides a large amount of other property as shown by the inventory filed herein, and that the petitioners request now the distribution and delivery of possession to the parties entitled thereto, of all and singular the real estate belonging to the said estate or in which the said estate may have any interest, in the State of Montana, and that the same can safely be now ordered to be distributed and delivered as prayed for, without damage or injury to said estate or any person interested therein.

And it further appearing that the legacies in said will contained to Thomas Jefferson Davis, Pet Davis and Miss Berget, and each of them have been fully paid by said administrator and that the rights and interests of the said parties and of the said petitioners in the estate of the said Andrew J. Davis, deceased, are as follows, to-wit:— Subject to the expenses of administration of the estate of Andrew J. Davis, deceased; the said John E. Davis as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue are entitled to have and receive two hundred and fifty eleven-hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty four eleven hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive fifty eleven hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty five eleven hundredths (25-1100) of said estate in kind; but that no portion of the real estate owned by said Andrew J. Davis, deceased, and situated in the State of Iowa, is to comprise any portion of the said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled; nor are they to be charged with any part of the bequest given to the said Thomas Jefferson Davis in said will, but that the same shall be settled as to them as if no bequest had been made;

And it further appearing that finally Andrew J. Davis, Jr., and

Charles H. Palmer, Trustees, appointed by the compromise agreement of certain heirs of the said Andrew J. Davis, deceased, dated April 28th, 1893, are entitled to have and receive four hundred and thirty one eleven hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust: —

It is Now Hereby Ordered, Adjudged and Decreed that the rights and the interests of the respective parties are as hereinbefore set forth: —

It is Further Ordered, Adjudged and Decreed that the prayers of said petitions be and the same are hereby granted, that John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, be and he hereby is ordered and directed forthwith to distribute and deliver possession of all and singular the real estate belonging to the said estate of Andrew J. Davis, deceased, or in which said estate may have any interest, situated in the State of Montana, to the following persons or their agents or legal representatives: and that such persons do have and hold their respective shares, parts and portions thereof: and that such shares, parts and portions be and the same are hereby distributed to them, as owners or tenants in common, in the following proportion, to-wit:

To the said Andrew J. Davis, Jr., and Charles H. Palmer, the said Trustees, Four hundred and thirty one eleven hundredths (431-1100) of said real estate: to be held and disposed of by them pursuant to the provisions of said trust.

To the said Henry A. Root, Sarah M. Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue, two hundred and fifty eleven hundredths (250-1100) of said real estate.

To the said John E. Davis, as administrator of the estate of John A. Davis, deceased, two hundred eleven hundredths (200-1100).

To the said Elizabeth S. Bowdoin, fifty eleven hundredths (50-1100).

To the said Calvin P. Davis, fifty eleven hundredths (50-1100).

To the said Harriet Wood fifty eleven hundredths (50-1100).

To the said Elizabeth A. Smith, twenty five eleven hundredths (25-1100).

To the said Harriet R. Sheffield and Henry A. Davis, forty-four eleven-hundredths (44-1100).

Dated at Butte City, Montana, February 8th, 1898.

JOHN LINDSAY,
Judge Second Judicial District Court, State of Montana, Silver Bow County.

Filed Feb. 8th, 1898.

COMPLAINANT'S EXHIBIT LII.

[Put in Evidence, page 306.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the petition of Henry A. Root, Ellen S. Cornue, Joseph A. Coram and Sarah Maria Cummings for a partial distribution of said estate.

CONSENT TO PARTIAL DISTRIBUTION.

We the undersigned claiming liens upon whatever interest Henry A. Root, Ellen S. Cornue, Joseph A. Coram and Sarah Maria Cummings, or either of them, may have in the estate of Andrew J. Davis, deceased, in the following sums:

Toole and Wallace	$17,000.00
Eugene T. Wilson, Receiver of the Merchants' National Bank of Helena, Montana	10,000.00
Estate of Frank E. Corbett	7,500.00
Toole and Bach	1,000.00

do hereby consent that the petition for partial distribution of said estate filed by said Henry A. Root, Ellen S. Cornue, Joseph A. Coram and Sarah Maria Cummings in this Court on the day

of February, be granted and the distribution be made as therein prayed for.

Dated at Helena, Montana, this day of March, 1901.

TOOLE & WALLACE.

E. T. WILSON, *Receiver, Merchants' National Bank of Helena, Montana.*

TOOLE & BACH,

ESTATE OF FRANK E. CORBETT *by Adelaide T. Corbett, sole legatee and executrix of said estate, under the will.*

COMPLAINANT'S EXHIBIT LIII.

[Put in Evidence, page 306.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

DECREE OF COURT.

Be it Remembered that on the 11th day of November, 1901, the joint and several petition of Sarah Maria Cummings, Henry A. Root, Ellen S. Cornue and Joseph A. Coram that the administrator of said estate distribute to said petitioners a portion of the net proceeds of the shares of said estate to which they and each of them will be and are entitled, coming on to be heard pursuant to the order of this court duly made and filed herein on the 9th day of February, 1901, fixing the 21 day of February, 1901, for a hearing thereof, and said hearing having been by the court duly continued until this date: and pursuant to the notice given thereof as provided in said order, proof of the due posting of said notice and of the personal service thereof upon John H. Leyson, administrator with the will annexed of the estate of Andrew J. Davis, deceased, as required by law and the previous order of the court, being made to the satisfaction of the court: and upon reading the joint and several petition of Harriet R. Sheffield and Henry A. Davis joining in the said petition of Sarah Maria Cummings, Henry A. Root, Ellen S. Cornue and Joseph

A. Coram, and upon reading the answer of Elizabeth Bowdoin, Calvin P. Davis and Harriet Holton consenting thereto, and the petition of said parties praying for the same relief, and upon reading the answer and objections of John H. Leyson, administrator as aforesaid, and the answer and objections of John E. Davis, administrator of John A. Davis, deceased, and the replication of said petitioners thereto; and upon due proof submitted to the court in support of the issues raised by said petition, answers and objections thereto and the replication to such answers and objections and upon due consideration thereof; and it appearing that all said petitioners and the said John H. Leyson, administrator as aforesaid, and the said John E. Davis, administrator as aforesaid, having appeared by their said attorneys; and it further appearing that due and proper notice to the creditors of said estate has been regularly given pursuant to the statutes of the State of Montana in such cases made and provided, and that more than twelve (12) calendar months have elapsed since the appointment of said administrator and that more than ten (10) calendar months have elapsed since the date of the first publication of notice to creditors; and that no claims have been proven and allowed against said estate which have not been fully paid and that no contested claims are in existence; that all taxes which have attached to or accrued against said estate have been fully paid; that since the filing of said petition Sarah Maria Cummings has died and that Henry A. Root has been appointed administrator of her estate with the will annexed in the State of Montana and has been duly substituted herein by the order of this court in the place and stead of said Sarah Maria Cummings; and it further appearing that Joseph A. Coram is the owner by purchase and conveyance of all and singular of the rights, titles and interests of Mary L. Dunbar, Elizabeth S. Ladd and Charles H. Ladd, her husband, in and to the said estate of Andrew J. Davis, deceased; and it further appearing that no injury or damage whatever can result to said estate by the distribution of one hundred thousand ($100,000) dollars and one hundred (100) shares of the capital stock of the First National Bank of Butte, Montana, belonging to said estate, as prayed for, to the persons entitled thereto as requested by said petitioners; and it

further appearing that John H. Leyson, as such administrator, has now on hand in cash the sum of One hundred and thirty thousand ($130,000) and that John H. Leyson, as ancillary administrator of the estate of Andrew J. Davis, deceased, in the State of Massachusetts, has on hand in that state the sum of about four hundred thousand ($400,000) dollars; and it further appearing that the distribution prayed for herein may be allowed to the petitioners without loss to the creditors of the estate of Andrew J. Davis, deceased; and it further appearing that the rights of all persons interested in the estate of Andrew J. Davis, deceased, subjected to the future expenses of administration of said estate, are as follows.

That John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate; that Henry A. Root, Ellen S. Cornue, Joseph A. Coram, and Henry A. Root, administrator with the will annexed of the estate of Sarah Maria Cummings, deceased, are entitled to have and receive two hundred and fifty eleven-hundredths (250-1100) of said estate; that said Harriet P. Sheffield and Henry A. Davis are entitled to have and receive forty-four-eleven-hundredths (44-1100) of said estate; that Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Holton, as successor in interest of Harriet Wood, are entitled severally to have and receive fifty-eleven-hundredths (50-1100) of said estate; that Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate, and that Andrew J. Davis, Junior, and Charles H. Palmer, Trustees, appointed by the compromise agreement of certain heirs of said Andrew J. Davis, deceased, dated April 28, 1893, are entitled to have and receive four hundred and thirty-one eleven-hundredths (431-1100) of said estate to be held and disposed of them pursuant to the provisions of said trust.

Now Therefore, on motion of Charles R. Leonard, John B. Clayberg, W. E. Cullen and C. P. Drennen, attorneys for the respective petitioners, it is hereby Ordered, Adjudged and Decreed that the rights and interests of all the persons and parties in and to the estate of Andrew J. Davis, deceased, are as hereinbefore set forth.

It is Hereby Further Ordered, Adjudged and Decreed that the

objections and answers of John H. Leyson, Administrator with the will annexed of the estate of Andrew J. Davis, deceased, and of John E. Davis, administrator of the estate of John A. Davis, deceased, be, and the same are hereby overruled.

It is Further Ordered, Adjudged and Decreed that John H. Leyson, administrator with the will annexed of the estate of Andrew J. Davis, deceased, distribute, pay and turn over to the respective petitioners or to their attorneys each and all of their several interests in and to the sum of one hundred thousand ($100,000) dollars, and that he turn over and transfer to said several petitioners, or to their attorneys, the one hundred (100) shares of the capital stock of the First National Bank of Butte, Montana, in the following interests and amounts: To Henry A. Root, Ellen S. Cornue, Joseph A. Coram and Henry A. Root, administrator with the will annexed of the estate of Sarah Maria Cummings, deceased, two hundred and fifty eleven-hundredths (250-1100) of said money and said stock; to Elizabeth S. Bowdoin fifty eleven-hundredths (50-1100) of said money and said stock; to Calvin P. Davis fifty eleven-hundredths (50-1100) of said money and said stock; to Harriet Holton, as successor to the interest of Harriet Wood; fifty eleven-hundredths (50-1100) of said money and said stock; to Harriet R. Sheffield and Henry A. Davis forty-four eleven hundredths (44-1100) of said money and said stock.

And it is Hereby Further Ordered, Adjudged and Decreed that said Henry A. Root, Ellen S. Cornue, Joseph A. Coram, and Henry A. Root, administrator with the will annexed of the estate of Sarah Maria Cummings, deceased, or their attorneys, who shall receive the two hundred and fifty eleven-hundredths (250-1100) of said cash and property so distributed as above, shall pay to Toole & Wallace the sum of twelve thousand five hundred dollars ($12,500) and interest thereon at the rate of ten per cent per annum from and after the 25th day of August, 1897; to J. K. Toole and T. C. Bach, the sum of one thousand dollars ($1,000); to Eugene T. Wilson receiver, as assignee of the firm of McConnell & Clayberg ten thousand dollars ($10,000), to George W. Stapleton the sum of two thousand three hundred and thirty-three dollars and thirty-three cents ($2333.33)

pro rata, and in fixing the pro rata amount of each of the above persons there shall be included the sum of seven thousand five hundred dollars ($7500.00) claimed by the estate of Frank E. Corbett, deceased.

And it is Further Ordered that the pro rata sum of said seventy-five hundred dollars shall be held in trust for the estate of said Frank E. Corbett, deceased, until the amount of the claim of said estate against said Root and others is finally adjudicated or fixed by a decree of judgment of a court of competent jurisdiction, or agreed upon and settled and fixed by the parties in interest thereto.

It is Further Ordered, Adjudged and Decreed, that Elizabeth A. Smith, and Charles H. Palmer and Andrew J. Davis, Trustees, may appear before this court and obtain a further order for distribution of the shares of said estate hereinbefore fixed and decreed to belong to them at any time within sixty days from the date hereof.

It is Hereby Further Ordered and Decreed that the bond provided for by sub-division 1, section 2833, is hereby dispensed with and that the distribution herein ordered may therefore be had without the giving of a bond by the parties to whom distribution is ordered.

Dated and signed this 3rd day of December, 1901.

E. W. HARNEY,
Judge.

[Filed December 3, 1901.]

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, within and for the County of Silver Bow, do hereby certify that each and all of the foregoing written and printed or partly written and partly printed matters records and documents hereto annexed are true complete and correct copies of records files and papers, on file and of record in the office of the Clerk of said Court in the matters, actions and proceedings therein mentioned as the same appear on file and of record in the office of the Clerk of said Court.

In Witness Whereof I have hereunto subscribed my name and office as Clerk of said District Court and affixed the seal of said District Court, at the office of the Clerk thereof, in the City of Butte, Silver Bow County, State of Montana, on this 21 day of April, A. D. 1904.

SAMUEL M. ROBERTS,
Clerk of the District Court of the Second Judicial
(L. S.) *District of the State of Montana, within and*
for the County of Silver Bow.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, E. W. Harney Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that Samuel M. Roberts, whose genuine original signature is subscribed to the annexed Certificate and Attestation, is and was, at the time of making the same, the Clerk of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Clerk: that full faith and credit are due to his official acts, and that he is the legal keeper of all the Records and the Seal of said Court: that said Certificate and Attestation is in due form of law: and that the Seal affixed thereto is the genuine Seal of said Court.

Witness my hand at Butte, Montana, this 21st, day of April, A. D. 1904.

E. W. HARNEY
Judge of said Court.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that the Honorable E. W. Harney, whose name is subscribed to the annexed and foregoing certificate, is and was at the

time of making the same, Judge of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Judge, to all whose acts as such full faith and credit are due, and that the signature of said Judge to said Certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said District Court, at Butte, Mont., this 21 day of April, A. D. 1904.

SAMUEL M. ROBERTS,
Clerk of said Court.

(L. S.)

COMPLAINANT'S EXHIBIT LV.

[Put in Evidence, page 418.]

This Agreement, entered into this 28th, day of April, 1893, between Andrew J. Davis and John E. Davis, of the City of Butte, County of Silver Bow, and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the city of Chicago, State of Illinois, being all the heirs at law of John A. Davis, deceased, late of the City of Butte, County of Silver Bow, State of Montana, and John E. Davis, Administrator of the estate of John A. Davis, deceased, parties of the first part and Henry A. Root of the City of Helena, County of Lewis and Clarke, State of Montana, a child and heir of Anna C. Root, deceased, sister of the late Andrew J. Davis, deceased, and Maria Cummings, widow, of the town of Ware, State of Massachusetts, sister of said Andrew J. Davis, deceased, Mary Louise Dunbar, an unmarried woman of the City of Springfield, State of Massachusetts, a niece of said Andrew J. Davis, deceased, Ellen S. Cornue of Croton Falls, State of New York, child and heir of said Anna C. Root, deceased, who was a sister of said Andrew J. Davis, and Joshua G. Cornue, her husband, and Elizabeth S. Ladd, of Springfield, Massachusetts, a child and heir of Sophronia Firman, deceased, who was also a sister of said Andrew J. Davis, deceased, and Charles H. Ladd, her husband, for themselves, parties of the second part, Witnesseth:

Whereas, on or about the 11th day of March, 1890, at the City of Butte, Montana, Andrew J. Davis, departed this life leaving a large estate both real and personal, and

Whereas, the following named persons were his surviving heirs in case he died intestate, to-wit:

John A. Davis, Butte, Montana, Erwin Davis, New York City, New York; Calvin P. Davis, Sebastopol, Sonoma County, California; brothers of said deceased; Miss Diana Davis, Somers, Connecticut; Mrs. Sarah Maria Cummings, Ware Massachusetts; Mrs. Harriet Woods, Springfield, Massachusetts; and Mrs. Salina A. Bowdoin, Springfield, Massachusetts, all sisters of said deceased; Mrs. Ellen S. Cornue, Croton Falls, New York; and Henry A. Root, Helena, Montana; both children of Anna C. Root, deceased, who was a sister of said Andrew J. Davis, deceased; Miss Mary L. Dunbar, Springfield, Massachusetts, and Mrs. Mary A. Smith of Oakland, California, both children of Roxana Dunbar, deceased, who was the sister of the said Andrew J. Davis, deceased, Harriet Hitchcock Davis, now Harriet Sheffield of New Rochelle, New York, and Henry A. Davis of Monson, Massachusetts, both children of Asa Davis, deceased, who was a brother of the said Andrew J. Davis, deceased; and Mrs. Lizzie S. Ladd, Springfield, Massachusetts, who is a daughter of Sophronia Firman, who was a sister of Andrew J. Davis, deceased; and

Whereas, on or about the 23rd day of July, 1890, John A. Davis, one of the last above named heirs, presented for probate in the District Court of Silver Bow County, Montana, a paper purporting to be the last will and testament of said A. J. Davis, deceased, by the terms of which, aside from some unimportant bequests, said John A. Davis, was made the sole legatee and devisee of all and singular the estate of said Andrew J. Davis, deceased, and

Whereas, on the . . . . . day of August, 1890, Maria Cummings and Henry A. Root named, filed their contest in writing to the probate of said alleged will, and after the issues of said contest had been duly adjusted the same were tried by said Court and a jury, in which trial the said jury disagreed, and

Whereas, the said issues are at this time undetermined and pending, and

Whereas, the said Elizabeth Ladd and Charles H. Ladd, her husband, Mary Louise Dunbar, Ellen S. Cornue and Joshua G. Cornue her husband, above named are interested in the contests now pending, wherein said Maria Cummings and Henry A. Root are contestants: and

Whereas, heretofore, to-wit: on the . . . . . day of January, 1893, the said John A. Davis, departed this life intestate, leaving as his heirs at law him surviving, the following named persons, to-wit: Andrew J. Davis and John E. Davis, both of the City of Butte, State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the City of Chicago, State of Illinois: and

Whereas, letters of administration have been granted on the estate of the said John A. Davis, to said John E. Davis: and

Whereas, said John E. Davis as such administrator has been legally substituted in all of said contests as the proponent of said alleged will: and

Whereas, those interested directly, as above recited in the contests of said Sarah Maria Cummings and Henry A. Root, have been compelled to undergo heavy expenses in the preparation and trial of said contest: and

Whereas, all of the other heirs of said Andrew J. Davis, deceased, except those directly benefitted by the terms of said alleged will as legatees and devisees and their heirs, have refused to aid or assist said Maria Cummings and Henry A. Root, and those interested with them in said contest, although if said contest should be maintained all of said other heirs would be benefitted thereby, and if the said contest had not been filed and if said alleged will had finally been probated they would have received nothing as heirs at law, of said estate: and

Whereas, the said John A. Davis, deceased, during his lifetime, and his heirs since his death, have also paid out large sums of money and incurred large expenses in endeavoring to probate said alleged will: and

Whereas, the said parties of the first part herein are the owners of and represent one-eleventh (1-11) of the entire estate of said Andrew J. Davis, deceased, and the parties of the second part herein are the owners of three and one-half elevenths (3½-11) of said estate of Andrew J. Davis, deceased, in case of intestacy, and the said parties of the first part, with the exception of a few small bequests, are the sole beneficiaries under the provisions of the said alleged will so sought to be probated, and all of the parties hereto are desirous of settling and compromising the said action, proceedings and contests and desire to act conjointly, in said compromise and in the distribution of said estate.

Now Therefore, in consideration of the premises and the provisions of this agreement, and the sum of One Dollar to the first parties paid by the second parties the receipt whereof is hereby acknowledged it is hereby agreed as follows:

I. In case said will shall be finally probated said estate shall be divided as follows, to-wit:—

The first parties hereto shall have two-elevenths (2-11) of said estate in kind; and the said second parties hereto shall have three and one-half elevenths (3½-11) of said estate in kind.

The first and second parties hereto shall each have and receive out of the remainder of said estate the sum on account of expenses and litigation heretofore incurred as hereinbefore recited of Five hundred thousand dollars ($500,000.); whatever balance remains shall be divided equally between said first and second parties subject to the other terms and provisions of this contract.

II. For the purpose of carrying into effect the foregoing provision the said parties of the first part do hereby sell, assign, transfer and set-over unto the said parties of the second part an undivided three and one-half elevenths (3½-11), of said estate in kind, and hereby direct that by the decree probating said will, if the same is probated, there shall be distributed immediately to said parties of the second part two and one-half elevenths (2½-11) of said estate in kind in such interests to each of said second parties as said second parties may at that time direct.

There shall also be distributed by said decree to said first parties

two-elevenths (2-11) of said estate in kind in such interests to each as the said first parties at that time may direct: Provided, however, that the transfers provided for in this section of this agreement shall not be valid unless said will is probated.

The remainder of said estate after the distribution of the two and one-half elevenths to the said second parties and the two-elevenths to the first parties, shall be distributed by said decree to Charles H. Palmer and Andrew J. Davis as joint Trustees of the parties hereto, to be applied, used or distributed according to the terms and provisions of this contract, and in such distribution to said Trustees shall be included one-eleventh (1-11) of said estate in kind, which shall be held by said Trustees and if said will shall finally be probated and the estate distributed under said will according to the terms of this contract, said Trustees are hereby directed to deliver over and transfer unto said parties of the second part in such interests to each as said second parties at that time direct, the said one-eleventh (1-11) of said estate so distributed to and held by such Trustees in the manner above recited.

III. In case said will is defeated by any contest or contests other than those of said Henry A. Root, and Maria Cummings so that said will cannot be probated and so that said estate must be distributed as an intestate estate, and no compromise or settlement can be made by the parties hereto, with the other heirs or pretended heirs of Andrew J. Davis, deceased, and each of the parties hereto are compelled to pay their own expenses of litigation, said second parties agree that they will give unto said first parties, one-eleventh (1-11) of said estate so that first parties will receive upon such distribution two-elevenths (2-11) of said estate and the said second parties will receive two and one-half elevenths (2½-11) of said estate.

IV. For the purpose of carrying this provision into effect said second parties hereby sell, assign, set over and convey unto said first parties one-eleventh (1-11) of said estate out of their three and one-half elevenths (3½-11) and hereby authorize the Court in the decree of distribution to distribute the same to said first parties, and to each in such amounts as said first parties may direct.

Provided, however, that this provision and conveyance shall only be operative in case such estate is distributed as an intestate estate, among the persons hereinbefore recited to be the heirs of Andrew J. Davis, deceased.

V. In case said will is defeated, and said first parties obtain said estate or any part thereof through, under or by virtue of any assignment, conveyance or agreement from any person claiming to be an heir of said Andrew J. Davis, deceased, or otherwise, this agreement shall be considered and be in full force and effect as to all such estate, the same as though the parties of the first part procured such estate under and by virtue of the terms and conditions of said will.

For the purpose of carrying this provision into effect the said parties of the first part hereby sell, assign, convey and set over unto said second parties, such interests in any and all assignments, conveyances and agreements from any other person or persons, which they may now have, or which John A. Davis, may have procured in his lifetime, or which said first parties or either of them, may acquire during the continuance of this contract, as may be necessary to carry out this contract.

VI. In case it becomes necessary that a general administrator should be appointed in the settlement of said estate, or that an administrator with the will annexed should be appointed it is hereby agreed by all the parties hereto that John H. Leyson of the City of Butte of the State of Montana, shall be appointed such administrator.

VI½. It is hereby further agreed that whenever the representatives of the parties hereinafter named, shall determine it to be for the best interests of said parties, and necessary for the carrying of this contract into effect, to withdraw the contests of said Henry A. Root and Maria Cummings, the same shall be duly withdrawn.

VII. And it is moreover especially provided that if said will be probated, the judgment and decree probating said will and the withdrawal of said contest in writing shall be based upon the terms and conditions contained in this agreement, as a consideration of the settlement and compromise of the litigation now pending in said Court. It is therefore expressly stipulated and agreed that any per-

son or persons whomsoever claiming to be beneficiaries in or in any manner interested in said will by reason of any transfer, purchase or agreement, or pretended transfer, purchase or agreement, or otherwise, with any legatee, devisee or beneficiary under the said will, shall not have or receive the benefits of said judgment or decree and the withdrawal of said contest in writing without first ratifying this agreement in every respect, and upon a failure so to do, the same may be set aside upon the motion of either of the parties hereto, and said contest reinstated as it stood before such judgment and decree was entered and contestants be remitted to all their rights, thereunder, the said judgment or decree having been entered as aforesaid, in consideration of the full and faithful performance of all the terms and conditions herein expressed, by any or all persons interested therein.

VIII. It is hereby further mutually agreed that any person or persons whomsoever claiming to be in any manner interested in said estate by reason of any transfer, purchase or agreement, or pretended transfer, purchase or agreement, or otherwise with any of the parties hereto shall not have or receive the benefits of this contract, without first ratifying this agreement in every respect, and upon refusal so to do, this agreement may be set aside at the request of either of the parties hereto.

IX. It is hereby expressly understood and agreed that the stock in the First National Bank of Butte, is not included in and is not to be effected by this contract, but the same shall be left open to litigation and determination between the representatives of said estate, or any person interested in said estate and said A. J. Davis, who claims the title to and ownership of said stock.

And nothing herein contained shall be construed in any way to effect the right of said A. J. Davis or said estate to said stock or the right of said estate or any one interested therein, to institute any proceedings, to ascertain whether said stock belongs to said A. J. Davis, or to said estate.

That said litigation may be instituted after distribution of said estate under the terms of this contract, or otherwise if second parties or any other person interested in said estate shall so desire. In

case the stock of said bank shall finally be determined to belong to said estate, the same shall be turned over to said estate, and shall be subject to all the terms and conditions of this contract, to the same extent and for all purposes as though it had at all times been a part of said estate.

X. It is hereby further agreed that neither of the parties hereto will make any settlement, compromise or adjustment with any of the heirs, or pretended heirs, of said Andrew J. Davis, deceased, not party to this contract, without the consent of the other parties hereto, and for the mutual benefit of the parties hereto, and any transfer, conveyance, or assignment of any of the interests of any of the heirs or pretended heirs of said Andrew J. Davis, deceased, to any of the parties to this agreement shall inure to the full benefit of all the parties to this contract, according to their respective rights hereunder, notwithstanding the same may be taken in the name of one or more of the parties hereto, or in the name of any third person.

XI. It is hereby further agreed that such legal and other proceedings shall be taken in the matter of said estate from time to time looking toward the closing up of said estate and the carrying out of this contract as shall be mutually agreed upon by the parties to this contract.

XII. It is hereby further agreed that each of the parties hereto will nominate and appoint a person to act for each of them in the further carrying out of this agreement, and that whenever by the terms of this contract any act or thing is to be had or done upon the consent of the parties hereto such consent shall be given for the respective parties by the persons thus appointed, and all matters relative to compromises, litigation and expenses and other acts and things necessary to carry out this contract shall be done and performed upon the consent of said representative.

In case they cannot agree all matters in dispute shall be left to A. H. Barrett of Butte, Montana, as arbitrator between them and the conclusion of said arbitrator shall be final and conclusive, and be followed.

And for the purpose of carrying this provision into effect the said first parties hereto nominate and appoint Andrew J. Davis of the

City of Butte, State of Montana, as their representative, and Attorney in Fact, to act for and represent them in said affairs; hereby giving and granting unto said Andrew J. Davis full power and authority to do and perform such acts as may be necessary in the premises in their names, places and stead, to the same effect and purpose as though all of such acts were done and performed by said first parties personally.

And the said second parties hereby nominate and appoint Charles H. Palmer of Butte City, State of Montana, as their representative and Attorney in fact to act for and represent them in such affairs and hereby give and grant unto said Palmer full power and authority to do and perform such acts as may be necessary in the premises in their names, places and steads, and to the same effect and purpose as though all such acts were done and performed by said second parties personally.

XIII. It is hereby further agreed that all expenses incurred in the carrying out of this contract shall be furnished, one half by the parties of the first part, and one half by Henry A. Root, Joseph A. Coram and Charles H. Palmer. And it is further agreed that the parties who furnish such funds shall be entitled to reimbursement of the same together with interest at the rate of ten per centum per annum from the date of the respective advances out of such estate.

It is agreed as part of the expenses of carrying this contract into effect, there shall be included the balance of moneys agreed to be paid to Thomas J. Davis of Selma, Iowa, by John A. Davis now deceased, under a contract between them, dated June 23rd 1890.

XIV. It is mutally agreed that these presents are made, in, with and for the purpose of settlement and compromise of said action, proceedings and contest, and to the settlement and distribution of said estate, and that on account thereof should such settlement or compromise not be concluded or carried out, none of the recitals or statements contained herein shall be admissible for or against any of the parties hereto, or of their . . . . . heirs or assigns, in any action or proceeding in any court or elsewhere, upon any issue or for any purpose.

In witness whereof the parties have hereunto set their hands and seals this 28th day of April, 1893.

ANDREW J. DAVIS. SEAL.
JOHN E. DAVIS. SEAL.
GEORGE W. DAVIS. SEAL.
CHARLES G. DAVIS. SEAL.
THEAH JANE DAVIS,
Guardian for Morris A. Davis. SEAL.
THEAH JANE DAVIS. SEAL.
MORRIS A. DAVIS. SEAL.
HENRY A. ROOT. SEAL.
ELLEN S. CORNUE. SEAL.
JOSHUA G. CORNUE. SEAL.
ELIZABETH S. LADD. SEAL.
CHARLES H. LADD. SEAL.
SARAH M. CUMMINGS,
by Gideon Wells and Henry A. Root, Attys. SEAL.
M. LOUISE DUNBAR,
by Gideon Wells and Henry A. Root, Attys. SEAL.
JOHN E. DAVIS,
Administrator of the Estate of John A. Davis, deceased. SEAL.
EDWARD A. DAVIS. SEAL.

In consideration of the execution of the foregoing contract, and of the reimbursement as therein provided for, we Henry A. Root, Joseph A. Coram and Charles H. Palmer, hereby jointly and severally agree, to advance from time to time as required by the representatives of the parties therein named, one half of all expenses which may be incurred in carrying this contract into effect.

HENRY A. ROOT. SEAL.
J. A. CORAM. SEAL.
CHARLES H. PALMER. SEAL.

We hereby accept the trust herein created.

ANDREW J. DAVIS,
CHARLES H. PALMER.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 28th day of April 1893, before me the undersigned a Notary Public within and for the County of Silver Bow, State of Montana, personally came Henry A. Root, John E. Davis, Andrew J. Davis, Charles H. Palmer and Joseph A. Coram, all to me personally known to be the individuals described in and who executed the within and foregoing agreement, and who severally acknowledged to me each for himself, that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal the day and year first above written in this certificate.

JAMES W. FORBIS
(L. S.) *Notary Public.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 28th day of April 1893 before me the undersigned a Notary Public, within and for the County of Silver Bow, State of Montana, personally appeared John E. Davis, the person described in and who executed the within and foregoing agreement, and who is personally known to me to be the person described in and who executed the same, as the Administrator of the Estate of John A. Davis, Deceased, and who acknowledged to me that he executed the same as such administrator, and in his capacity as such, freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

JAMES W. FORBIS
(L. S.) *Notary Public.*

STATE OF ILLINOIS,

COUNTY OF COOK ss.

On this 2nd day of June 1893 before me, the undersigned a Notary Public within and for the County of Cook, State of Illinois, personally appeared Theah Jane Davis, personally known to me to be the person described in and who executed the foregoing instrument of writing as the guardian of Morris A. Davis, a minor, and acknowledged to me that as the guardian of Morris A. Davis, a minor she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

M. SALMONSON

(L. S.) *Notary Public*

STATE OF ILLINOIS

COUNTY OF COOK ss.

On this 2nd day of June 1893, before me the undersigned a Notary Public within and for the County of Cook, State of Illinois, personally came Theah Jane Davis to me personally known to be the individual described in and who executed the within and foregoing agreement, and who acknowledged to me that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal the day and year first above written in this certificate.

M. SALMONSON

(L. S.) *Notary Public.*

STATE OF ILLINOIS

COOK COUNTY ss.

On this 13th day of June, A.D. 1893, before me, the undersigned, a Notary Public within and for the County of Cook and State of Illinois, personally came Edward A. Davis and Morris A. Davis, both to me personally known to be individuals described in and who executed the within and foregoing agreement, and who severally acknowledged to me each for himself that he executed the same

freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written in this certificate.

EDWARD S. JUDD
(L. S.) *Notary Public.*

STATE OF NEW YORK
COUNTY OF PUTNAM ss.

On this 20th day of June 1893 before me the undersigned, a Notary Public within and for the County of Putnam and State of New York personally came Joshua G. Cornue and Ellen S. Cornue his wife both to me personally known to be the individuals described in and who executed the within and foregoing agreement, and who severally acknowledged to me, each for himself and herself that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In Testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written in this certificate.

FREDERIC S. BARNUM
(L. S.) *Notary Public*
Putnam County, N. Y.

STATE OF NEW YORK.
PUTNAM COUNTY, ss.

I, Edward C. Weeks, Clerk of said County of Putnam, and also Clerk of all the Courts of Record, directed by law to be held therein, do hereby Certify, That Frederic S. Barnum, Esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument, was, at the time of taking such proof or acknowledgment a Notary Public in and for said County, duly authorized to take the same, and that I am well acquainted with his handwriting, and verily believe that the signature thereto purporting to be his, is genuine. And I Further Certify, That said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof, I have hereunto set my hand, and affixed my official Seal, at Carmel, this 20th day of June 1893.

E. C. WEEKS
(L. S.) *Clerk.*

STATE OF MASSACHUSETTS
COUNTY OF HAMPDEN ss.

On this sixth day of July 1893, before me the undersigned a Notary Public within and for said County, personally appeared Elizabeth S. Ladd and Charles H. Ladd the persons described in and who executed the within and foregoing agreement, and who are personally known to me to be the persons described in and who executed the same, and who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

WALTER S. ROBINSON,
(L. S.) *Notary Public.*

COMMONWEALTH OF MASSACHUSETTS.
HAMPDEN, ss.

I, Robert O. Morris, Clerk of the Supreme Judicial Court, which is a Court of Record for the County and Commonwealth aforesaid, do hereby certify that Walter S. Robinson, Esquire, whose name is subscribed to the certificate of proof of acknowledgment of the annexed instrument, and therein written, was, at the time of the taking such proof or acknowledgment, a Notary Public within and for said Commonwealth of Massachusetts, duly authorized to take the same; and that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said certificate is genuine; and I certify that the said instrument is executed and acknowledged according to the laws of this State.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Springfield, this seventh day of July, A. D. 1893.

ROBERT O MORRIS
(L. S.) *Clerk.*

STATE OF ILLINOIS
COUNTY OF COOK ss.

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this 11th day of July, A. D., 1893, personally appeared Gideon Wells and Henry A. Root, attorneys in fact for Sarah Maria Cummings and M. Louise Dunbar, known to me to be respectively said Gideon Wells and Henry A. Root, and exhibited their power of attorney executed on the 5th day of July 1893, by the said Sarah Maria Cummings and M. Louise Dunbar, and the said Gideon Wells and the said Henry A. Root for themselves and the said Sarah Maria Cummings and M. Louise Dunbar, severally acknowledged that they had freely and voluntarily executed the foregoing instrument as their and the free act and deed of the said Sarah Maria Cummings and M. Louise Dunbar for the uses and purposes therein set forth.

Subscribed and sworn to before me this 11th day of July, A. D., 1893.

EDITH L. MAY,
(L. S.) *Notary Public.*

STATE OF ILLINOIS,
COOK COUNTY, ss.

I, Henry Wulff, Clerk of the County Court of Cook County, the same being a Court of Record, Do Hereby Certify that Edith L. May, Esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment, a Notary Public in and for Cook County, duly commissioned, sworn and acting as such and authorized to take the same: that I am well acquainted with the handwriting of said notary, and verily believe that the signature to the said proof or acknowledgment is genuine; and further that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Chicago, in the said County, this 11 day of July, 1893.

HENRY WULFF
(L. S.) *Clerk.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 16th day of May, 1893, before me James W. Forbis, a Notary Public, in and for the County of Silver Bow, State of Montana, personally appeared George W. Davis and Charles G. Davis, personally known to me to be the persons described in and who acknowledged to me each for himself, that he executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

JAMES W. FORBIS

(L. S.) *Notary Public.*

COMPLAINANT'S EXHIBIT LVI.

(Put in Evidence, page 418.)

This Agreement, made and entered into this twenty-fifth day of March, A. D. 1895, by and between Harriet R. Sheffield and Henry A. Davis, children and sole heirs at law of Asa Davis, brother of Andrew J. Davis, deceased, by William L. Snyder, their attorney in fact, parties of the first part, and Andrew J. Davis and John E. Davis, of the City of Butte, County of Silver Bow and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the City of Chicago, State of Illinois, being all heirs at law of John A. Davis, deceased, late of the City of Butte, County of Silver Bow and State of Montana, and John E. Davis, administrator of the estate of John A. Davis, deceased, all by Andrew J. Davis, their attorney in fact, and Henry A. Root, of the City of Helena, and State of Montana, a child and heir of Anna C. Root, deceased, sister of the late Andrew J. Davis, deceased, and Maria Cummings, widow, of the town of Ware, in the State of Massachusetts, sister of Andrew J. Davis, deceased, Mary Louise Dunbar, an unmarried woman, of the City of Springfield, in the State of Massachusetts, a niece of said Andrew J. Davis, deceased, Ellen S. Cornue, of

Croton Falls, in the State of New York, child and heir of said Anna C. Root, deceased, who was a sister of said Andrew J. Davis, deceased, and Joshua G. Cornue, her husband, and Elizabeth S. Ladd, of Springfield in the State of Massachusetts, a child and heir of Sophronia Firman, deceased, who was also a sister of said Andrew J. Davis, deceased, and Charles H. Ladd, her husband, all by Charles H. Palmer, their attorney in fact, parties of the second part, Witnesseth: that,

Whereas, on or about the eleventh day of March, A. D. 1890, at the City of Butte, Silver Bow County, Montana, said Andrew J. Davis departed this life, leaving a large estate, both real and personal: and

Whereas, the following named persons were his surviving heirs in case he died intestate, to wit: John A. Davis, of Butte, Montana; Erwin Davis, of New York City, New York; Calvin P. Davis, of Sebastopol, Sonoma County, California; all brothers of said deceased; Miss Diana Davis, of Somers, Connecticut; Mrs. Sarah Maria Cummings, of Ware, Massachusetts; Mrs. Harriet Woods, of Springfield, Massachusetts; and Mrs. Salina A. Bowdoin, of Springfield, Massachusetts, all sisters of said deceased; Mrs. Ellen S. Cornue, of Croton Falls, New York; and Henry A. Root, of Helena, Montana, both children of Anna C. Root, deceased, who was a sister of said Andrew J. Davis, deceased; Miss Mary L. Dunbar, of Springfield, Massachusetts; and Mrs. Mary A. Smith, of Oakland, California, both children of Roxana Dunbar, deceased, who was a sister of said Andrew J. Davis, deceased; Harriet Hitchcock Davis, now Harriet Sheffield, of New Rochelle, New York, and Henry A. Davis, of Monson, Massachusetts, both children of Asa Davis, deceased, who was a brother of the said Andrew J. Davis, deceased; and Mrs. Elizabeth S. Ladd, of Springfield, Massachusetts, who is a daughter of Sophronia Firman, who was a sister of Andrew J. Davis, deceased; and,

Whereas, on or about the twenty-third day of July, A. D. 1890, John A. Davis, one of the last above named heirs, presented for probate in the District Court of Silver Bow County, Montana, a paper purporting to be the last will and testament of said Andrew

J. Davis deceased, by the terms of which, aside from some unimportant bequests, said John A. Davis was made the sole legatee and devisee of all and singular the estate of said Andrew J. Davis, deceased; and,

Whereas, on the . . . . . day of August, A. D. 1890, Maria Cummings and Henry A. Root, above named, filed their contest in writing to the probate of said alleged will, and after the issues of said contest had been duly adjusted the same were tried by said Court and a jury, in which trial said jury disagreed; and,

Whereas, during said month of August, A. D. 1890, Harriet R. Shefield and Henry A. Davis, above named, also filed their contest in writing to the probate of said alleged will, which said issues as well as those in the contest of said Root and Cummings, are at this time undetermined and pending; and,

Whereas, said Elizabeth S. Ladd and Charles H. Ladd, her husband, Mary Louisa Dunbar, Ellen S. Cornue, and Joshua G. Cornue, her husband, above named, are interested in the contests now pending, wherein said Maria Cummings and Henry A. Root are contestants; and,

Whereas, heretofore, to-wit: on the . . . . . day of January, A. D. 1893, the said John A. Davis departed this life intestate, leaving as his heirs at law him surviving, the following named persons to-wit: Andrew J. Davis and John E. Davis, both of the City of Butte, Silver Bow County, Montana, and Theah Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the City of Chicago, in the State of Illinois; and,

Whereas, letters of administration have been granted on the estate of said John A. Davis, deceased, to said John E. Davis, who, as such administrator, has been legally substituted in all said contests as the proponent of said will; and,

Whereas, the said parties of the first part herein are the owners of and represent one-eleventh (1-11) of the entire estate of said Andrew J. Davis, deceased, in case it should be determined that he died intestate; and,

Whereas, all the parties of the second part herein have heretofore

entered into a contract compromising and settling their interests in said estate, as between themselves; and,

Whereas, it is the desire of all the parties hereto to settle and compromise the contests so instituted by the parties of the first part herein and to act conjointly in the distribution and settlement of said estate;

Now Therefore, in consideration of the premises and the sum of One Dollar interchangeably paid to, by and between the parties hereto, the receipt whereof is hereby acknowledged, it is hereby agreed as follows, to-wit:

That said parties of the first part shall have and receive out of and from said estate, in kind, as the same shall be distributed, one-twentyfifth (1-25) of the entire estate of said Andrew J. Davis, deceased, at the time of said distribution, whether the same shall be distributed under the said alleged will or as an intestate estate, or under any proceedings wherein and whereby the parties of the second part herein receive a distributive share;

Provided, however, that in case any party not hereinabove mentioned as an heir at law of said Andrew J. Davis, deceased, shall succeed in obtaining a final decree distributing the entire estate to said person, excluding the parties of the second part herein from said estate, then the covenant herein contained on the part of the second parties hereto, agreeing to give said parties of the first part hereto one-twentyfifth (1-25) of said estate of Andrew J. Davis, deceased, shall not be applicable or enforceable.

Said parties of the first part hereby agree to withdraw their contest hereinbefore referred to, in open Court, and consent that a decree may be entered probating said will.

Provided, however, that said decree shall contain a clause finding and decreeing that said parties of the first part herein are the owners of and entitled to one-twentyfifth (1-25) of said estate, in kind as distributed, and decreeing that the same shall be distributed to them.

Said parties of the second part hereby agree and guarantee unto said parties of the first part that said parties of the first part shall have distributed to them, in the settlement of said estate, subject to the proviso hereinabove set forth, one-twentyfifth (1-25) of said

entire estate, in kind as distributed, whether said distribution takes place under the will above mentioned, or under a decree finding that said Andrew J. Davis, deceased, died intestate, or under any decree determining that any other person or persons is the sole heir at law of said Andrew J. Davis, deceased, whose interest or interests in said estate has or have been purchased or otherwise acquired by the said second parties hereto, or any or either of them.

Said parties of the first part, for the purpose of carrying this agreement into effect, hereby sell, assign, transfer, convey and set over unto said parties of the second part, subject to the provisions contained in this agreement, any and all interests, of every kind, character and description, in and to said estate, and each and every part and parcel thereof, save and except the undivided one-twentyfifth (1-25) interest therein, and hereby agree that such remainder, and the whole thereof, may be distributed directly to said parties of the second part, in such way, form and manner as they may agree and determine among themselves, saving and reserving to themselves only the said undivided one-twentyfifth (1-25) of said estate, in kind as distributed; and said parties of the first part hereby further covenant and agree that they are the owners of said one-eleventh (1-11) interest in said estate of Andrew J. Davis, deceased, in case it should be determined that said Andrew J. Davis, deceased, died intestate, and that they have good right and lawful authority to sell and transfer the same, and that the same is free and clear of and from all levies, liens, conveyances, assignments and encumbrances whatsoever.

However, this agreement is made with full knowledge that a certain executory agreement was made between the first parties hereto and one Erwin Davis, dated June 17th, 1892, for a sale to said Davis by said first parties of all their interest in said estate of Andrew J. Davis, deceased, which said contract said first parties hereto hereby represent was duly rescinded and abandoned by the parties thereto. But should said Erwin Davis seek to enforce said agreement and succeed in sustaining it, it is understood and agreed that the parties of the first part herein shall not be entitled to the one-twentyfifth (1-25) part of said estate herein provided to be

transferred to them, nor shall the parties of the second part herein be held to the parties of the first part herein for the same, and in that case the decree of distribution under the probate of the will, so far as it distributes one-eleventh (1-11) of said estate claimed by said parties of the first part herein, shall be of no effect, and said decree may be so amended as to omit the distribution of any part of said one-eleventh (1-11) of said estate claimed by the parties of the first part herein, or of the one-twentyfifth (1-25) to said parties of the first part herein. In case said Erwin Davis shall at any time hereafter institute any proceedings or suits against said first parties herein to enforce said contract or any alleged rights thereunder, said first parties shall immediately notify said second parties herein and said second parties shall have the right to contest the same in the name of said first parties herein, at the cost or expense, however, of said parties of the second part herein: and said first parties herein further agree to give them all assistance in their power.

Said parties of the second part hereby further covenant and agree that the said undivided one-twentyfifth (1-25) interest so to be distributed unto said parties of the first part shall be subject to no cost or expense of litigation, save and except such as may be incurred by the general administrator of said estate in his administration, under the order of the Court, and that any and all contests concerning the validity of said will or the ownership of said property of said Andrew J. Davis, deceased, by any other person or persons, shall be managed and paid for by said parties of the second part herein.

And said parties of the first part hereby further agree that John H. Leyson, of the City of Butte and State of Montana, shall be appointed the general administrator of said estate of Andrew J. Davis, deceased, with the will annexed, and that they will in writing consent to and request his appointment. Should said Leyson die, resign or be removed his successor shall be a person who will be equally satisfactory to the parties of the first part, and in the event the parties hereto cannot agree as to the person so to be appointed, he shall be selected by the Court.

In case the proceedings in said estate of Andrew J. Davis, deceased, now pending in the City of Boston, in the State of Massa-

chusetts, and in the State of Iowa, or any other proceedings for such administration, shall be so determined that those parts of said estate now situated in said States of Massachusetts and Iowa shall be distributed as an intestate estate, the parties of the first part hereto shall receive an undivided one-twentyfifth (1-25) of the amounts so distributed in said States in full of all of their interests in said property, and that the remainder of said one-eleventh (1-11) of said property shall be distributed by said Courts directly to said parties of the second part herein. In case it shall be finally determined in said proceedings in said States of Massachusetts and Iowa that said property shall be distributed by proceedings ancillary to proceedings in the State of Montana, then the same shall be considered as a part of said estate, the same as though distributed by the Court in the City of Butte.

It is further agreed hereby that Martin J. Keogh, of the City of New York, shall control and direct the distribution of eighty-five per cent (85 per cent) of said one-twentyfifth (1-25) so to be distributed to said parties of the first part herein, and George F. Shelton and Cullen & Toole, of the City of Helena, the remaining fifteen (15) per cent. of said one-twentyfifth (1-25), and said sums shall be paid to said attorneys, their heirs or assigns, in the proportion above provided.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, by their respective attorneys in fact, this twenty-sixth day of March, A. D. 1895.

HARRIET R. SHEFFIELD, (L. S.)
By Wm. L. Snyder, her Attorney in Fact.
HENRY A. DAVIS, (L. S.)
By Wm. L. Snyder, his Attorney in Fact.
ANDREW J. DAVIS, (L. S.)
THEAH JANE DAVIS, (L. S.)
By Andrew J. Davis, her Attorney in fact.
JOHN E. DAVIS, (L. S.)
By Andrew J. Davis, his Attorney in fact.
EDWARD ASA DAVIS, (L. S.)
By Andrew J. Davis, his Attorney in fact.

GEORGE WESLEY DAVIS, (L. S.)
By Andrew J. Davis, his Attorney in fact.
CHARLES GRANVILLE DAVIS, (L. S.)
By Andrew J. Davis, his Attorney in fact.
MORRIS ALLARD DAVIS, (L. S.)
By Andrew J. Davis, his Attorney in fact.
JOHN E. DAVIS, *Administrator of Estate of John A. Davis, deceased,* (L. S.)
By Andrew J. Davis, his Attorney in fact.
HENRY A. ROOT, (L. S.)
By C. H. Palmer, his Attorney in fact.
MARIA CUMMINGS, (L. S.)
By C. H. Palmer, her Attorney in fact.
MARY LOUISE DUNBAR, (L. S.)
By C. H. Palmer, her Attorney in fact.
ELLEN S. CORNUE, (L. S.)
By C. H. Palmer, her Attorney in fact.
JOSHUA G. CORNUE, (L. S.)
By C. H. Palmer, his Attorney in fact.
ELIZABETH S. LADD, (L. S.)
By C. H. Palmer, her Attorney in fact.
CHARLES H. LADD, (L. S.)
By C. H. Palmer, his Attorney in fact.

I hereby approve of the above agreement.

JOSEPH A. CORAM.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this twenty-sixth day of March, A. D. 1895, before me, the undersigned, a Notary Public within and for said County and State, personally appeared William L. Snyder, as the attorney in fact for Harriet R. Sheffield and Henry A. Davis, and each of them; and at the same time also personally appeared before me Andrew J. Davis as the attorney in fact for John E. Davis, Theah Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, and John E. Davis, administrator of the

estate of John A. Davis deceased, and each of them; and at the same time also personally appeared before me Charles H. Palmer, as the attorney in fact for Henry A. Root, Maria Cummings, Mary Louise Dunbar, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Ladd and Charles H. Ladd, and each of them; the said William L. Snyder, Andrew J. Davis and Charles H. Palmer being all personally known to me to be respectively the persons described in and who, as attorneys in fact for the persons aforesaid, respectively, executed the foregoing instrument, and whose names as such attorneys in fact are subscribed thereto; and the said William L. Snyder, Andrew J. Davis and Charles H. Palmer severally acknowledged to me that, as such attorneys in fact and for said respective parties, they executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year in this certificate first above written.

D'GAY STIVERS

(L. S.) *Notary Public, Silver Bow County, State of Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this twenty-sixth day of March, A. D. 1895, before me, the undersigned, a Notary Public within and for said County and State, personally appeared Andrew J. Davis, personally known to me to be the person described in and who executed the foregoing instrument and whose name is subscribed as a party thereto, and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year in this certificate first above written.

D'GAY STIVERS

(L. S.) *Notary Public, Silver Bow County, State of Montana.*

COMPLAINANT'S EXHIBIT LVII

[Put in Evidence, page 419.]

This Indenture made this twenty-second day of June, A. D. 1897, by and between Andrew J. Davis, of Butte, Montana, Edward A. Davis, of Chicago, Illinois, by Andrew J. Davis, his attorney in fact, so constituted by instrument dated the twenty-eighth day of April, 1893; John E. Davis, of Butte, Montana; Charles G. Davis, of Chicago, Illinois; George W. Davis, Bachelor, and Morris A. Davis, bachelor, both of . . . . . , sons and heirs of the said John A. Davis, deceased; and Thea Jane Davis, of . . . . . , widow of John A. Davis, deceased, parties of the first part, and Helen M. Davis, wife of Andrew J. Davis; Tenie B. Davis, wife of John E. Davis, both of Butte, Montana, and Gertrude F. Davis, wife of Charles G. Davis, and Mary A. Davis, wife of Edward A. Davis, both of Chicago, Illinois, parties of the second part; and Henry A. Root, of Butte, Montana; Ellen S. Cornue, of Croton Falls, New York; Sarah Maria Cummings, of Ware, Massachusetts; Elizabeth S. Ladd, of Springfield, Massachusetts; Mary Louise Dunbar, of Springfield, Massachusetts; all heirs at law of Andrew J. Davis, deceased, parties of the third part; and Rosine B. Root, wife of Henry A. Root; and Joshua G. Cornue, husband of Ellen S. Cornue; and Charles H. Ladd, husband of Elizabeth S. Ladd, parties of the fourth part; and John E. Davis, as administrator of the estate of John A. Davis, deceased, party of the fifth part; and Elizabeth S. Bowdoin and John A. Bowdoin, her husband, of Springfield, Massachusetts, by Charles M. Demond, of the firm of Logan, Demond & Harby, her attorney in fact, so constituted by instrument dated the sixteenth day of June, 1897; and Harriet Wood, of Springfield, Massachusetts, by Charles M. Demond, of the firm of Logan, Demond & Harby, her attorney in fact, so constituted by instrument dated June sixteenth, 1897; and Calvin P. Davis, of Peachland, Sonoma County, California, by Charles M. Demond, his attorney in fact, so constituted by instrument dated June 8, 1897; parties of the sixth part, Witnesseth:

I. Whereas, Andrew J. Davis, of the City of Butte, Montana,

died at the City of Butte, where he resided, on March 11, 1890, leaving a large estate, real, personal and mixed, situated in the State of Montana, and elsewhere: and

II. The said Andrew J. Davis left him surviving as his only heirs at law and next of kin the following persons, entitled, in case of his intestacy, to the following shares of the said estate, and being of the following relationship to him, viz:

(a) The said Diana Davis, a sister, one-eleventh;

(b) The said Sarah M. Cummings, a sister, one-eleventh;

(c) The said Harriet Wood, a sister, one-eleventh;

(d) The said Elizabeth S. Bowdoin, a sister, one-eleventh;

(e) The said Calvin P. Davis, a brother, one-eleventh;

(f) The said John A. Davis, a brother, now deceased, one-eleventh;

(g) Erwin Davis, of New York City, a brother, one-eleventh;

(h) The said Henry A. Root and Ellen S. Cornue, children of Anna C. Root, deceased, a sister, one-twenty-second each;

(i) Elizabeth A. Smith, of Temescal, Contra Costa County, California; and the said Mary Louise Dunbar; children of Roxanna Dunbar, deceased, a sister, one-twenty-second each;

(j) Harriet R. Shefield, of Northport, New York, and Henry A. Davis, of Monson, Massachusetts, children of Asa L. Davis, deceased, a brother, one-twenty-second each;

(k) The said Elizabeth S. Ladd, child of Sophronia Firman, deceased, a sister, one-eleventh and

III. Whereas, a paper purporting to be the last will and testament of Andrew J. Davis, deceased, dated July 20, 1866, was propounded for probate by the said John A. Davis in July, 1890, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which said will gave, devised and bequeathed to the said John A. Davis all of the property of Andrew J. Davis, deceased, except a life maintenance therein given to Thomas Jefferson Davis, Pet Davis and Miss Bergett; and

IV. Whereas, the probate of said will was contested in said court by the said Henry A. Root and Sarah Maria Cummings, jointly, and

also by the said Harriet R. Sheffield and Henry A. Davis, jointly; and

V. Whereas, pending said contests, and on or about January 21, 1893, the said John A. Davis died intestate, leaving him surviving the parties of the first part, his sons and widow, as his only heirs at law and next of kin, and on March 11, 1893, the said John E. Davis was, by said Court, duly appointed his administrator, and on or about April 1, 1893, the said John E. Davis, as such administrator, was substituted as proponent of said will in the place of his said father, John A. Davis, by order of said Court; and said probate proceedings, so begun by the said John A. Davis, were, by order of said Court, revived; and

VI. Whereas, on or about March 27, 1895, the said contests, so instituted as aforesaid, against the probate of the said will, were compromised in said Court, and the said will was, by order of said Court on said day, admitted to probate, and by certain contracts, stipulations, conveyances and agreements, made pursuant to the said compromise, among others, dated the 28th day of April, 1893, and the 25th day of March, 1895, it was agreed and contracted that the following persons should have and be entitled to the following shares of said estate of Andrew J. Davis, deceased, in kind:

Forty-four eleven-hundredths (44-1100) to the said Harriet R. Sheffield and Henry A. Davis; that is to say, twenty-two eleven-hundredths (22-1100) thereof to each of them (and subject to the bequests in said will to Thomas Jefferson Davis, Pet Davis and Miss Bergett);

Four hundred and fifty-six eleven-hundredths (456-1100) thereof to the said parties of the first part; and,

Six hundred eleven-hundredths (600-1100) thereof to the parties of the third and fourth parts, with the exception of Rosina B. Root, wife of Henry A. Root;

and pursuant to the said contracts, stipulations, agreements and conveyances, a decree of the said Court was, on said March 27, 1895, entered according; and,

VII. Whereas, the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Diana Davis in

and to the said estate of the said Andrew J. Davis, deceased, as heir at law or next of kin of the said Andrew J. Davis, deceased, or otherwise, and are now the owners thereof; and the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Harriet R. Sheffield and Henry A. Davis in and to the said estate of the said Andrew J. Davis, deceased, as heirs at law or next of kin, or otherwise, over and above the said forty-four eleven-hundredths (44-1100) of the said estate, so transferred and conveyed to them as aforesaid, and are now vested therewith and the owners thereof; and,

VIII. Whereas, the said Elizabeth S. Bowdoin and Calvin P. Davis, after the probate of said will, did duly, within the time prescribed by law, institute in said Court separate contests, by petition, to revoke the probate of the said will, which contests are now at issue and are now pending, and the said Harriet Wood is interested with them in the said prosecution thereof, and is represented by the same attorney; and,

IX. Whereas, it is proposed and contemplated by the parties hereto to settle, adjust and compromise said contests of the said Elizabeth S. Bowdoin and Calvin P. Davis, and the claims and rights of the said Harriet Wood, and to fix and adjust the status and shares of the parties hereto in and to the said estate of Andrew J. Davis, deceased;

Now, Therefore, in consideration of the premises, and of the sum of One dollar, paid by each party hereto to the other, and in consideration of other valuable considerations, the receipt of all of which by each party from the other is hereby acknowledged, and in consideration of the compromise and settlement of the said contests of the said Elizabeth S. Bowdoin and Calvin P. Davis, and of the rights and claims of the said Harriet Wood, and the dismissal of the said contests, it is hereby covenanted, agreed, stipulated and granted, as follows:

First: The parties of the first, second, third and fourth parts, and each of them, do hereby sell, assign, set over and transfer, and do hereby grant, bargain, sell, convey and confirm, unto the said Elizabeth S. Bowdoin and the said Calvin P. Davis and the said Harriet

Wood, their respective heirs, executors, administrators and assigns, forever, one undivided twenty-second (1-22) interest or part, in kind, to each of them respectively, in and to all of the property and estate of the said Andrew J. Davis, deceased, real, personal and mixed, wherever situated, with which said parties are now vested or to which they are in any way entitled, or with which they or either of them may hereafter be vested or entitled, as heirs, next of kin, legatees or devisees of the said Andrew J. Davis, deceased, or by virtue of any contract in relation to said estate: except such real estate as is situated in the State of Iowa and which the parties of the first and third parts, or their representatives, have heretofore agreed to convey to the said Thomas Jefferson Davis, which said real estate in Iowa is excepted from the terms of this indenture: and in and to the said estate of Andrew J. Davis, deceased, as it now exists, and in and to any property thereof which the said estate may hereafter acquire, the said estate and property, however, to be subject to the payment of maintenance given in said will to Pet Davis and Miss Bergett, and to the payment of all debts against said estate, and costs and charges of administration in Montana and elsewhere.

And with respect to all lands hereby transferred and conveyed, the said parties do hereby also grant, bargain, sell and convey, excepting as hereinbefore set forth all and singular the one undivided twenty-second (1-22) interest or part to each of the said Elizabeth S. Bowdoin, Harriet Wood, and Calvin P. Davis, in and to all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all veins, leads or lodes therein or thereto belonging, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth, and all other metals and minerals therein, and all the rights, privileges and franchises thereto incident, attendant and appurtenant, or therewith usually had and enjoyed.

To Have and to Hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said Elizabeth S. Bowdoin, the said Harriet Wood and the said

Calvin P. Davis, and each of them, their respective heirs and assigns, forever, one undivided twenty-second (1-22) part of all the same to each of them respectively, the said parties hereby transferring and granting in all (subject and excepting as aforesaid), three undivided twenty-seconds (3-22) of all the property hereinbefore set forth and specified, to each of the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, one undivided twenty-second (1-22) thereof, which undivided twenty-second part thereof is hereby transferred and granted to each severally, and which they respectively hold with the other parties as tenants in common, and not as joint tenants.

Second: The parties of the first, second, third, fourth and fifth parts, their respective heirs, executors, administrators and assigns, do hereby covenant and agree to and with the parties of the sixth part, their respective heirs, executors, administrators and assigns, that in case Elizabeth A. Smith, whose contest against the probate of the will of Andrew J. Davis, deceased, is now pending, shall in said contest or by any settlement or adjustment of the same, or otherwise, receive or be entitled to any portion of the said estate, that then and in that event no portion so coming to the said Elizabeth A. Smith shall be taken from the shares herein transferred and granted to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, but that said shares shall be free and clear of all liability to pay or to contribute to the payment of the same, or in any part thereof; and do further covenant and agree that they will adjust and settle all claims of Thomas Jefferson Davis to all share in said estate, and that the shares herein granted and transferred to Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood shall be free and clear of all liability to pay or contribute to the payment in whole or in part, of any claim or claims of the said Thomas Jefferson Davis, and do further agree that said shares so granted and transferred by this indenture to the said Elizabeth S. Bowdoin and Harriet Wood and Calvin P. Davis shall be free and clear of and from all costs, expenses, charges, counsel and attorney fees of any parties of the first, second, third, fourth and fifth parts hereto, or any of them, expended, paid out, incurred or contracted in probating or opposing the probate of said will, or in any other matter or proceeding relating to said estate

or the property thereof, or in respect to any litigation connected therewith, except expenses and costs of administration of the estate of Andrew J. Davis, deceased, and of litigation by the administrator of said estate as such.

Third: It is mutually understood, covenanted and agreed by and between all the parties hereto, their respective heirs, executors, administrators and assigns, that the share or interest so as above transferred and granted to each of the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, in and by this indenture, is a one undivided twenty-second (1-22) part or interest, in kind, to each of them, not only in and to all property of said estate of Andrew J. Davis, deceased, real, personal and mixed, and in and to all property, choses in action and other rights and interest now owned by said estate, real, personal and mixed, and wherever situated (subject and excepting as aforesaid) but also in and to all claims, suits, choses in action and rights of said estate, in law or equity, for the recovery of property of said estate, or otherwise (subject and excepting as aforesaid) which now exist or which hereafter may exist or accrue and of which the said Andrew J. Davis, deceased, died seized or possessed, or in which he had any interest at the time of his death, or to which his estate since his death had or has or may acquire any right or interest and which may hereafter come into the ownership of the said estate by operation of law or otherwise; it being the intention of this indenture that this indenture and conveyance shall be binding and operative upon all interests and property which the said parties of the first, second, third, fourth and fifth parts (subject and excepting as aforesaid) now have as heirs at law or next of kin of the said Andrew J. Davis, deceased, in and to his estate, or under or by virtue of the provisions of any will of said Andrew J. Davis, deceased, which is now or may hereafter be admitted to probate, or which they or either of them have acquired or may acquire in any manner whatsoever, by assignment or transfer, from any person claiming to be an heir of Andrew J. Davis, deceased, or otherwise, and whether such interest shall descend to them or either of them, directly from Andrew J. Davis, deceased, or his estate, or by virtue of his will or otherwise, or whether such interests shall descend

to or be acquired by or distributed to them directly from John A. Davis, deceased, or his estate, or otherwise; and that it is further understood, covenanted and agreed by the parties of the first part herein, that in case any distribution of any of the property of the estate of Andrew J. Davis, deceased, shall be had through or in the estate of John A. Davis, deceased, to all or any of the parties hereto, that then and in that event the shares or interests herein conveyed, granted and transferred to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood shall be free and clear of all claims of creditors of said John A. Davis, deceased, now filed in the matter of his said estate or which may hereafter be urged, prosecuted or filed, and free and clear from all costs of administration, attorney and counsel fees and all other charges and expenses in or against the said estate of John A. Davis, deceased, *Provided*, however that in case Erwin Davis shall succeed in establishing any claim to and in recovering any part of the property of said estate in Massachusetts, so that the same shall not be obtained by or distributed to the parties of the first, third and fifth parts herein, by reason of the said claims of Erwin Davis, then said portion so obtained by the said Erwin Davis, in Massachusetts, shall not be considered as a part of the estate of Andrew J. Davis, deceased, conveyed or agreed to be conveyed by or under the terms of this indenture.

Fourth: In consideration of the premises, the said parties of the sixth part, to-wit: Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Calvin P. Davis and Harriet Wood, for themselves, their heirs, executors, administrators and assigns, do hereby sell, assign, convey, transfer and grant unto the said parties of the first and third parts, their heirs and assigns, forever, all the right, title, interest, claim and demand whatsoever, whether at law or in equity, and whether vested or contingent, of the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, and all and each of them, of, in and to all and every portion of the said estate of Andrew J. Davis, deceased, and all property thereof, whether real, personal or mixed, and wherever situated, except three undivided twenty-seconds (3-22) interests or parts or shares thereof, in kind, transferred and conveyed to said Elizabeth S. Bowdoin, Harriet Wood and Calvin P.

Davis by this instrument, as hereinbefore provided, and the said Elizabeth S. Bowdoin and the said Calvin P. Davis do hereby withdraw, and do hereby agree to withdraw and dismiss, in open Court or otherwise, their said contests so filed against the probate of said will, as aforesaid, each party to pay his own costs, and all moneys deposited as security for costs to be returned to said Elizabeth S. Bowdoin and Calvin P. Davis, or their attorneys.

Fifth: It is mutually understood, covenanted and agreed that all parties hereto shall, so far as in their power lies, aid in securing speedily both a partial and final distribution of the said estate or estates, according to the terms of this agreement, and without the giving of any bond, if practicable, and agree to endeavor to obtain an order of the Court accordingly; and it is further agreed that no party to this instrument shall oppose such distribution, partial or final, and that all parties hereto shall assist, as far as in their power lies, in securing the property of said estate in Massachusetts to be forwarded by the administrators of the said estate in Massachusetts to the administrators of said estate in Silver Bow County, Montana, to be then in said County distributed as speedily as possible.

Sixth: It is further mutually agreed that the decree or decrees to be entered and filed in said Court, withdrawing said contests, shall fix and set forth the shares of the said estate as herein transferred and granted, to the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, and shall be based upon all the terms and conditions of this indenture; and it is further mutually agreed that the law firm of Logan, Demond & Harby, of New York, and C. P. Dremmen, attorney at law in Butte, Montana, shall control and direct the distribution of the said shares so transferred and granted to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, and that if said attorneys so elect, all sums of money and personal property to be distributed, on account of said shares, in accordance with the terms of this indenture, shall be distributed to said attorneys, or their heirs or assigns, or as they may direct.

Seventh: This indenture shall not affect the right of the said estate of Andrew J. Davis, deceased, or any party hereto, of instituting or conducting suits or litigations, either before or after dis-

tribution, to recover for said estate any property to which said estate, at the time of the death of the said Andrew J. Davis, or since then, or now, was, has been, is, or shall hereafter be entitled, which right is reserved and saved to any or all of the parties hereto, if any now exists or may hereafter accrue: Provided, however, and it is understood and agreed by and between all the parties hereto, that nothing in this agreement contained, either by reason of the execution hereof by the said Andrew J. Davis, one of the parties of the first part herein, for himself or as attorney in fact for any other party hereto, or otherwise, shall be construed or held or taken in anywise to affect or change or enlarge or diminish or impair the respective rights or claims of the said estate of Andrew J. Davis, deceased, on the one part, or of the said Andrew J. Davis, one of the parties of the first part herein, on the other part, of, in or to certain shares of the capital stock of the First National Bank of Butte, Montana, claimed by the said Andrew J. Davis, one of the parties of the first part herein, under and by virtue of a gift thereof to him, as his individual property, by the said Andrew J. Davis, deceased, or in any litigation that may now be pending or may hereafter be instituted, relating in any way to the said shares of said stock, and no grant or conveyance herein, made on the part of, or by the said Andrew J. Davis, one of the parties of the first part herein, to any of the parties to this agreement, shall be held or construed to give or grant to any one any right or interest, or to waive any right the said Andrew J. Davis, one of the parties of the first part herein, has or claims, in or to said shares of said stock, or any of them, claimed by him as his individual property under the gift above mentioned, nor shall any of the covenants or provisions of this agreement on his part apply to or affect said shares of stock, unless said shares should finally be adjudged to be the property of the said estate of Andrew J. Davis, deceased.

Eighth: It is further understood and hereby stipulated as part of the consideration of this agreement that none of the parties hereto shall take or institute any action or proceeding to charge the administrator with the will annexed of the said estate of Andrew J. Davis, deceased, for or on account of any default of the said administrator, if any there be, heretofore made or occurring, for any failure of said

administrator to invest or derive interest from any of the funds
said estate, and no claim shall be made against such administrato
by any of the parties hereto, for or on account of any such failure
default heretofore.

In Witness Whereof, the several parties to this indenture an
agreement have hereunto set their hands, the day and year fir
hereinabove written.

ANDREW J. DAVIS.
EDWARD A. DAVIS.
By Andrew J. Davis, His attorney-in-fact
JOHN E. DAVIS.
JOHN E. DAVIS.
As Administrator of the Estate of John A. Davis, deceased
HELEN M. DAVIS.
TENIE B. DAVIS.
CHARLES G. DAVIS.
GERTRUDE F. DAVIS.
MORRIS A. DAVIS.
MARY A. DAVIS.
THEAH JANE DAVIS.
GEORGE W. DAVIS.
HENRY A. ROOT.
ROSINE B. ROOT.
ELLEN S. CORNUE.
JOSHUA G. CORNUE.
MARY LOUISE DUNBAR.
ELIZABETH S. LADD.
CHARLES H. LADD.
SARAH M. CUMMINGS.
ELIZABETH S. BOWDOIN.
By Charles M. Demond, Her attorney-in-fact
JOHN A. BOWDOIN.
By Charles M. Demond, His attorney-in-fact
HARRIET WOOD.
By Charles M. Demond, Her attorney-in-fact
CALVIN P. DAVIS.
By Charles M. Demond, His attorney-in-fact

Know all Men by these Presents: That we, Henry C. Davis, of Peachland, Sonoma County, California, son of Calvin P. Davis, Ina A. Cochran, of said Peachland in said County and State, daughter of said Calvin P. Davis, and Arthur F. Cochran, her husband, by Charles M. Demond, their attorney in fact, so constituted by instrument dated the 8th day of June, 1897, do hereby ratify and approve the annexed indenture dated the 22nd day of June, 1897, to which the said Calvin P. Davis is a party, and do approve and confirm the same, and all the provisions thereof, to the same extent as though we were original parties thereto.

In Witness Whereof, we have hereunto set our hands and seals by our said attorney this 25th day of June, 1897.

HENRY C. DAVIS,
INA A. COCHRAN,
ARTHUR C. COCHRAN,
All by Charles M. Demond, Their attorney-in-fact.

Signed, sealed, and delivered in the presence of:
JOHN F. FORBIS.

Duly acknowledged.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 25th day of June in the year 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, State of Montana, personally appeared Charles M. Demond, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Henry C. Davis, Ina A. Cochran and Arthur C. Cochran; and acknowledged to me that he subscribed the names of Henry C. Davis, Ina A. Cochran and Arthur C. Cochran thereto as principals, and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF MADISON, ss.

On this 28 day of June, 1897 before me Augustus Anderson a Notary Public in and for the County of Madison, State of Montana, personally appeared Andrew J. Davis, and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, all personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement and who severally acknowledged to me, each for himself and herself, that they executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

AUGUSTUS ANDERSON.

(L. S.) *Notary Public in and for the County of Silver Bow, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 25th day of June, 1897, before me, L. Orvis Evans, a Notary Public in and for the County of Silver Bow, State of Montana, personally appeared Henry A. Root and Rosine B. Root, his wife, personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for the County of Silver Bow, Montana.*

STATE OF MONTANA,

COUNTY OF MADISON, ss.

On this 28 day of June, 1897, before me Augustus Anderson, a Notary Public in and for the County of Madison, State of Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as attorney

in fact of Edward A. Davis, and acknowledged to me that he subscribed the name of Edward A. Davis, thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

AUGUSTUS ANDERSON.

(L. S.) *Notary Public in and for the County of Madison, State of Montana.*

STATE OF ILLINOIS,

COUNTY OF COOK, ss.

On this 13th day of July, 1897 before me, Nellie M. Lewis Panushka, a Notary Public in and for the County of Cook, State of Illinois, personally appeared Charles G. Davis, and Gertrude F. Davis, his wife, both personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement and who severally acknowledged to me, each for himself and herself that they executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

NELLIE M. LEWIS-PANUSHKA.

(L. S.) *Notary Public in and for the County of Cook, State of Illinois.*

STATE OF WASHINGTON,

COUNTY OF SPOKANE, ss.

On this 13th day of August 1897, before me, Guss W. Roche, a Notary Public in and for the County of Spokane, State of Washington, personally appeared Thea Jane Davis, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

GUSS W. ROCHE.

(L. S.) *Notary Public in and for the County of Spokane, State of Washington.*

STATE OF ILLINOIS,

COUNTY OF COOK, ss.

On this 16th day of July, 1897 before me, Florence Couthoui Notary Public in and for the County of Cook, State of Illinois, p sonally appeared Mary A. Davis, wife of Edward A. Davis, kno to me to be the person whose name is subscribed to the within inst ment and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and seal t day and year in this certificate first above written.

FLORENCE COUTHOUI.

(L. S.) *Notary Public in and for the County of Cook, State of Illino*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 19th day of August, 1897, before me L. Orvis Evans, Notary Public in and for the County of Silver Bow, State of Mo tana, personally appeared George W. Davis, known to me to be t person whose name is subscribed to the within instrument a acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and seal t day and year in this certificate first above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for the County of Silver Bow, State of Montan*

STATE OF ILLINOIS,

COUNTY OF COOK, ss.

On this 13th day of July, 1897 before me, Nellie M. Lew Panushka, a Notary Public in and for the County of Cook, State Illinois, personally appeared Morris A. Davis, known to me to the person whose name is subscribed to the within instrument a acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and seal t day and year in this certificate above written.

NELLIE M. LEWIS-PANUSHKA.

(L. S.) *Notary Public in and for the County of Cook, State of Illino*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 25th day of June, 1897, before me L. Orvis Evans, Notary Public in and for the County of Silver Bow, State of Montana, personally appeared Charles M. Demond, known to me to be the person whose name is subscribed to the within instrument as attorney in fact of Elizabeth S. Bowdoin, John A. Bowdoin, Harriet Wood and Calvin P. Davis, and acknowledged to me that he subscribed the names of Elizabeth S. Bowdoin, John A. Bowdoin, Harriet Wood, and Calvin P. Davis, thereto as principals and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for the County of Silver Bow, Montana.*

STATE OF MONTANA,

COUNTY OF MADISON, ss.

On this day of June, 1897, before me Augustus Anderson, a Notary Public in and for the County of Madison, State of Montana, personally appeared John E. Davis, known to me to be the person whose name is subscribed to the within instrument, as administrator of the estate of John A. Davis deceased, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

AUGUSTUS ANDERSON.

(L. S.) *Notary Public in and for the County of Madison, Montana.*

STATE OF MASSACHUSETTS

COUNTY OF HAMPDEN, ss.

On this 8th day of July, 1897 before me, George D. Lang, a Notary Public in and for the County of Hampden, State of Massachusetts, personally appeared Elizabeth S. Ladd and Charles H.

Ladd her husband, both personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement and who severally acknowledged to me, each for himself and herself, that they executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

GEORGE D. LANG.

(L. S.) *Notary Public in and for the County of Hampden, State of Massachusetts.*

STATE OF MASSACHUSETTS,

COUNTY OF HAMPDEN, ss.

On this 8th day of July, 1897 before me, George D. Lang, a Notary Public in and for the County of Hampden, State of Massachusetts, personally appeared Mary Louise Dunbar, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

GEORGE D. LANG.

(L. S.) *Notary Public in and for the County of Hampden, State of Massachusetts.*

COMMONWEALTH OF MASSACHUSETTS,

COUNTY OF HAMPDEN, ss.

On this 7th day of July 1897 before me Henry N. Bowman, a Notary Public in and for the Commonwealth of Massachusetts, personally appeared Ellen S. Cormie and Joshua G. Cormie, her husband, both personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement and who severally acknowledged to me, each for himself and herself, that they executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

HENRY N. BOWMAN.

(L. S.) *Notary Public in and for the Commonwealth of Massachusetts.*

STATE OF MASSACHUSETTS.

COUNTY OF HAMPDEN, ss.

On this 8th day of July, 1897 before me Wm. C. Eaton, a Notary Public in and for the County of Hampden, State of Massachusetts, personally appeared Sarah Maria Cummings, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

WM. C. EATON.

(L. S.) *Notary Public in and for the County of Hampden, State of Massachusetts.*

COMPLAINANT'S EXHIBIT LVIII.

[Put in Evidence, page 489.]

This Identure, Made this sixth day of August, A.D. 1897, by and between Andrew J. Davis, of Butte, Montana: Edward A. Davis of Chicago, Illinois, by Andrew J. Davis, his attorney in fact, so constituted by instrument dated the twenty-eighth day of April, 1893: John E. Davis of Butte, Montana: Charles G. Davis, of Chicago, Illinois, by Andrew J. Davis, his attorney in fact, so constituted by instrument dated July 13th, 1897. George W. Davis, bachelor of Butte, Montana, and Morris A. Davis of Chicago, Illinois, bachelor, by Andrew J. Davis, his attorney in fact so constituted by instrument dated July 13th, 1897, sons and heirs of the said John A. Davis, deceased: and Thcah Jane Davis, of Butte, Montana, widow of John A. Davis, deceased, parties of the first part and Helen M. Davis, wife of Andrew J. Davis: Tenie B. Davis, wife of John E. Davis, both of Butte, Montana, and Gertrude F. Davis, wife of Charles G. Davis, and Mary A. Davis, wife of Edward A. Davis, both of Chicago, Illinois, by Andrew J. Davis, their attorney in fact so constituted by instrument dated July 13th, 1897, parties of the second part: and Henry A. Root, of Butte, Montana: Ellen S. Corume of Croton Falls, New York: by Henry A. Root her attorney

in fact so constituted by instrument dated July 8th, 1897, Sarah Maria Cummings, of Ware, Massachusetts, by Henry A. Root her attorney in fact so constituted by instrument dated July 8th, 1897; Elizabeth S. Ladd, of Springfield, Massachusetts, by Joseph A. Coram her attorney in fact so constituted by instrument dated July 8th, 1897; Mary Louise Dunbar, of Springfield, Massachusetts, by Joseph A. Coram her attorney in fact so constituted by instrument dated July 8th, 1897; all heirs at law of Andrew J. Davis, deceased, parties of the third part; and Rosine B. Root, wife of Henry A. Root; and Joshua G. Cornue, husband of Ellen S. Cornue, by Henry A. Root his attorney in fact, so constituted by instrument dated July 8th, 1897; and Charles H. Ladd, husband of Elizabeth S. Ladd, by Joseph A. Coram his attorney in fact, so constituted by instrument dated July 8th, 1897, parties of the fourth part; and John E. Davis, as administrator of the estate of John A. Davis, deceased; party of the fifth part; and Elizabeth A. Smith, of Claremont, Alameda County, California, by J. Howard Smith her attorney in fact, so constituted by instrument dated April 6th, 1886; and J. Howard Smith, of said Claremont, her husband, parties of the sixth part, witnesseth:

I. Whereas, Andrew J. Davis, of the City of Butte, Montana, died at the City of Butte, where he resided, on March 11, 1890; leaving a large estate, real, personal and mixed, situated in the State of Montana, and elsewhere; and

II. The said Andrew J. Davis left him surviving as his only heirs at law and next of kin the following persons, entitled in case of his intestacy, to the following shares of the said estate, and being of the following relationship to him, viz:

(a) Diana Davis, a sister, one-eleventh;

(b) The said Sarah M. Cummings, a sister, one-eleventh;

(c) Harriet Wood, a sister, one-eleventh;

(d) Elizabeth S. Bowdoin, a sister, one-eleventh;

(e) Calvin P. Davis, a brother, one-eleventh;

(f) The said John A. Davis, a brother, now deceased, one-eleventh;

(g) Erwin Davis, of New York City, a brother, one-eleventh;

(h) The said Henry A. Root and Ellen S. Cornue, children of Anna C. Root, deceased, a sister, one-twenty-second each:

(i) The said Elizabeth A. Smith, of Claremont Alemeda County, California; and the said Mary Louise Dunbar, children of Roxanna Dunbar, deceased, a sister, one-twenty-second each:

(j) Harriet R. Sheffield, of Northport, New York, and Henry A. Davis, of Monson, Massachusetts, children of Asa L. Davis, deceased, a brother, one-twenty-second each:

(k) The said Elizabeth S. Ladd, child of Sophronia Firman, deceased, a sister, one-eleventh; and

III. Whereas, a paper purporting to be the last will and testament of Andrew J. Davis, deceased, dated July 20, 1866, was propounded for probate by the said John A. Davis, in July, 1890, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which said will gave, devised and bequeathed to the said John A. Davis, all of the property of Andrew J. Davis, deceased, except a life maintenance therein given to Thomas Jefferson Davis, Pet Davis and Miss Bergett; and,

IV. Whereas, the probate of said will was contested in said court by the said Henry A. Root and Sarah Maria Cummings, jointly, and also by the said Harriet R. Sheffield and Henry A. Davis, jointly; and,

V. Whereas, pending said contests, and on or about January 24, 1893, the said John A. Davis died intestate, leaving him surviving the parties of the first part, his sons and widow, as his only heirs at law and next of kin, and on March 11, 1893, the said John E. Davis was by said Court, duly appointed his administrator, and on or about April 1, 1893, the said John E. Davis, as such administrator, was substituted as proponent of said will in the place of his said father, John A. Davis, by order of said Court; and said probate proceedings, so begun by the said John A. Davis, were, by order of said Court, revived; and,

VI. Whereas, on or about March 27, 1895, the said contests, so instituted as aforesaid, against the probate of the said will, were compromised in said Court, and the said will was, by order of said

Court on said day, admitted to probate, and by certain contracts, stipulations, conveyances and agreements, made pursuant to the said compromise, among others, dated the 28th day of April, 1893, and the 25th day of March, 1895, it was agreed and contracted that the following persons should have and be entitled to the following shares of said estate of Andrew J. Davis, deceased, in kind: Forty-four eleven-hundredths (44-1100) to the said Harriet R. Shefield and Henry A. Davis; that is to say, twenty-two eleven-hundredths (22-1100) thereof to each of them (and subject to the bequests in said will to Thomas Jefferson Davis, Pet Davis and Miss Burgett); Four Hundred and Fifty-six eleven-hundredths (456-1100) thereof to the said parties of the first part; and, Six Hundred eleven-hundredths (600-1100) thereof to the parties of the third and fourth parts, with the exception of Rosine B. Root, wife of Henry A. Root; and, pursuant to the said contracts, stipulations, agreements and conveyances, a decree of the said Court was, on said March 27, 1895 entered according; and,

VII. Whereas, the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Diana Davis in and to the said estate of the said Andrew J. Davis, deceased, as heir at law or next of kin of the said Andrew J. Davis, deceased, or otherwise, and are now the owners thereof; and the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Harriet R. Shefield and Henry A. Davis in and to the said estate of the said Andrew J. Davis, deceased, as heirs at law or next of kin, or otherwise, over and above the said forty-four eleven-hundredths (44-1100) of the said estate, so transferred and conveyed to them as aforesaid, and are now vested therewith and the owners thereof; and,

VIII. Whereas, the said Elizabeth S. Bowdoin and Calvin P. Davis after the probate of said will, did duly, within the time prescribed by law, institute in said Court separate contests, by petition to revoke the probate of the said will, and the said Harriet Wood was interested with them in the said prosecution thereof, and was represented by the same attorneys; and,

IX. Whereas, the said contests of the said Elizabeth S. Bowdoin,

and the said Calvin P. Davis to revoke the probate of said will, and the rights and the claims of the said Harriet Wood have been settled and compromised with the parties of the first, second, third, fourth and fifth parts, by a certain contract and deed dated June 22, 1897, wherein it was agreed among other things that the said Elizabeth S. Bowdoin, the said Calvin P. Davis and the said Harriet Wood should each have and receive one undivided twenty-second interest or share in kind in and to the said Estate of Andrew J. Davis, deceased, subject and excepting certain property therein specified and the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Elizabeth S. Bowdoin and John A. Bowdoin, her husband, and the said Calvin P. Davis and the said Harriet Wood in and to the said estate of Andrew J. Davis, deceased, as heirs at law or next of kin or otherwise, over and above the said three-twenty-second interest in said estate so transferred and conveyed to them as aforesaid and are now vested therewith and the owners thereof, and

X. Whereas, the said Elizabeth A. Smith after the probate of said will did also duly within the time prescribed by law, institute in said Court a contest by petition to revoke the probate of said will, which contest is now at issue and is now pending and,

XI. Whereas it is proposed and contemplated by the parties hereto to settle adjust and compromise said contest of the said Elizabeth A. Smith, and to fix and adjust the status and shares of the parties hereto in and to the said estate of Andrew J. Davis, deceased.

Now, therefore, in consideration of the premises and the sum of One Dollar, paid by each party hereto to the other, and in consideration of other valuable considerations, the receipt of all of which by each party from the other is hereby acknowledged, and in consideration of the compromise and settlement of the said contest of the said Elizabeth A. Smith and the dismissal of the said contest it is hereby covenanted, agreed, stipulated and granted, as follows:

First. The parties of the first, second, third and fourth parts, and each of them, do hereby sell, assign, set over and transfer, and do hereby grant, bargain, sell, convey and confirm, unto the said Elizabeth A. Smith her heirs, executors, administrators and assigns for-

ever, one undivided forty-fourth (1-44) interest or part, in kind, in and to all of the property and estate of the said Andrew J. Davis, deceased, real, personal and mixed, wherever situated, with which said parties are now vested or to which they are in any way entitled, or with which they or either of them may hereafter be vested or entitled, as heirs, next of kin, legatees or devisees of the said Andrew J. Davis, deceased, or by virtue of any contract in relation to the said estate; except such real estate as is situated in the State of Iowa and which the parties of the first and third parts, or their representatives have heretofore agreed to convey to the said Thomas Jefferson Davis, which said real estate in Iowa is excepted from the terms of this indenture; and in and to the said estate of Andrew J. Davis, deceased, as it now exists, and in and to any property thereof which the said estate may hereafter acquire, the said estate and property, however, to be subject to the payment of maintenance given in said will to Pet Davis and Miss Bergett, and to the payment of all debts against said estate, and costs and charges of administration in Montana and elsewhere.

And with respect to all lands hereby transferred and conveyed, the said parties do hereby also grant, bargain, sell, and convey, excepting as hereinbefore set forth, all and singular the one undivided forty-fourth (1-44) interest or part to the said Elizabeth A. Smith in and to all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all veins, leads, or lodes, therein or thereto belonging, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth, and all other metals and minerals therein, and all the rights, privileges and franchises thereto incident, attendant and appurtenant, or therewith usually had and enjoyed.

To Have and to Hold, all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said Elizabeth A. Smith, her heirs and assigns forever.

Second: The parties of the first, second, third, fourth and fifth parts, their respective heirs, executors, administrators and assigns,

do hereby covenant and agree to and with the parties of the sixth part their respective heirs, executors, administrators and assigns, that the share or interest herein granted and transferred to the said Elizabeth A. Smith shall be free and clear of all liability to pay or contribute to the payment of the shares or interests heretofore granted and transferred by any of the other parties hereto to the said Harriet R. Sheffield, Henry A. Davis, Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood in and by said compromise agreements, hereinbefore referred to, and do further covenant and agree that they will adjust and settle all claims of Thomas Jefferson Davis to all share in said estate, and that the share herein granted and transferred to Elizabeth A. Smith shall be free and clear of all liability to pay or contribute to the payment, in whole or in part, of any claim or claims of the said Thomas Jefferson Davis, and do further agree that said share so granted and transferred by this indenture to the said Elizabeth A. Smith shall be free and clear of and from all costs, expenses, charges, counsel and attorney fees of any parties of the first, second, third, fourth and fifth parts hereto, or any of them, expended, paid out, incurred or contracted in probating or opposing the probate of said will, or in any other matter or proceeding relating to said estate or the property thereof, or in respect to any litigation connected therewith, except expenses and costs of administration of the estate of Andrew J. Davis, deceased, and of litigation by the administrator of said estate, as such.

Third: It is mutually understood, covenanted and agreed by and between all the parties hereto, their respective heirs, executors, administrators and assigns, that the share or interest so as above transferred and granted to the said Elizabeth A. Smith in and by this indenture, is a one undivided forty-fourth (1-44) part or interest, in kind, not only in and to all property of said estate of Andrew J. Davis, deceased, real, personal and mixed, and in and to all property, choses in action and other rights and interests now owned by said estate, real, personal and mixed, and wheresoever situated (subject and excepting as aforesaid), but also in and to all claims, suits, choses in action and rights of said estate, in law or equity for the recovery of property of said estate or otherwise, (subject and

excepting as aforesaid), which now exist or which hereafter may exist or accrue, and of which the said Andrew J. Davis, deceased, died seized or possessed, or in which he had any interest at the time of his death or to which his estate since his death had or has or may acquire any right or interest and which may hereafter come into the ownership of the said estate by operation of law or otherwise; it being the intention of this indenture that this indenture and conveyance shall be binding and operative upon all interests and property which the said parties of the first, second, third, fourth and fifth parts (subject and excepting as aforesaid) now have as heirs at law or next of kin, of the said Andrew J. Davis, deceased, in and to his estate, or under or by virtue of the provisions of any will of said Andrew J. Davis, deceased, which is now or may hereafter be admitted to probate, or which they or either of them have acquired or may acquire in any manner whatsoever, by assignment or transfer from any person claiming to be an heir of Andrew J. Davis, deceased, or otherwise, and whether such interest shall descend to them, or either of them, directly from Andrew J. Davis, deceased, or his estate, or by virtue of his will or otherwise, or whether such interests shall descend to or be acquired by or distributed to them directly from John A. Davis, deceased, or his estate, or otherwise; and that it is further understood, covenanted and agreed by the parties of the first hart herein, that in case any distribution of the property of the estate of Andrew J. Davis, deceased, shall be had through or in the estate of John A. Davis, deceased, to all or any of the parties hereto, that then and in that event the share or interest herein conveyed, granted and transferred to the said Elizabeth A. Smith shall be free and clear of all claims of creditors of said John A. Davis, deceased, now filed in the matter of his said estate or which may hereafter be urged, prosecuted or filed, and free and clear from all costs of administration, attorney and counsel fees and all other charges and expenses in or against the said estate of John A. Davis, deceased. Provided, however, that in case Erwin Davis shall succeed in establishing any claim to and in recovering any part of the property of said estate in Massachusetts, so that the same shall not be obtained by or distributed to the parties of the first, third, and

fifth parts herein, by reason of the said claims of Erwin Davis, then said portion so obtained by the said Erwin Davis in Massachusetts, shall not be considered as a part of the estate of Andrew J. Davis, deceased, conveyed or agreed to be conveyed by or under the terms of this indenture.

Fourth: In consideration of the premises, the said parties of the sixth part, to-wit: Elizabeth A. Smith and J. Howard Smith her husband for themselves, their heirs, executors, administrators and assigns, do hereby sell, assign, convey, transfer and grant, unto the said parties of the first and third parts, their heirs and assigns forever, all the right, title, interest, claim demand whatsoever, whether at law or in equity, and whether vested or contingent, of the said Elizabeth A. Smith, of, in and to all and every portion of the said estate of Andrew J. Davis, deceased, and all property thereof whether real, personal or mixed, and wherever situated, except one undivided forty-fourth (1-44) interest or part or share thereof, in kind, transferred and conveyed to said Elizabeth A. Smith by this instrument, as hereinbefore provided, and the said Elizabeth A. Smith does hereby withdraw, and does hereby agree to withdraw and dismiss, in open Court or otherwise, her said contest so filed against the probate of said will, as aforesaid, each party to pay his own costs.

Fifth: It is mutually understood, covenanted and agreed that all parties hereto shall, so far as in their power lies, aid in securing speedily both a partial and final distribution of the said estate or estates, according to the terms of this agreement, and without the giving of any bond, if practicable, and agree to endeavor to obtain an order of the Court accordingly; and it is further agreed that no party to this instrument shall oppose such distribution, partial or final, and that all parties hereto shall assist, as far as in their power lies, in securing the property of said estate in Massachusetts to be forwarded by the administrators of the said estate in Massachusetts to the administrator of said estate in Silver Bow County, Montana, to be then in said County distributed as speedily as possible.

Sixth: It is further mutually agreed that the decree or decrees to be entered and filed in said Court, withdrawing said contests or any of them, shall fix and set forth the share of the said estate as herein

transferred and granted, to the said Elizabeth A. Smith and shall be based upon all the terms and conditions of this indenture.

Seventh: This indenture shall not effect the right of the said estate of Andrew J. Davis, deceased, or any party thereto, of instituting or conducting suits or litigations, either before or after distribution, to recover for said estate any property to which said estate, at the time of the death of the said Andrew J. Davis, or since then, or now, was, has been, is, or shall hereafter be entitled, which right is reserved and saved to any or all of the parties hereto, if any now exists or may hereafter accrue: Provided, however, and it is understood and agreed by and between all the parties hereto, that nothing in this agreement contained, either by reason of the execution hereof, by the said Andrew J. Davis, one of the parties of the first part herein, for himself or as attorney in fact for any other party hereto, or otherwise, shall be construed or held or taken in any wise to affect or change or enlarge or diminish or impair the respective rights or claims of the said estate of Andrew J. Davis, deceased, on the one part, or of the said Andrew J. Davis, one of the parties of the first part, herein, on the other part, of, in or to certain shares of the capital stock of The First National Bank of Butte, Montana, claimed by the said Andrew J. Davis, one of the parties of the first part herein, under and by virtue of a gift thereof to him, as his individual property, by the said Andrew J. Davis, deceased, or in any litigation that may now be pending or may hereafter be instituted, relating in any way to the said shares of said stock, and no grant or conveyance herein, made on the part of, or by the said Andrew J. Davis, one of the parties of the first part herein, to any of the parties to this agreement, shall be held or construed to give or grant to any one any right or interest, or to waive any right the said Andrew J. Davis, one of the parties of the first part herein, has or claims, in or to said shares of said stock, or any of them, claimed by him as his individual property under the gift above mentioned, nor shall any of the covenants or provisions of this agreement on his part apply to or affect said shares of stock, unless said shares should finally be adjudged to be the property of the said estate of Andrew J. Davis, deceased.

Eighth: It is further understood and hereby stipulated as part of the consideration of this agreement that none of the parties hereto shall take or institute any action or proceeding to charge the administrator with the will annexed of the said estate of Andrew J. Davis, deceased, for or on account of any default of the said administrator, if any there be, heretofore made or occurring, for any failure of said administrator to invest or derive interest from any of the funds of said estate, and no claim shall be made against such administrator by any of the parties hereto, for or on account of any such failure or default heretofore.

In Witness Whereof, the several parties to this Indenture and Agreement have hereunto set their hands, the day and year first hereinabove written.

ANDREW J. DAVIS,
EDWARD A. DAVIS,
By Andrew J. Davis, his attorney in fact.
CHARLES G. DAVIS,
By Andrew J. Davis, his attorney in fact.
MORRIS A. DAVIS,
By Andrew J. Davis, his attorney in fact.
GERTRUDE F. DAVIS,
By Andrew J. Davis, her attorney in fact.
MARY A. DAVIS,
By Andrew J. Davis, her attorney in fact.
THEAH JANE DAVIS,
GEORGE W. DAVIS,
ELIZABETH A. SMITH,
otherwise known as Lizzie D. Smith, by J. Howard Smith, her attorney in fact.
J. HOWARD SMITH,
HENRY A. ROOT,
ROSINE B. ROOT,
ELLEN S. CORNUE,
By Henry A. Root, her attorney in fact.
SARAH MARIA CUMMINGS,
By Henry A. Root, her attorney in fact.

JOSHUA G. CORNUE,
By Henry A. Root, his attorney in fact.
ELIZABETH S. LADD,
By Joseph A. Coram, her attorney in fact
MARY LOUISE DUNBAR,
By Joseph A. Coram, her attorney in fact
CHARLES H. LADD,
By Joseph A. Coram, his attorney in fact
JOHN E. DAVIS,
JOHN E. DAVIS,
Administrator of the Estate of John A. Davis, deceased
HELEN M. DAVIS,
TENIE B. DAVIS.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS.
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Edward A. Davis, and acknowledged to me that he subscribed the name of said Edward A. Davis thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Charles G. Davis, and acknowledged to me that he subscribed the name of said Charles G. Davis thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August in the year 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Morris A. Davis and acknowledged to me that he subscribed the name of said Morris A. Davis thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Gertrude F. Davis, and acknowledged to me that he subscribed the name of said Gertrude F. Davis thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,

(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Mary A. Davis, and acknowledged to me that he subscribed the name of said Mary A. Davis thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,

(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW ss.

On this 18th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared John E. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 19th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for the County of Silver Bow, State of Montana, personally appeared George W. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, State of Montana.*

STATE OF WASHINGTON,
COUNTY OF SPOKANE, ss.

On this 13th day of August, in the year, 1897, before me, Guss W. Roche, a Notary Public in and for Spokane County, Washington, personally appeared Theah Jane Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

GUSS W. ROCHE,
(L. S.) *Notary Public in and for Spokane County, Washington.*
Residing at Spokane.

STATE OF MONTANA,
COUNTY OF MADISON, ss.

On this 18th day of August, in the year, 1897, before me, Augustus Anderson, a Notary Public in and for Madison County, Montana, personally appeared Helen M. Davis, known to me to be the

person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

(L. S.)

AUGUSTUS ANDERSON,
Notary Public in and for Madison County, Montana.

STATE OF MONTANA,
COUNTY OF MADISON, ss.

On this 18th day of August, in the year 1897, before me, Augustus Anderson, a Notary Public in and for Madison County, Montana, personally appeared Tenie B. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

(L. S.)

AUGUSTUS ANDERSON,
Notary Public in and for Madison County, Montana.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Henry A. Root, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
Notary Public in and for Silver Bow County, Montana.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Henry A. Root, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Ellen S. Cornue, and acknowledged to me that he subscribed the name of said Ellen S. Cornue thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Henry A. Root, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Sarah Maria Cummings, and acknowledged to me that he subscribed the name of said Sarah Maria Cummings thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Joseph A. Coram, known to me to be the person whose name is subscribed to the within instrument as the attor-

ney in fact of Elizabeth S. Ladd, and acknowledged to me that he subscribed the name of said Elizabeth S. Ladd thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Joseph A. Coram, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Mary Louise Dunbar, and acknowledged to me that he subscribed the name of said Mary Louise Dunbar thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Rosine B. Root, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Henry A. Root, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Joshua G. Cornue and acknowledged to me that he subscribed the name of said Joshua G. Cornue thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 6th day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared Joseph A. Coram, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Charles H. Ladd, and acknowledged to me that he subscribed the name of said Charles H. Ladd thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS.

(L. S.) *Notary Public in and for Silver Bow County, Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

On this 18th day of August in the year 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared John E. Davis, known to me to be the person whose name is subscribed to the within instrument as the adminis-

trator of the estate of John A. Davis, deceased, and acknowledged to me that he executed the same, as such administrator.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
Notary Public in and for Silver Bow County, Montana.

(L. S.)

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th., day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared J. Howard Smith, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Elizabeth A. Smith, otherwise known as Lizzie D. Smith, and acknowledged to me that he subscribed the name of said Elizabeth A. Smith thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
Notary Public in and for Silver Bow County, Montana.

(L. S.)

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

On this 6th., day of August, in the year, 1897, before me, L. Orvis Evans, a Notary Public in and for Silver Bow County, Montana, personally appeared J. Howard Smith, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

L. ORVIS EVANS,
Notary Public in and for Silver Bow County, Montana.

(L. S.)

COMPLAINANT'S EXHIBIT LIX.

[Put in Evidence, page 420.]

This Indenture, made this 25 day of November 1898, by and between Elizabeth S Ladd and Charles H. Ladd her husband, and Mary Louise Dunbar, all of Springfield, in the State of Massachusetts, parties of the first part, and Joseph A Coram of Lowell in the State of Massachusetts, party of the second part Witnesseth That Whereas, the said parties of the first part are entitled to certain interests and shares in the estate of Andrew J Davis, deceased, as is shown by a certain decree of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, admitting to probate the last will and testament of said Andrew J Davis, deceased: and

Whereas, the estate of Andrew J Davis, deceased, consists of real and personal property, some situated in the State of Montana and some in the State of Massachusetts: and,

Whereas the parties of the first part have agreed to sell, convey and transfer unto the said party of the second part all their right, title, interest, claim and estate in and to the estate of Andrew J. Davis, deceased whether the same be claimed as an heir at law of the said Andrew J Davis or under and by virtue of the provisions of the said order and decree admitting the last will and testament of said Andrew J. Davis, deceased to probate.

Now Therefore the said parties of the first part in consideration of the sum of thirty two thousand five hundred dollars ($32,500.00) to them in hand paid by the said party of the second part the receipt is hereby acknowledged, do hereby Grant, Bargain, Sell, Convey and set Over unto the said party of the second part, and to his heirs, representatives and assigns forever all of their right, title, Interest, claim and estate and demands of whatever kind or character in and to all the property, real or personal of whatever kind, character or description and wherever situated of the estate of Andrew J Davis, deceased, whether the same has been heretofore distributed under the decree of distribution or whether the same is now in the hands of the administrator or administrators of the estate of Andrew J.

Davis, deceased, or whether the same has ever been administered upon.

It is the understanding between the parties hereto that all right, title, estate or property which the said parties of the first part have or could under any circumstance claim in and to the estate of Andrew J Davis, deceased, and to all of the property thereof wherever situated shall be fully conveyed, transferred and set over by this deed and conveyance to the said party of the second part and the said party of the second part may from and after the signing and delivery of this conveyance have the full and complete right to the possession of all of said property and to receive and in the names of the parties of the first part to receipt for all moneys, choses in actions or other personal property of whatever kind, character and description wherever situated and in his own right or in the right of the parties of the first part to demand, receive, sue for or in anywise dispose of any such property as fully and to the same effect and extent as the parties of the first part might or could have done but for this conveyance.

And the administrator or administrators of the estate of Andrew J Davis, deceased are hereby authorized and directed to turn over and deliver to the said party of the second part all lands, moneys or other property, real or personal, which in the decree of distribution entered in said estate, might have been or could be delivered to the parties of the first part, and the receipt of the party of the second part shall be a full and complete acquittance to said administrator or administrators as if executed by the parties of the first part in person.

And in any decree of distribution hereafter entered in the matter of the estate of Andrew J Davis, deceased, in any Court whatever the said party of the second part may be substituted for the parties of the first part or if not so substituted and any distribution shall be made to the parties of the first part the same shall inure to the benefit of the party of the second part, as fully and to the same effect as if the distribution had been made to him.

To Have and to Hold unto the said party of the second part and to his heirs, representatives and assigns forever all of the property of the estate of Andrew J Davis, deceased, which now or may here-

after belong to the said parties of the first part, together with all improvements, rights, privileges and appurtenances thereunto belonging or in anywise appertaining.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ELIZABETH S. LADD (SEAL)
CHARLES H. LADD (SEAL)
MARY LOUISE DUNBAR (SEAL)

STATE OF MASSACHUSETTS,
COUNTY OF HAMPDEN ss.

On this 26th day of November, 1898, before me, Jonathan Barnes, a Notary Public in and for the County of Hampden, State of Massachusetts, personally appeared Elizabeth S. Ladd and Charles H. Ladd, her husband, both personally known to me to be two of the persons who executed the within and foregoing deed and each acknowledged to me that they executed the same.

In Testimony Whereof, I have hereunto set my hand and seal the day and year first above written.

JONATHAN BARNES
(NOTARIAL SEAL) *Notary Public in and for the County of Hampden, Massachusetts.*

STATE OF MASSACHUSETTS,
COUNTY OF HAMPDEN, ss.

On this 25th day of November 1898 before me Jonathan Barnes a Notary Public in and for the County of Hampden, State of Massachusetts, personally appeared Mary Louise Dunbar, who is personally known to me to be one of the persons who executed the within and foregoing deed and she acknowledged to me that she executed the same.

In Testimony Whereof I have hereunto set my hand and seal the day and year above written.

JONATHAN BARNES,
(NOTARIAL SEAL) *Notary Public in and for the County of Hampden, Massachusetts.*

Filed for Record Dec 2nd A. D. 1898 at 5 o'clock, P. M.
JOHN WESTON, *County Recorder.*
By A. E. WHITES, *Deputy.*

This Indenture, made this second day of June in the year of our Lord one thousand eight hundred and ninety-nine between Joseph A. Coram and Cora E. Coram, his wife, of Lowell, Massachusetts, Ellen S. Cornue and Joshua G. Cornue, her husband, of Croton Falls, New York, and Sarah Maria Cummings of Ware, Massachusetts, the parties of the first part, to Henry A. Root, of Butte, Montana, the party of the second part, Witnesseth: —

That the said parties of the first part for and in consideration of the sum of one Dollar, lawful money of the United States of America, to them in hand paid by the said second party, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns forever, all the following described property, situate, lying and being in the State of Montana, and described as follows, to wit:

All of the right, title and interest of said parties of the first part, of, in and to all real estate within the state of Montana, held or now owned by the said first parties and the grantors of Joseph A. Coram, under and by virtue of a decree of partial distribution of date February 8, 1898, in Estate No. 285, of the Records of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, said decree having issued out of said Court. It being understood that no rights are conveyed by the said first parties of, in or to any rights, which they have under and by virtue of the property held in trust by Andrew J. Davis and Charles H. Palmer, trustees, and alluded to in the said decree of partial distribution.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed, and

To Have and to Hold, all and singular the said premises together

with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOSEPH A. CORAM (SEAL)
CORA E. CORAM (SEAL)
ELLEN S. CORNUE (SEAL)
JOSEPH G. CORNUE (SEAL)
SARAH MARIA CUMMINGS (SEAL)

Witness to J. A. C. and C. E. C.
LARKIN T. TRULL.
JENNIE B. TRULL.
Witness to Ellen S. Cornue and Joshua G. Cornue.
FREDERIC S. BARNUM.
Witness to Sarah Maria Cummings.
WM. E. EATON

STATE OF MASSACHUSETTS.
COUNTY OF MIDDLESEX. ss.

On this second day of June in the year 1899 before me Larkin T. Trull a Justice of the Peace in and for the County of Middlesex, State of Massachusetts, personally appeared Joseph A. Coram and Cora E. Coram known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand the day and year in this certificate first above written.

LARKIN T. TRULL
Justice of the Peace in and for Middlesex County, Massachusetts.

COMMONWEALTH OF MASSACHUSETTS.
MIDDLESEX. ss.

I, Edward W. Trull, Assistant Clerk of the Police Court of Lowell, in the District of Lowell, in said County of Middlesex the same being a Court of Record, and Common Law Jurisdiction do hereby certify that Larkin T. Trull, was, on the day of the date of the

annexed certificate, a Justice of the Peace in and for said Commonwealth, residing in said County, duly commissioned, qualified and authorized to take affidavits and to certify the acknowledgments of Deeds: that full faith and credit should be given to all his official acts: that I am well acquainted with the handwriting of said Larkin T. Trull, and that I verily believe that the signature to the annexed certificate is in his own proper handwriting and genuine, and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and seal of said Court, at Lowell, in said County, this third day of June A. D. 1899.

EDWARD W. TRULL, *Asst Clerk.*

(POLICE COURT SEAL)

THE STATE OF NEW YORK,
COUNTY OF PUTNAM, ss.

On this sixth day of June in the year 1899, before me, Frederic S. Barnum, a Notary Public in and for the County of Putnam, State of New York, personally appeared Ellen S. Cornue and Joshua G. Cornue, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In Witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

FREDERIC S. BARNUM
(L. S.) *Notary Public in and for Putnam County, State of New York.*

STATE OF NEW YORK,
PUTNAM COUNTY, ss.

I, Edward C. Weeks, Clerk of said County of Putnam and also Clerk of all the Courts of Record, directed by law to be held herein, do hereby Certify, That Frederic S. Barnum, Esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment a Notary Public in and for said County, duly authorized to take the

same, and that I am well acquainted with his handwriting and verily believe that the signature thereto purporting to be his is genuine.

And I further Certify, That said instrument is executed, and acknowledged according to the laws of the State of New York.

In Testimony Whereof, I have hereunto set my hand, and affixed my official seal at Carmel this 7th day of June 1899.

E. C. WEEKS,
Clerk.

(COUNTY SEAL)

THE STATE OF MASSACHUSETTS,
COUNTY OF HAMPSHIRE, ss.

On this 8th day of June in the year 1899, before me Wm. C. Eaton, a Notary Public in and for the County of Hampshire, State of Massachusetts personally appeared Sarah Maria Cummings known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written in this certificate.

WM. C. EATON
Notary Public in and for Hampshire County, State of Massachusetts.

(NOTARIAL SEAL)

THE COMMONWEALTH OF MASSACHUSETTS,
HAMPSHIRE, ss.

I, Wm. H. Clapp, Clerk of the Supreme Judicial Court, a Court of Record for the county and Commonwealth aforesaid, and also Clerk of said County, do certify that Wm. C. Eaton Esq., of Ware, Mass. whose signature is affixed to the Certificate on the paper hereto annexed, was at the date thereof a Notary Public within and for said County, duly commissioned and acting under the authority of this Commonwealth, and that full faith and credit is, and ought to be given to his acts and attestations done in that capacity; and that I am acquainted with the handwriting of the said Wm. C. Eaton Esq., and believe his signature to said Certificate is genuine; also, that the instrument hereto annexed is executed and acknowledged according to the laws of this Commonwealth for the purposes therein expressed, and that said Wm. C. Eaton Esq., was duly authorized

to take the acknowledgment of deeds and to administer oath under the laws of said Commonwealth.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Judicial Court, and of said County, this ninth day of June in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. CLAPP, *Clerk.*

(COURT SEAL.)

(U. S. Revenue $19 so affixed and cancelled)

Filed for record July 7th, A. D., 1899 at 30 min past 4 o'clock, P. M.

J. E. MORAN, *County Recorder.*

This Indenture, made this Tenth day of May, in the year One Thousand Nine Hundred by and between Henry A. Root, of the City, County and State of New York, and Rosine B. Root, his wife, parties of the first part, and Winfield S. Stern, of the same place, party of the second part, Witnesseth: —

That the parties of the first part, for and in consideration of the sum of one dollar and other good and valuable considerations to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part, and to his heirs, representatives and assigns forever, all their right, title, interest, claim and estate in and to all real estate and mining property belonging to the estate of Andrew J. Davis, deceased, and situated in the State of Montana, of whatever kind, character or description and wherever situated in the said State of Montana.

It is the purpose and intention of the parties of the first part to convey to the said party of the second part all right, title and interest which they have or claim in and to the real and mining property of Andrew J. Davis, deceased, in the said State of Montana, either as heirs at law or by virtue of any agreements or compromises entered into by and between them and the other heirs-at-law of the said Andrew J. Davis, deceased, and to grant unto the said party of the

second part whatever interest they may have acquired, either as heirs at law or under and by virtue of such agreements, whether the same has heretofore been distributed by the decree of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow or not.

It is Understood and Agreed that this conveyance shall convey unto the said party of the second part any right, title or interest which the said parties of the first part may have or may hereinafter acquire under and by virtue of any decree of distribution made and entered in the matter of the Estate of Andrew J. Davis, deceased, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in and to any and all real estate and mining property situated in the State of Montana.

It is Understood and Agreed that this conveyance shall convey unto the said party of the second part any right, title and interest which the said parties of the first part may have acquired by mesne conveyances from Ellen S. Cornue and Joshua G. Cornue, her husband, of Croton Falls, in the State of New York, or from Sarah Maria Cummings, of Ware in the State of Massachusetts; or from Mary Louise Dunbar, of Springfield, in the State of Massachusetts; or from Elizabeth S. Ladd and Charles H. Ladd, her husband, of Springfield in the State of Massachusetts; or from Joseph A. Coram and Cora Coram, his wife, of Lowell, in the State of Massachusetts; in and to all real estate and mining property situated in the State of Montana.

The parties of the first part hereby constitute the said party of the second part, their true and lawful attorney, irrevocable, to do and perform any such acts or deeds in their name as may be necessary to be done or performed in order to secure the title to any of the property herein conveyed; and whatever title in said property has heretofore been acquired by the parties of the first part is hereby conveyed to the said party of the second part; and whatever title shall hereafter be acquired by the said parties of the first part shall inure to the party of the second part:—

To Have and to Hold the above described premises, with the im-

provements and appurtenences, unto the said party of the second part, and to his heirs, representatives and assigns forever.

In Witness Whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

HENRY A. ROOT (SEAL)

In the Presence of:— ROSINE B. ROOT (SEAL)

ROBT. E. J. CORCORAN.

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss.

On this Tenth day of May, in the year One Thousand Nine Hundred, before me personally came Henry A. Root and Rosine B. Root, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they duly and severally acknowledged to me that they executed the same.

ROBT. E. J. CORCORAN,

Notary Public Kings County, Certificate filed in N. Y. Co.

(NOTARIAL SEAL)

(U. S. Revenue 50 cents affixed and cancelled.)

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss.

I, William Sohmer, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do Hereby Certify, That Robt. E. J. Corcoran has filed in the Clerk's Office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe the signature to the said certificate of proof or acknowledgment to be genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 10 day of May, 1900.

WM. SOHMER,

Clerk.

(SEAL)

(U. S. Revenue fee affixed and cancelled.)

Filed for record May 18 at 2:45 P. M. 1900.

J. E. MORAN, *County Recorder.*
By N. W. SIMMONS, *Deputy.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, John Weston, County Clerk and Recorder of said County, do hereby certify that the foregoing annexed instruments of writing constitute and embrace a full, true, correct and complete copy of a certain original deed or instrument, as recorded at page 366 in Book "31" of Deeds, and of a certain other original deed or instrument as recorded at page 58 of Book "35" of Deeds, and of a certain other original deed or instrument as recorded at page 349 of Book "39" of Deeds, Records of said Silver Bow County, State of Montana, in the office of the County Clerk and Recorder thereof.

In Witness Whereof, I have hereunto subscribed my name and office, and affixed the seal of said County, this 23rd., day of June, A. D. 1904.

JOHN WESTON,
(SEAL) *County Clerk and Recorder of Silver Bow County, State of Montana.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Presiding Justice of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that John Weston whose genuine original signature is subscribed to the foregoing annexed Certificate and Attestation is and was, at the time of making the same, the County Clerk and Recorder of said County of Silver Bow in the State of Montana, and the legal keeper of all records, of deeds, conveyances and assignments, recorded by authority of law in said County of Silver Bow, and of the Seal of said County, duly elected, sworn, commissioned qualified and acting as such County Clerk and Recorder; that full faith and credit are due and ought to be given to all his official acts, one of which is the making and certifying

copies of said records of which he is the legal keeper; and that his foregoing certificate and attestation hereto annexed is in due form of law, and the seal thereto affixed, is the genuine seal of said County.

In Witness Whereof, I have hereunto set my hand this 23rd., day of June, A. D. 1904.

JOHN B. McCLERNAN
Presiding Judge of said Court.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that the Honorable whose name is subscribed to the annexed and foregoing certificate, is and was at the time of making the same, Presiding Justice of the said District Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, duly elected, commissioned, sworn qualified and acting as such Presiding Justice, to all whose official acts as such Presiding Justice, full faith and credit are due and ought to be given, and that his genuine signature is subscribed to the foregoing annexed certificate.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said District Court, at Butte, Montana, this 23rd., day of June, A. D. 1904.

(SEAL)

SAMUEL M. ROBERTS
Clerk of said Court.

COMPLAINANT'S EXHIBIT LX. IN REBUTTAL.

[Put in Evidence, page 452.]

Law Office,
ROBERT G. INGERSOLL, 253 Broadway,
Rooms 813-814.

NEW-YORK, Sept. 29, 1897.

My dear Mr. Leyson — Col. Ingersoll Mr. Logan Mr. Demond and I want to see you upon very important business & I have assured them that you will be at Col. Ingersolls office on Friday at 2 P. M.

If it is impossible for you to be here at that time please wire Demond when & where we can meet. Yours truly

H. A. Root

COMPLAINANT'S EXHIBIT LXI. IN REBUTTAL.

[Put in Evidence, page 454.]

Form No. 1

THE WESTERN UNION TELEGRAPH COMPANY.
INCORPORATED
21,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL THE WORLD.

This Company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.
Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delay, in transmission or delivery of unrepeated messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within SIXTY days after the message is filed with the Company for transmission.
This is an unrepeated message, and is delivered by request of the sender, under the conditions named above.

ROBERT C. CLOWRY, President and General Manager.

Number	Sent by	Rec'd by	Check
13	Sx	J	16 paid

Received at 1145 A M Oct 2, 1897 190

Dated Boston Mass

To J. H. Leyson Harding Ave

Root wants you to meet Logan Ingersoll Him and me at Adams House Boston Monday twelve J. A. Cogam

COMPLAINANT'S EXHIBIT LXII. IN REBUTTAL

[Put in Evidence, page 461.]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. REGISTRY OF PROBATE.

I, Elijah George, Register of the Probate Court for said County of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said Court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said Court, and on file and of record in the Office of said Court, to wit: — the petition for the administrator of the estate of Andrew J. Davis, late of Butte, in the State of Montana, deceased, to transmit estate to himself as administrator in the State of Montana, — the order of notice on said petition, — and the copy of the decree of the Supreme Judicial Court dismissing the appeal from the probate of the will of said deceased.

In witness whereof, I have hereunto set my hand and the seal of said Court, this first day of September in the year of our Lord one thousand nine hundred and four

ELIJAH GEORGE

[SEAL] *Register.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

I, John W. McKim, Esquire, Judge of the Probate Court within and for the County of Suffolk, hereby certify that Elijah George, Esquire, whose signature is affixed to the annexed certificates and attestation, is the Register and proper Certifying Officer of said Court, and has, by law, the custody of the seal, and all the Records, books, documents and papers of, or appertaining to said Court, and that said certificates and attestation are in due form and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand, this first day of September in the year of our Lord one thousand nine hundred and four.

JOHN W. McKIM

[SEAL] *Judge of Probate Court.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. REGISTRY OF PROBATE.

I, Elijah George, Esquire, Register of the Probate Court within and for the County of Suffolk, hereby certify that John W. McKim, Esquire, whose signature is affixed to the annexed Certificate, is the senior presiding Judge of said Court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, this first day of September in the year of our Lord one thousand nine hundred and four.

ELIJAH GEORGE

[SEAL] *Register.*

To the Honorable the Judge of the Probate Court in and for the County of Suffolk in the Commonwealth of Massachusetts.

Respectfully represents Henry A. Root of the City of Butte, State of Montana, Herbert P. Cummings of Ware in the State of Massachusetts, executor of the estate of Sarah Maria Cummings, Joseph A. Coram of Lowell, Massachusetts, and Ellen S. Corune of Croton Falls in the State of New York.

I. That Andrew J. Davis, of Butte, in the State of Montana, died on the 11th day of March, 1890, testate, and at the time of his death had estate in said County of Suffolk on which his will would operate.

II. That after a contest upon the allowance of the will of said Andrew J. Davis in said State of Montana, a compromise agreement was entered into by certain persons interested by which the rights of such persons so agreeing in the estate of said Andrew J. Davis were agreed upon and fixed.

III. That thereupon, to wit, on the 27th day of March, 1895, the Second Judicial District Court of the State of Montana in and for the County of Silver Bow, having full jurisdiction in the premises, and in pursuance of said agreement, admitted the will of said Andrew J. Davis to probate, and by its decrees determined the proportionate interests of certain parties in said estate. A copy of

said will and of said decree of 1895 is hereto annexed and marked Exhibit A.

IV. That subsequently in the year 1897, and after applications for revocation of said probate had been instituted and were pending, certain further compromise agreements were entered into by other persons interested in said estate, one of which was dated June 22, 1897, and made by and with all of the heirs and next of kin of the said Andrew J. Davis, deceased.

V. That upon the making of said agreement of compromise in said year 1897, it was ordered by said Probate Court of Montana, by order dated August 24, 1897, that the action of John E. Davis, as Administrator of the estate of John A. Davis, deceased, in making said agreement of compromise be approved and affirmed, and that thereafter, upon petitions duly made on the said 24th day of August, 1897, said District Court in Montana, being the Probate Court, modified said decree of probate, dated March 27, 1895, as appears by a copy of said decree of August 24, 1897, a copy of which is hereto annexed and marked Exhibit B.

VI. That said decree of said Montana District Court, Exhibit B, dated August 24, 1897, is in full force and effect, is final and cannot in any respect be modified or changed, and sets forth the shares or interests in said estate of Andrew J. Davis to which the persons therein mentioned are entitled, which shares and interests are as follows:

Two hundred eleven hundredths (200/1100) thereof in kind to John E. Davis, as administrator of the said estate of John A. Davis, deceased; two hundred and fifty eleven hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty four eleven hundredths (44/1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven hundredths (50/1100) thereof in kind to Calvin P. Davis; fifty eleven hundredths (50/1100) thereof in kind to Harriet Wood; twenty five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith; fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed in and by

the compromise agreement dated April 23, 1893, are entitled to have and receive as such trustees and for such purposes of such trust four hundred and thirty one eleven hundredths (431/1100) of said estate in kind.

VII. That the bequests to Pet Davis, Thomas Jefferson Davis, and Miss Bergett, mentioned in said will of said deceased, have been paid.

That Harriet Wood, mentioned in said decree, was a resident of Springfield, in the County of Hampden in Massachusetts and died testate, in the year 1900, and Harriet S. Holton of said Springfield has been appointed by the Probate Court of said Hampden County, her executrix and that she has duly qualified as such executrix and is still acting as such.

That said Sarah Maria Cummings, mentioned in said decree, was a resident of Ware, in the County of Hampshire, in the State of Massachusetts, and died testate April 5, 1901, and Herbert P. Cummings of said Ware has been appointed by the Probate Court of said Hampshire County her executor and that he has duly qualified as such executor and is still acting as such.

That the interests of said Mary L. Dunbar, Elizabeth S. Ladd, and Charles H. Ladd in and to the estate of the said Andrew J. Davis, and under said decree have been assigned and transferred to Joseph A. Coram of Lowell, Massachusetts.

VIII. That the names and residences of the persons mentioned in said decrees hereto annexed, marked Exhibit A, and Exhibit B, and interested in said estate, are as follows:

Herbert P. Cummings, Executor. Ware, Massachusetts.
Ellen S. Cornue Croton Falls, N. Y.
Joshua G. Cornue " " "
Joseph A. Coram Lowell, Mass.
Elizabeth S. Bowdoin Springfield, Mass.
John A. Bowdoin " "
Harriet S. Holton, Executrix. " "
Harry A. Davis Monson, Mass.
Harriet R. Sheffield New Rochelle, N. Y.
Calvin P. Davis Peachland, California.
Elizabeth A. Smith Oakland, "

Charles H. Palmer, Trustee Boston, Mass.
John E. Davis, Administrator Butte, Montana.
Andrew J. Davis, Jr., Trustee " "
Henry A. Root " "

IX. That John H. Leyson, a resident of Butte in the State of Montana, was appointed in said State of Montana by said Court as Administrator with the will annexed of Andrew J. Davis, deceased, on the 23rd day of April, 1895, accepted said trust and is still acting as such Administrator; a copy of the letters of administration granted to him and of his oath as such administrator is hereto annexed and found in said Exhibit A.

X. That on the 8th day of October, 1897, said John H. Leyson filed a petition to this Court to be appointed Administrator with the will annexed of the said Andrew J. Davis within this Commonwealth, and that said petitioner filed with such petition a duly authenticated copy of the will of said Andrew J. Davis and of the probate thereof in said State of Montana: that this Court granted the said petition and appointed said John H. Leyson such administrator within this Commonwealth on the 10th day of March, 1898. Said Leyson accepted such appointment and gave the bond ordered by this Court, and is still acting as such Administrator.

XI. That said Leyson, Administrator appointed by this Court, has paid from the estate of said Andrew J. Davis in this Commonwealth, all of the debts for which the estate of said Andrew J. Davis is liable in this Commonwealth, and as such administrator has in his hands and possession one hundred seventy (170) bonds of the Butte & Boston Consolidated Mining Company of the par value of $1000 each and about the sum of three hundred thirty seven thousand dollars ($337,000) in cash.

XII. That said Leyson, administrator as aforesaid, has had in his possession the foregoing number of bonds and the large amount in cash for a period of several years last past, and that the said bonds and cash should be distributed to the persons entitled thereto without delay.

XIII. That the petitioners are parties interested in the estate of Andrew J. Davis under said decrees probating the will of said Andrew J. Davis and are desirous that their shares of said bonds

and cash or a just portion thereof in the discretion of the Court should be transmitted forthwith by said Leyson as ancillary administrator in the State of Massachusetts to said Leyson as permanent administrator in the State of Montana to be there disposed of to your petitioners according to the laws of said state.

Wherefore your petitioners pray that said John H. Leyson, administrator with the will annexed of said Andrew J. Davis, appointed as above set forth in this Commonwealth, may be ordered by this Court, to transmit to himself, as administrator with the will annexed of the said estate of Andrew J. Davis in the State of Montana, the whole or part of the property of said estate in his hands and possession as administrator in said Commonwealth, to be disposed of in said State of Montana according to the laws thereof.

Or that said John H. Leyson, administrator with the will annexed of said Andrew J. Davis appointed as above set forth in this Commonwealth may be ordered by this Court to transmit to himself, as administrator of the said estate of Andrew J. Davis in the State of Montana, the shares and portions of said estate of Andrew J. Davis in his hands and possession as administrator in said Commonwealth to which your petitioners are entitled or so much thereof as this Court may deem just, to be disposed of in said State of Montana to said petitioners according to the laws thereof.

And your petitioners pray that a similar order may be entered in this Court directing the transmission to said State of Montana of the shares and portions of any other person or persons interested in the said estate under said decrees as may come into this court and join in this petition upon the hearing thereof.

HENRY A. ROOT
HERBERT P. CUMMINGS,
Executor of the last will & testament of Sarah Maria Cummings
By Henry A. Root, his attorney
ELLEN S. CORNUE
By Henry A. Root her attorney
JOSEPH A. CORAM
Petitioners

STATE OF MASSACHUSETTS

COUNTY OF HAMPDEN ss. DECEMBER 2, 1903

Then personally appeared the above named Henry A. Root one of the petitioners, and made oath to the truth of the above representation according to the best of his knowledge and belief.

Before me, EDWARD H. LATHROP,

(SEAL) *Notary Public.*

A.

SECOND JUDICIAL DISTRICT COURT, STATE OF MONTANA, SILVER BOW COUNTY.

In the Matter of the Estate of Andrew J. Davis, Deceased.

No. 980

STATE OF MONTANA

COUNTY OF SILVER BOW ss.

The last will of Andrew J. Davis, deceased, a copy of which is hereto annexed, having been proved and recorded in the Second Judicial District Court of Montana, within and for Silver Bow County & the executors named in said will being dead,

John H. Leyson, of Butte, Silver Bow County, Montana, is hereby appointed administrator with the will annexed.

Witness, E. A. Niedenhofen, Clerk of said Court, with the Seal thereof affixed, this, the twenty-third of April, A. D. 1895.

By Order of the Court:

H. A. NIEDENHOFEN,

(COURT SEAL) *Clerk of said Court.*

Know all men by these presence that I, A. J. Davis, of the County of Van Buren, & State of Iowa, being in good health of sound and Desposing mind & memory do make and publish this my last will and testament & as to my worldly estate & all the property real personal and mixed of which I shall be seized & possessed or to which I shal be entitled at the time of my decease.

I devise, bequeath and dispose thereof in the manner following, to wit.

My will is that I guive & bequeath to Thomas Jefferson Davis & Pet Davis & her mother Miss Bergett, all three of Van Buren Co.,

Iowa, a life mantainance. That is to say they shall have the necessaries of life out of my estate during their natural life.

This amount of annuity to be set apart by my executors hereinafter named & the judgment of my executors as to the amount necessary to set apart for the support of the above named persons shall be final.

I guive devise and bequeath to my beloved brother, John A. Davis reversion or remainder of my property wherther real personal or mixed to have and to hold the same forever together with all the profits and income thereof to the said John A. Davis, his heirs admintrator or assigns to his & their use and benefit forever.

And lastly I do nominate and appoint James Davis and Job Davis of Davis County, & State of Iowa to be the executors of this my last will and testament.

In testimony whereof I, the said A. J. Davis have to this my last will and testament contained on one sheat of paper, I have subscribed my name and affixed my seal this the 20th day of July, in the year of our Lord, one thousand eight hundred and Sixty-six (1866)

A. J. Davis.

Signed, sealed published and delivered by the said A. J. Davis as and for his last will and testament in the presence of us who at his request and in his presence & in the presence of each other have subscribed our names as witnesses thereto.

Witnessed

J. C. Sconce
James Davis
Job Davis

Second Judicial District Court. State of Montana. Silver Bow County.

In the Matter of the Estate of Andrew J. Davis, Deceased. No. 2854

State of Montana
County of Silver Bow ss.

I do solemnly swear that I will support the Constitution of the United States of America and the Constitution of the State of Montana; that I will perform, according to law, the duties of administrator of the estate of Andrew J. Davis, deceased, with the will annexed.

John H. Leyson.

Subscribed and sworn to before me this twentieth day of April, A. D. 1895.

D. GAY STIVERS,

(NOTARIAL SEAL) *Notary Public, Silver Bow County, State of Montana.*

Filed Apr 23 1895.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the contest of Henry A. Root and Maria Cummings against the probate of the proposed will of the said deceased, wherein John E. Davis is proponent, and the said Henry A. Root et al., contestants. And the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, and wherein John E. Davis, administrator of said John A. Davis, deceased, has been substituted for said deceased.

The petition of John A. Davis, deceased, heretofore filed, praying for the admission to probate of a certain document, filed in this Court, purporting to be the last will and testament of Andrew J. Davis, deceased, and that letters testamentary be issued to said petitioner, this day, regularly coming on to be heard, and it appearing to the Court that John E. Davis has been duly appointed administrator of the estate of said petitioner, John A. Davis, deceased, and that letters of administration have been duly issued to him, and that he is duly qualified and acting as such, and that the said John E. Davis, administrator as aforesaid, has been duly substituted for and in the place of the said John A. Davis, deceased, and said petition having, by leave of the Court, been amended accordingly, and it appearing that the contests of the said Henry A. Root and Maria Cummings, and of Harriet R. Sheffield, and Henry A. Davis, have been compromised and settled, and the said contests this day dismissed and withdrawn in open Court in pursuance of stipulations and agreements, and it appearing that there is no further contest or opposition to the probate of the said alleged will, and due proof having been made to the satisfaction of this court that due notice had been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served as required by the previous order of this Court; and it fur-

ther appearing to this Court that notice has been given according to law, to all parties interested, and after examining John C. Sconce and Mary A. Downey produced on behalf of said petitioner, whose testimony has been reduced to writing and filed herein, from which it appears that said document is the last will and testament of said Andrew J. Davis, deceased; and that it was executed in all particulars as required by law, and that said testator at the time of the execution of the same was of sound and disposing mind, and not under restraint and not acting under duress, menace, fraud or undue influence; that said Andrew J. Davis, deceased, died on the 11th day of March, A. D. 1890, being a resident of the City of Butte, County of Silver Bow, State of Montana, at the time of his death, and leaving both real and personal estate in said County and State and elsewhere.

That the said estate and effects for and in respect of which the probate of said will is applied for, as aforesaid, does not exceed the value of Three Million Dollars:

And all the parties hereto appearing in open Court by their respective attorneys, and in pursuance of the stipulations and agreements and consent in open Court, and upon the proofs aforesaid,

It is ordered that the said document heretofore filed, purporting to be the last will and testament of the said Andrew J. Davis, deceased, be admitted to probate, as the last will and testament of the said deceased.

And it appearing by the said agreements and stipulations of the parties and by consent duly entered in open Court that Harriet R. Sheffield, now of Northport, Suffolk County, State of New York, and Henry A. Davis, of the town of Monson, State of Massachusetts, are the sole heirs at law of Asa Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive each one fiftieth (1/50) in kind of said estate upon the distribution or distributions of said estate.

And it further appearing by said agreements and stipulations of the parties and by consent duly had in open Court that Andrew J. Davis and John E. Davis, of the City of Butte and State of Mon-

tana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the City of Chicago and State of Illinois, are the sole heirs at law of John A. Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive upon final distribution of said estate, nineteen forty fourths (19/44) of the remainder of said estate after deducting one twenty fifth (1/25) thereof hereinbefore provided for Harriet R. Sheffield and Henry A. Davis, subject however, to the bequests of said will, no part of which bequests are to be borne by said one twenty fifth (1/25) of said estate belonging to said Sheffield and Davis.

And it further appearing by said agreements and stipulations of the parties, and by consent duly had in open Court that Henry A. Root, of the City of Helena, State of Montana, and Ellen S. Cornue, of the town of Croton Falls and State of New York, are the children and sole heirs of Anna C. Root, deceased, a sister of said Andrew J. Davis, and that Sarah Maria Cummings, widow, of the town of Ware and State of Massachusetts, is a sister of said Andrew J. Davis, deceased and Mary Louise Dunbar, an unmarried woman, of the City of Springfield and state of Massachusetts, is a neice of the said Andrew J. Davis, deceased, and Elizabeth S. Ladd, of the City of Springfield and State of Massachusetts, is a child and heir of Sophronia Firmin, deceased, who is also a sister of said Andrew J. Davis, deceased, and Charles H. Ladd, her husband, and Joshua G. Cornue, husband of the said Ellen S. Cornue, and are entitled to have and receive twenty five forty-fourths (25/44) of the remainder of said estate, after the one twenty fifth (1/25) thereof above provided for said Harriet R. Sheffield and Henry A. Davis, subject to said bequests made in said will.

Now Therefore, it is ordered, adjudged and decreed in pursuance thereof, that the said Harriet R. Sheffield, of the town of Northport, County of Suffolk, and State of New York, and Henry A. Davis, of the town of Monson, State of Massachusetts, sole heirs at law of Asa Davis, deceased, brother of Andrew J. Davis, deceased, have and receive each one fiftieth (1/50) of said estate in kind, on the

distribution or distributions thereof: And that the said Andrew J. Davis and John E. Davis, of the City of Butte, State of Montana, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the city of Chicago, State of Illinois, have and receive nineteen forty fourths (19/44) of the remainder of said estate, after providing for the one twenty fifth (1/25) of said estate for Harriet R. Sheffield and Henry A. Davis as above, and subject to the bequests made in said will, and that said Henry A. Root, of the City of Helena, State of Montana, Sarah Maria Cummings of the town of Ware, State of Massachusetts, Mary Louise Dunbar, of the City of Springfield, State of Massachusetts, Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Charles H. Ladd, husband of the said Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Ellen S. Cornue and Joshua G. Cornue, her husband, of the town of Croton Falls, State of New York, have and receive twenty five forty fourths (25/44) of the remainder of said estate in kind, after providing for the one twenty fifth (1/25) thereof for the said Harriet H. Sheffield and Henry A. Davis, as above, subject to the bequests of said will.

And the said stipulations and agreements of the parties in interest and to be affected by this cause and proceeding, is by consent in open Court, adopted and made the basis of this order and decree, according to the terms and provisions of said stipulations and agreements.

Done in open Court this 27th day of March, 1895.

(signed) JOHN J. MCHATTON,
Judge.

Filed Mar 27 1895 at 10.25 A. M.

H. A. NIEDENHOFEN, *Clerk.*
By C. C. HENDERSON, *Deputy.*

B.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root et al, contestants; and the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, deceased, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it Remembered That on the 24th day of August, 1897, the petition in the above entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the Court has been heretofore made on the 24th day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contest now pending are represented by attorneys in Court.

It is Ordered that the contests heretofore instituted in Court by Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, be and the same are hereby dismissed, (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this Court heretofore made on the 27th day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this Court confirming the making, executing and delivering the same, it is Ordered, Adjudged and Decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the said administrator of the estate of said Andrew J. Davis, deceased, with the will annexed, keep, retain, and hold in his possession and under his

control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreement, said order and the provisions thereof.

And it is hereby Ordered, Adjudged and Decreed in pursuance of said compromise agreement and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis, deceased, and so held, retained and controlled by said administrator, and be distributed by him, be, and the same are hereby established and declared to be as follows, to wit: That is to say:— Subject to the bequests in said will of said Andrew J. Davis, deceased given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate. The parties to said compromise agreement are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:—

Two hundred eleven hundredths (200/1100) thereof in kind to John E. Davis, as administrator of the said estate of John A. Davis, deceased, two hundred and fifty eleven hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty-four eleven hundredths (44/1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven hundredths (50/1100) thereof in kind to Calvin P. Davis; fifty eleven hundredths (50/1100) thereof in kind to Harriet Wood; twenty five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith, fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer trustees appointed in and by the compromise agreement dated April 23, 1893, are entitled to have and receive as such trustees and for such purposes of such trust four hundred and thirty one eleven hundredths (431/1100) of said estate in kind.

It being Further Ordered, however, that no portion of the real estate owned by the said Andrew J. Davis, and situated in the State of Iowa, shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be

entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be affected by this cause and proceeding are, by consent in open court, adopted and made the basis of this order and decree, according to the terms and provisions of said contract and agreements.

Done in Open Court this 24th day of August, A. D., 1897.

JOHN LINDSAY, *Judge.*

Filed August 24th 1897.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

To John H. Leyson, administrator with the will annexed, and to all persons interested in the estate of Andrew J. Davis, late of Butte, in the State of Montana, deceased.

Whereas Henry A. Root, Herbert P. Cummings, Joseph A. Coram and Ellen S. Cornue, have presented to said Court, their petition praying that said John H. Leyson as administrator with the will annexed of said estate in the State of Massachusetts be ordered to transmit to himself as administrator with the will annexed in the State of Montana, the whole of said estate in said Commonwealth, or that portion thereof to which said petitioners are entitled, to be disposed of in said State of Montana to said petitioners according to the laws thereof.

You are hereby cited to appear at a Probate Court, to be held at Boston, in said County of Suffolk, on the twenty-fourth day of December A. D. 1903, at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted. And said petitioners are ordered to serve this citation by mailing, post-paid, or delivering a copy thereof to each of you fourteen days at least, before said Court, and by publishing the same once in each week, for three successive weeks, in the Boston Daily Advertiser, a newspaper published in Boston, the last publication to be one day at least before said Court.

Witness, John W. McKim, Esquire, Judge of said Court, this third day of December in the year one thousand nine hundred and three.

ELIJAH GEORGE, *Register*.

I have served the foregoing citation as therein ordered by

HENRY A. ROOT

SUFFOLK, ss.

Dec. 24, A. D. 1903 Personally appeared Henry A. Root and made oath to the truth of the above return by him subscribed.

Before me,

D E WEBSTER *Justice of the Peace*.

[Endorsed:]

Andrew J. Davis
Petition, Citation and Decree for Admr. in Mass. to transmit Estate to himself as Admr. in Montana.
Filed Dec. 23- 1903.
Returnable " 24- 1903.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. In Equity & Probate.

SUPREME JUDICIAL COURT.

No. 6132.

JOHN H. LEYSON, Petitioner, Appellee,

vs.

ERWIN DAVIS, respondent, Appellant.

DECREE.

This case came on to be heard and was argued by counsel and thereupon, on consideration thereof, it is ordered, adjudged and decreed that said appeal be dismissed; that the decree of the Probate Court admitting to Probate the will of Andrew J. Davis late of Butte, Montana, and appointing John H. Leyson of said Butte, administrator with said will annexed, be and the same hereby is affirmed; that said cause be remitted to the Probate Court for further proceedings not inconsistent herewith.

By the Court,

March 9, 1898. JOHN NOBLE, *Clerk*.

A true copy, Attest:

(SEAL) C. H. COOPER, *Asst. Clerk*.

The foregoing copy is typewritten in the original and the following words appear written in ink on the back of the paper.

"Decree It is agreed that the within decree may be entered all appeal from it is waived

(sgd.) H G ALLEN
Solicitor for John H Leyson
R M SALTONSTALL
RICHARD W HALE
Solicitors for Erwin Davis"

COMPLAINANT'S EXHIBIT LXIII. IN REBUTTAL.

[Put in Evidence, page 462.]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. REGISTRY OF PROBATE.

I, Elijah George, Register of the Probate Court for said County of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said Court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said Court, and on file and of record in the Office of said Court, to wit: — the petition for amendment and extension of decree admitting the foreign will of Andrew J. Davis, late of Butte, Montana, deceased, to probate, or revocation of former decree and entry of proper order or decree in the premises and for distribution of shares in Massachusetts and the order of notice on said petition: — and the affidavit of John E. Davis, filed August 25, 1904.

In witness whereof, I have hereunto set my hand and the seal of said Court, this thirtieth day of August in the year of our Lord one thousand nine hundred and four.

ELIJAH GEORGE
Register.

[SEAL]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

I, John W. McKim, Esquire, Judge of the Probate Court within and for the County of Suffolk, hereby certify that Elijah George, Esquire, whose signature is affixed to the annexed certificates and

attestation, is the Register and proper Certifying Officer of said Court, and has, by law, the custody of the seal, and all the Records, books, documents and papers of, or appertaining to said Court, and that said certificates and attestation are in due form and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand, this thirtieth day of August in the year of our Lord one thousand nine hundred and four.

JOHN W. McKIM
Judge of Probate Court.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. REGISTRY OF PROBATE.

I, Elijah George, Esquire, Register of the Probate Court within and for the County of Suffolk, hereby certify that John W. McKim, Esquire, whose signature is affixed to the annexed Certificate, is the senior presiding Judge of said Court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, this thirtieth day of August in the year of our Lord one thousand nine hundred and four.

ELIJAH GEORGE
Register.

[SEAL.]

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents John E. Davis, of the City of Butte, Silver Bow County, State of Montana, as administrator of the estate of John A. Davis deceased, that Andrew J. Davis a citizen and resident of said place died thereat on or about March 11, 1890, leaving certain money and other personal property situate in Suffolk County, Commonwealth of Massachusetts, of the value of about five hundred thousand dollars, and real and personal estate situate in the State of Montana, and elsewhere of great value, and leaving him surviving brothers and sisters, nephews and nieces, who were his next of kin and heirs at law.

That thereafter in July 1890 a writing purporting to be the l
will and testament of said Andrew dated in the year 1866, was offe
for admission to probate in the District Court of the Second Judic
District of the State of Montana within and for the County of Silv
Bow, the Court having domiciliary jurisdiction of the estate of s
Andrew J. Davis, deceased, by John A. Davis who is named in s
will as legatee and devisee of the estate of Andrew, with the exce
tion of three minor bequests of maintenance given to other perso
mentioned in said will. That thereupon contests of the validity
said will and objections to the admission thereof to probate we
instituted in said District Court of the State of Montana in the na
of Henry A. Root a nephew, and Sarah Maria Cummings a sister,
said Andrew J. Davis, and prosecuted for a long period of time
behalf of said Root and Cummings and other heirs at law of sa
Andrew, associated together in said will contests.

That while said contests were pending, on or about January 2
1893 John A. Davis proponent of, and devisee and legatee und
said will, died intestate leaving him surviving, next of kin and hei
at law, and thereafter one of them, your petitioner John E. Davi
was by order duly made and entered in and by said District Cou
of the State of Montana, appointed administrator of the estate
John A. Davis deceased, and your petitioner qualified as su
administrator, and letters of administration of and upon the esta
of John A. Davis, deceased were thereupon duly issued to yo
petitioner appointing and commissioning him as such administrat
of John A. Davis, deceased, dated March 11, 1893, a duly authe
ticated copy of which letters are hereto annexed marked "Exhib
A", and made a part hereof; and your petitioner has ever sinc
been and now is the duly appointed, qualified and acting admini
trator and legal representative of John A. Davis deceased, and
such your petitioner was duly substituted as proponent of said wi
of Andrew J. Davis deceased, in place of said John A. Davis, an
made party adverse to the contestants in all contests of said wi
herein mentioned.

That thereafter in the year 1893 by reason and in consideratio
of the prosecution of said will contests and litigation involving th

estate of Andrew J. Davis deceased, and for the purpose and in consideration of determining the same, stipulations were made in writing by your petitioner as administrator and legal representative of John A. Davis the deceased proponent of and legatee and devisee under said will and his heirs, to and with said contestants of said will and other heirs of said Andrew associated in said contests, providing and stipulating to the effect that judgment or decree might be entered in and by said District Court of the State of Montana, in said will contests, adjudging and decreeing that said contestants and other heirs associated with them in said will contests shall have certain parts, shares, and parcels of said estate of Andrew J. Davis deceased, and that such shares shall be distributed and delivered to said contestants and other heirs at law of said Andrew associated in said will contests, as their property in kind on the distribution of said estate, after all contests and litigation which were then pending or which might thereafter be instituted were determined and subject to the determination thereof.

That thereafter on March 27, 1895, said District Court of the State of Montana duly made and entered its judgment and decree in said contests, ordering, adjudging and decreeing among other things that said heirs associated in said will contests, to-wit, Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue and her husband Joshua G. Cornue, Elizabeth S. Ladd and her husband Charles H. Ladd, and Mary L. Dunbar, should have certain portions of said estate in kind on distribution thereof, and also that certain other heirs at law of said Andrew who had interposed contests of said will should have certain portions of said estate in kind on distribution thereof, none of whom were named as legatee or devisee in said will, but were awarded and decreed certain portions of said estate according to said stipulations made by your petitioner as administratrix and legal representative of John A. Davis deceased, and his heirs, in consideration of the prosecution of said will contests in order to determine the same, and end said litigation over the estate of Andrew, a duly authenticated copy of which decree last mentioned is hereto annexed marked "Exhibit B" and made a part of this petition.

That other contests of said will were also instituted in said D
trict Court of Montana by other heirs at law of said Andrew
Davis, which were pending until or about August 24, 1897, prio
which date agreements were made between the last mentioned c
testants, and all the parties to said stipulations and agreements
above mentioned, by which it was stipulated and agreed that c
of said last mentioned contestants should have certain shares of
estate of Andrew J. Davis deceased, in kind, to be awarded
decreed to them by a decree of said District Court to be ente
finally determining all of said will contests and fixing the shares
said estate which each of said contestants and other heirs at law
said Andrew J. Davis should have in kind on distribution thereo

That said District Court of Montana also having jurisdiction
the estate of John A. Davis deceased, on or about August 24, 18
by its order duly made and entered of record approved the action
your petitioner John E. Davis as administrator of the estate of Jo
A. Davis deceased, in entering into and making each and all of
stipulations and agreements for the determination of said will c
tests, and the division and distribution of said estate, as therein p
vided, and duly ratified and confirmed each and all of said agr
ments and stipulations. And said District Court of Montana
found, adjudged and decreed, the value of each and all annuit
mentioned in said will of Andrew J. Davis deceased, at sums wh
do not exceed in the aggregate fifteen thousand dollars, and orde
the same paid out of funds of said estate, and each and all of
annuities have been heretofore fully paid and discharged.

That said District Court of the State of Montana on August
1897, also made and entered of record its final judgment and dec
in the matter of said will contests, in accordance with the stipu
tions and agreements aforesaid, determining each and all of said w
contests, and adjudging and decreeing that said estate shall
divided and distributed in kind to the persons, and in shares, pa
and parcels as in said decree provided, as follows: Two hundr
eleven hundredths (200/1100) thereof in kind to John E. Davis
administrator of the estate of John A. Davis deceased; two hundr
and fifty eleven hundredths (250/1100) thereof in kind to Henry

Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd and Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue: forty four eleven hundredths (44/1100) thereof in kind to Harriet R Sheffield and Henry A. Davis: fifty eleven hundredths (50/1100) thereof in kind to Calvin P. Davis: fifty eleven hundredths (50/1100) thereof in kind to Harriet Wood: twenty-five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith: fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin: and four hundred and thirty-one eleven hundredths (431/1100) thereof in kind to Andrew J. Davis, Jr., and Charles H. Palmer, trustees. That a duly authenticated copy of said last mentioned decree is hereto annexed marked "Exhibit C", and made a part hereof.

That said last mentioned decree is final and controling and vests in the persons therein mentioned right and title to said estate both real and personal in kind wherever situate, in the shares respectively as therein provided, which effect of said decree is so declared by the Supreme Court of the State of Montana, the highest judicial tribunal of said State in determining an appeal from an order of distribution of property of said estate made in accordance with said last mentioned decree, in which appeal the validity of said decree of August 24, 1897 determining said will contest and ordering and decreeing the division and distribution of said estate contrary to the terms of said will, was drawn in question; that in its opinion and decision determining said appeal (which is published under the authority of the State of Montana in volume 27 of Montana Reports at page 490 *et seq.*), the Supreme Court of Montana declared that said District Court had jurisdiction to make and enter said order, judgment and decree of August 24, 1897, of which a copy is hereto annexed marked "Exhibit C"; that it is a valid and binding decree and became the basis of administration and controling as to the devolution of the property of said estate; that each party named in said judgment or decree became thereby entitled to such share of said estate of Andrew J. Davis deceased, as provided in said decree to the same effect as if named as legatee or devisee to the same extent.

That each and all claims presented, allowed or asserted against the estate of Andrew J. Davis deceased in Montana have been fully

paid out of funds of said estate; and money and other personal property of said estate of Andrew J. Davis deceased situate in Montana of the value of about a million dollars, and real estate consisting principally of mining property situate in said Silver Bow County of great value, have heretofore been distributed, paid over and delivered, in accordance with the provisions of said decree of August 24, 1897, a copy of which is hereto annexed marked "Exhibit C", to the persons therein named or their assigns in shares and parcels as therein provided.

And your petitioner further represents that by reason of said proceedings, stipulations, agreements, decisions and decrees, of said District Court of the State of Montana, the persons named in said decree of August 24, 1897 and their assigns, are entitled to the property of said estate of Andrew J. Davis, deceased, situate in Massachusetts, in the shares and portions, respectively as provided in said decree of August 24, 1897, finally determining said will contests, a copy of which is hereto annexed marked "Exhibit C"; that your petitioner as the administrator and legal representative of John A. Davis the deceased legatee and devisee named in said will is entitled to have distributed to him directly, two hundred eleven hundredths (200/1100) of the property of said estate of Andrew J. Davis situate in Suffolk County, Massachusetts, and your petitioner as administrator and legal representative of John A. Davis deceased, is also entitled to have and receive through Andrew J. Davis, Jr., and Charles H. Palmer trustee in accordance with the provisions of their trust in the premises, one hundred sixty five and a half-eleven hundredths (165½/1100), out of said 431/1100 of the money and other personal property of said estate situate in Massachusetts, alloted and decreed to said trustees by said decree of August 24, 1897, determining said will contests, of which a copy is hereto annexed marked "Exhibit C"; that by reason of said agreements, stipulations, proceedings and decrees of said Courts of Montana your petitioner as the administrator and legal representative of John A. Davis the deceased legatee and devisee under said will cannot lawfully claim or demand or take or hold, and does not claim nor can the heirs of said John A. Davis claim, take or hold, nor do they

claim or demand, any part of the property belonging to the estate of Andrew J. Davis deceased situate in Suffolk County, Massachusetts, other than said two hundred-eleven hundredths (200 1100) thereof to which your petitioner is entitled directly as provided in said decree of August 24, 1897, and said one hundred and sixty-five and a half eleven hundredths (165½/1100) of said money and other personal property of said estate situate in Suffolk County, Massachusetts, through said trustees, according to the terms and conditions of their trust: that the other parts of said money and personal property of said estate of Andrew situate in Massachusetts after administration thereon is the property of, and should be distributed and delivered to said other persons mentioned in said decree of August 24, 1897, or their legal representatives or assigns, in parts and portions as therein provided, and the remaining two hundred sixty-five and a half eleven hundredths (265½/1100) of said 431 1100 of said money and personal property situate in Massachusetts, is allotted by said decree of August 24, 1897, to said Andrew J. Davis, Jr., and Charles H. Palmer as trustees in trust for the use and benefit of said five heirs associated in said will contests prosecuted in the names of said Root and Cummings, to-wit, Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary L. Dunbar and their representatives as their part of said 431/1100 of the estate of said Andrew decreed to said trustees.

And your petitioner further represents that there is now no dispute or contention whatever as to the shares or portions of said estate of Andrew J. Davis deceased, to which each of said heirs formerly contesting said will and contending for a share of said estate are entitled, the same being fully and finally settled and determined by said decree of August 24, 1897, and all property of said estate of Andrew situate in the Commonwealth of Massachusetts, ought to be divided and distributed in accordance with the provisions of said decree of August 24, 1897, finally determining said will contests, and fixing, adjudging and decreeing the shares, of said estate to which each party is entitled as therein set forth. And your petitioner is informed and believes that during the administration of that part of the estate of Andrew J. Davis deceased, situate

in Suffolk County, Massachusetts, this Honorable Probate Court of said County, has recognized the rights, shares and interests of each and all of said persons as mentioned and provided in said decree of said District Court of Montana of August 24, 1897, in and to that part of said estate within the jurisdiction of this Honorable Probate Court in the Commonwealth of Massachusetts, as ought to be done according to the laws of said Commonwealth.

That after said proceedings, stipulations, and decrees had been made and entered in and by said District Court of Montana as aforesaid, John H. Leyson who had been theretofore appointed by said District Court of Montana administrator of the estate of Andrew J. Davis deceased, with the will annexed as modified and superseded by said decree, and had duly qualified and was administering and distributing said estate in Montana pursuant to the provisions of said decree of August 24, 1897, presented to this Honorable Probate Court in and for the County of Suffolk, Massachusetts, his petition, together with a duly authenticated copy of said will of Andrew J. Davis deceased, and of said judgment rendered and entered by said District Court of the State of Montana on March 27, 1895, in said contests of said will whereby it was ordered and decreed that said estate shall be divided and distributed contrary to the provisions of said will; and thereupon as your petitioner is informed and believes said John H. Leyson prayed this Honorable Probate Court in and for the County of Suffolk, Massachusetts to receive and admit said will to probate as a foreign will admitted to probate in the State of Montana, inadvertently omitting to set forth and show to this Court that said will although referred to in said decree thereto annexed as having been admitted to probate, was in fact and in law superseded by the further terms and provisions of said decree thereto annexed made pursuant to the proceedings and stipulations therein mentioned; that thereupon the said John H. Leyson further prayed this Honorable Probate Court of Suffolk County, Massachusetts to appoint him as administrator with the will annexed, of the estate of Andrew J. Davis deceased, situate in Suffolk County, Commonwealth of Massachusetts; that thereupon said will which had in fact and in law been superseded by said decrees made and entered by

said District Court of Montana pursuant to said agreements, stipulations and proceedings, as aforesaid, with an authenticated copy of said decree of said District Court of Montana made and entered March 27, 1895 thereto annexed, was received by this Honorable Probate Court in and for Suffolk County, Massachusetts, and duly filed and recorded, without, as your petitioner is informed and believes through inadvertence, fully showing and making it appear in the order or decree and record admitting said will with said decree of said Montana Court thereto annexed, that the said will had been modified and superseded by the agreements, proceedings, decisions and decrees of said District Court in the State of Montana, except in so far as the same is shown by said decree, a duly certified copy of which is annexed to and filed with the copy of said will in this Honorable Probate Court of Suffolk County. That thereupon said John H. Leyson was by order of this Honorable Court appointed administrator with the will annexed of the estate of Andrew J. Davis deceased, situate in Suffolk County, Massachusetts, and he qualified, and letters of administration were issued to him, and he has ever since been and now is acting as such administrator in Massachusetts.

That each and all claims if any claimed and allowed by this Court against the estate of Andrew J. Davis deceased, in the Commonwealth of Massachusetts have been fully paid and discharged: that said John H. Leyson as such administrator in this Commonwealth has in his custody a large amount of money and other personal property, to-wit, the sum of about $337,000 current money of the United States and 170 interest bearing bonds issued by the Butte & Boston Consolidated Mining Company of the par value of one thousand dollars each, of which money and bonds your petitioner as administrator and legal representative of said John A. Davis deceased, is entitled to 200 1100 directly and 165 1100 through said Andrew J. Davis Jr., and Charles H. Palmer trustees, after expenses of administration of said estate in Massachusetts, allowed by this Court, are paid. That the administration of said estate in Massachusetts is finished with the exception of settling the final account of said John H. Leyson administrator, and the payment of

any expenses of administration remaining unpaid, and when the same is done there is no reason existing known to your petitioner why distribution of the shares of said funds and effects to which your petitioner is entitled, directly and through said trustees as aforesaid may not be made by order of the Honorable Probate Court in and for the County of Suffolk, Commonwealth of Massachusetts, without injury or prejudice to the rights of any one interested in other parts of said funds and effects situate in this Commonwealth.

That the names and places of residence respectively of the persons interested or claiming to be interested in or entitled to portions of said funds and other personal property of said estate situate in the Commonwealth of Massachusetts are as follows:

John E. Davis as administrator of the estate of John A. Davis deceased, Butte, Montana.

Andrew J. Davis Jr., trustee Butte, Montana.

Charles H. Palmer, trustee Boston, Massachusetts.

Henry A. Root Butte, Montana.

Ellen S. Cornue Croton Falls, New York.

Joshua G. Cornue Croton Falls, New York.

Herbert P. Cummings, Executor of Sarah Maria Cummings, Springfield, Massachusetts.

Charles H. Ladd, administrator of Elizabeth S. Ladd, Springfield, Massachusetts.

Mary Louise Dunbar, Springfield, Massachusetts.

Joseph A. Coram assignee of said Elizabeth S. Ladd, and Mary L. Dunbar, Lowell, Massachusetts.

Elizabeth S. Bowdoin, Springfield, Massachusetts.

John A. Bowdoin, Springfield, Massachusetts.

Harriet S. Holton, Executrix of Harriet Wood, Springfield, Mass.

Henry A. Davis, Monson, Massachusetts.

Harriet R. Sheffield, New Rochelle, New York.

Calvin P. Davis, Peachland, California.

George W. Davis guardian of Calvin P. Davis, Butte, Montana.

Wherefore your petitioner prays:

1. That the former orders and decree or decrees of this Honorable Court within and for the County of Suffolk, Commonwealth of

Massachusetts, admitting said will of Andrew J. Davis deceased to probate as a foreign will be amended and extended by further order of this Court or vacated modified or such order be made in place thereof as may be proper, so as to make it appear of record that said will a duly certified copy of which was filed in this Court with a copy of said decree of the said District Court of the State of Montana attached thereto has been superseded to such extent as to give full force and effect to the provisions of said decrees of said District Court of the State of Montana, duly rendered, made and entered in said contests of said will, authenticated copies of which decrees are hereto annexed marked "Exhibits B" and "Exhibit C."

2. That upon settlement in this Court of the final account of said John H. Leyson as administrator of said estate of Andrew J. Davis deceased in Massachusetts and payment of expenses of administration this Honorable Court order distribution and delivery to your petitioner as administrator and legal representative of John A. Davis deceased 200/1100 of all funds and effects belonging to said estate of Andrew J. Davis deceased, remaining in the custody of said John H. Leyson as administrator, situate in the Commonwealth of Massachusetts: and further order distributed and delivered to said Andrew J. Davis Jr., trustee, 165½/1100 of all funds and effects belonging to said estate of Andrew J. Davis deceased, remaining in the custody of said John H. Leyson, as such administrator of said estate situate in the Commonwealth of Massachusetts.

JOHN E. DAVIS,
Administrator of the Estate of
John A. Davis, deceased.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

John E. Davis being first duly sworn according to law deposes and says: that he is administrator of the Estate of John A. Davis deceased, and as such is the petitioner in and by the foregoing petition: that the representations set forth in the foregoing petition are true, except as to the representations therein stated and represented on the information and belief of affiant, and as to those repre-

sentations he says the same are true, to the best of his knowledge and belief.

JOHN E. DAVIS

Subscribed and sworn to before me this 13th day of February A. D. 1904.

RAYMOND M. PLACE
Notary Public within and for Silver Bow County, State of Montana.

(L. S.)

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents Andrew J. Davis Jr., trustee mentioned in the foregoing petition of John E. Davis as administrator of the Estate of John A. Davis deceased, that the representations set forth in the foregoing petition are true, that he the said Andrew J. Davis Jr., as such trustee joins in the foregoing petition, and represents and prays as therein set forth.

ANDREW J. DAVIS

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Andrew J. Davis being first duly sworn according to law deposes and says: that he is trustee as mentioned in the foregoing petition, that the representations of said petition are true, except as to the representations therein stated and represented on information and belief, and as to those representations he says the same are true to the best of his knowledge and belief.

ANDREW J. DAVIS

Subscribed and sworn to before me this 13th day of February, A. D. 1904.

RAYMOND M. PLACE
Notary Public within and for the County of Silver Bow, State of Montana.

(L. S.)

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, John Weston, County Clerk and ex-officio Recorder in and for the County of Silver Bow, State of Montana, do hereby certify that Raymond M. Place, Esquire, whose name is subscribed to the attached certificates of acknowledgment, proof or affidavit, was at the time of taking of said acknowledgment, proof or affidavit, a Notary Public, duly commissioned and sworn, and residing in said County, and was, as such Notary Public, an officer of said State, duly authorized by the laws thereof, to administer, take and certify proof of oaths and affirmations, to affidavits and depositions as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing and that his certificates or jurats to the affidavits hereto attached are in due form as provided by the laws of said State, and full faith and credit are due and ought to be given to his official acts as such Notary Public: and I further certify that I am well acquainted with his handwriting and verily believe that the signature subscribed to the attached certificates or jurats is his genuine signature.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 13th., day of February 1904.

JOHN WESTON

(L. S.) *County Clerk and ex-officio Recorder.*

By A. C. McDANIEL *Deputy.*

EXHIBIT A.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

In the matter of the Estate of Andrew J. Davis, deceased.

LETTERS OF ADMINISTRATION.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

John E. Davis is hereby appointed Administrator of the Estate of John A. Davis, deceased.

Witness, H. A. Niedenhofen, Clerk of the District Court of the

Second Judicial District of the State of Montana, with the seal thereof affixed, the 11th., day of March, 1893.

By order of the Court.

(L. S.) H. A. NIEDENHOFEN, *Clerk.*
By A. LAIST, *Deputy Clerk.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, John E. Davis do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Montana; and that I will faithfully perform, according to law, the duties of Administrator of the Estate of John A. Davis, deceased.

JOHN E. DAVIS.

Subscribed and sworn to before me, the 11th., day of March, 1893.

(L. S.) H. A. NIEDENHOFEN, *Clerk*
By A. LAIST, *Deputy Clerk.*

Endorsed: 491
Letters of Administration.
Issued to John E. Davis, on the 11th., day of March, 1893.
Filed March 11th., 1893.
H. A. Niedenhofen, Clerk.
By A. Laist, Deputy Clerk.

EXHIBIT B.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

In the matter of the Estate of Andrew J. Davis, Deceased.

Upon the contest of Henry A. Root and Maria Cummings against the probate of the proposed will of the said deceased, wherein John E. Davis is proponent, and said Henry A. Root et al., contestants. And the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, and wherein John E. Davis, administrator of said John A. Davis, deceased, has been substituted for said deceased.

The petition of John A. Davis, deceased heretofore filed, praying for the admission to probate of a certain document, filed in this court, purporting to be the last will and testament of Andrew J. Davis, deceased, and that letters testamentary be issued to said

petitioner, this day, regularly coming on to be heard, and it appearing to the Court that John E. Davis has been duly appointed administrator of the estate of said petitioner, John A. Davis, deceased, and that letters of administration have been duly issued to him, and that he is duly qualified and acting as such, and that the said John E. Davis administrator as aforesaid, has been duly substituted for and in place of the said John A. Davis, deceased, and said petition having by leave of court been amended accordingly, and it appearing that the contests of the said Henry A. Root and Maria Cummings, and of Harriet R. Sheffield, and Henry A. Davis, have been compromised and settled, and the said contests this day dismissed and withdrawn in open court, in pursuance of stipulations and agreements, and it appearing that there is no further contest or opposition to the probate of the said alleged will, and due proof having been made to the satisfaction of this court that due notice had been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served as required by the previous order of this Court; and it further appearing to this court that notice has been given according to law, to all parties interested, and after examining John C. Sconce and Mary A. Downey produced on behalf of said petitioner, whose testimony has been reduced to writing and filed herein, from which it appears that said document is the last will and testament of said Andrew J. Davis deceased: that it is executed in all particulars as required by law and that said testator at the time of the execution of the same was of sound and disposing mind, and not under restraint and not acting under duress, menace, fraud or undue influence: that said Andrew J. Davis, deceased, died on the 11th., day of March, A. D. 1890, being a resident of the City of Butte, County of Silver Bow, State of Montana, at the time of his death, and leaving both real and personal estate in said county and State and elsewhere.

That the said estate and effects, for and in respect of which the probate of said will is applied for, does not exceed the value of three millions dollars:

And all the parties hereto appearing in open court by their respec-

tive attorneys, and in pursuance of the stipulations and agreements and coasents in open court, and upon the proofs aforesaid,

It is ordered that the said document heretofore filed, purporting to be the last will and testament of the said Andrew J. Davis, be admitted to probate, as the said last will and testament of the said deceased.

And it appearing by the said agreements and stipulations of the parties and by consent duly entered in open court that Harriet R. Sheffield, now of Northport, Suffolk County, State of New York, and Henry A. Davis of the Town of Monson, State of Massachusetts, are the sole heirs at law of Asa Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive each one-fiftieth (1-50) in kind of said estate upon the distribution or distributions of said estate.

And it further appearing by said agreements and stipulations of the parties and by consent duly had in open court that Andrew J. Davis and John E. Davis, of the City of Butte, and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis and Morris Allard Davis, all of the City of Chicago, and State of Illinois, are the sole heirs at law of John A. Davis a brother of Andrew J. Davis deceased, and are entitled to have and receive upon final distribution of said estate nineteen forty-fourths (19-44) of the remainder of said estate after deducting one-twenty-fifth (1-25) thereof hereinbefore provided for Harriet R. Sheffield and Henry A. Davis, subject however, to the bequests of said will, no part of which bequests are to be borne by said one twenty-fifth (1-25) of said estate belonging to said Sheffield and Davis.

And it further appearing by said agreements and stipulations of the parties, and by consent duly had in open court that Henry A. Root, of the City of Helena, State of Montana, and Ellen S. Corme, of the town of Croton Falls and State of New York, are the children and sole heirs of Anna C. Root, deceased, a sister of said Andrew J. Davis, and that Sarah Maria Cummings, widow, of the town of Ware and State of Massachusetts, is a sister of said Andrew J. Davis, deceased, and Mary Louise Dunbar, an unmarried woman, of

the City of Springfield and State of Massachusetts, is the niece of the said Andrew J. Davis, deceased, and Elizabeth S. Ladd, of the City of Springfield and State of Massachusetts, is a child and heir of Sophronia Firmin, deceased, who is also a sister of said Andrew J. Davis deceased, and Charles H. Ladd, her husband, and Joshua G. Cornue, husband of the said Ellen S. Cornue, and are entitled to have and receive twenty-five forty-fourths (25-44) of the remainder of said estate, after the one twenty-fifth (1-25) thereof above provided for said Harriet R. Sheffield and Henry A. Davis, subject to the said bequests made in said will.

Now Therefore, it is ordered, adjudged and decreed in pursuance thereof, that the said Harriet R. Sheffield, of the town of Northport, County of Suffolk and State of New York, and Henry A. Davis of the town of Monson, State of Massachusetts, sole heirs at law of Asa Davis deceased, brother of Andrew J. Davis, deceased, have and receive each one-fiftieth (1-50) of said estate in kind, on distribution or distributions thereof: And that the said Andrew J. Davis and John E. Davis, of the City of Butte, State of Montana, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the City of Chicago, State of Illinois, have and receive nineteen forty-fourths (19-44) of the remainder of said estate, after providing for the one twenty-fifth (1-25) of said estate for Harriet R. Sheffield and Henry A. Davis as above, and subject to the bequests made in said will, and that said Henry A. Root of the City of Helena, State of Montana, Sarah Maria Cummings, of the town of Ware, State of Massachusetts, Mary Louise Dunbar, of the City of Springfield, State of Massachusetts, Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Charles H. Ladd, husband of the said Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Ellen S. Cornue and Joshua G. Cornue, her husband, of the town of Croton Falls, State of New York, have and receive twenty-five forty fourths (25-44) of the remainder of said estate in kind, after providing for the one twenty-fifth (1-25) thereof for the said Harriet R. Sheffield and Henry A. Davis, as above, subject to the bequests of said will.

And the said stipulations and agreements of the parties in interest

and to be affected by this cause and proceeding is, by consent in open court, adopted and made a basis of this order and decree, according to the terms and provisions of said stipulations and agreements.

Done in open Court this 27th., day of March, 1895.

JOHN J. McHATTON, *Judge.*

(Filed March 27th., 1895).

EXHIBIT C.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

In the matter of the Estate of Andrew J. Davis, deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root et al, contestants; and the contest of Harriet R. Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it Remembered that on the 24th., day of August, 1897, the petition in the above entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the Court has been heretofore made on the 24th., day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contests now pending are represented by attorneys present in Court:

It is Ordered that the contests heretofore instituted in this Court by Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith, be and the same are hereby dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this Court heretofore made on the 27th., day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this Court confirming the making, executing and delivering the same, It is Ordered, Adjudged and Decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of said Andrew J. Davis, deceased, with the will annexed, keep, retain and hold in his possession and under his control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreements, said order and the provisions thereof.

And it is Hereby Ordered, Adjudged and Decreed in pursuance of said petition, said compromise agreements and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis, deceased, and so held, retained and controlled by said administrator, and to be distributed by him, be, and the same are hereby established and declared to be as follows, to-wit: That is to say: — Subject to the bequests in said will of said Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate, the parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis deceased, to wit:

Two hundred eleven hundredths (200-1100) thereof in kind to John E. Davis as administrator of the estate of John A. Davis, deceased, two hundred and fifty eleven hundredths (250-1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue: forty four eleven hundredths (44-1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis: fifty eleven hundredths (50-1100) thereof in kind to Calvin P. Davis: fifty eleven hundredths (50-1100) thereof in kind to Harriet Wood: twenty-five eleven hundredths (25-1100) thereof in kind to Elizabeth A. Smith: fifty eleven hundredths (50-1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis Jr., and Charles H. Palmer

trustees appointed in and by the compromise agreement dated April 28, 1893, are entitled to have and receive as such trustees and for the purpose of such trust four hundred and thirty one eleven hundredths (431-1100) of said estate in kind.

It being further Ordered, however, that no portion of the real estate owned by said Andrew J. Davis, and situated in the State of Iowa, shall compromise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them, as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be affected by this cause and proceeding are, by consent in open Court, adopted and made the basis of this order and decree according to the terms and provisions of said contracts and agreements.

Done in Open Court this 24th., day of August, A. D. 1897.

(Signed) JOHN LINDSAY, *Judge*.

Filed August 24th., 1897.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the foregoing writing hereto annexed marked "Exhibit A" is a true, complete and correct copy of the original letters of administration duly issued by order of said District Court, and attested with the seal thereof, to John E. Davis, appointing and commissioning him as administrator of the Estate of John A. Davis, deceased, and that said letters have not been revoked but are now in full force and effect as the same appear in the records of said Court: and that the foregoing writings hereto annexed marked "Exhibit B" and "Exhibit C" respectively is a full, true, complete and correct copy of certain judgments and decrees of said District

Court of the Second Judicial District of the State of Montana within and for the County of Silver Bow, duly rendered by said Court and entered of record in the office of the Clerk thereof, in certain contests of the will of Andrew J. Davis, deceased, instituted and prosecuted in said Court, and determined as in said orders, judgments and decrees provided, as appears by the records of said Court in the office of the Clerk thereof.

In witness whereof I have hereunto subscribed my name and office and affixed the seal of said Court at the office of the Clerk thereof in the City of Butte, said County and State, this 12th., day of February, A. D. 1904.

SAMUEL M. ROBERTS,
Clerk of the District Court of the Second Judicial District of the State of Montana, within and for the County of Silver Bow.

(L. S.)

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, E. W. Harney Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that Samuel M. Roberts, whose genuine signature is subscribed to the Annexed Certificate and Attestation, is and was, at the time of making the same the Clerk of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Clerk; that full faith and credit are due to his official acts, and that he is the legal keeper of all the Records and the Seal of said Court; that said Certificate and Attestation is in due form of law; and that the Seal affixed thereto is the genuine Seal of said Court.

Witness my hand at Butte, Montana, this 12th., day of February, A. D. 1904.

E. W. HARNEY,
Judge of said Court.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that the Honorable E. W. Harney whose name is subscribed to the annexed and foregoing certificate, is and was at the time of making the same, Judge of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Judge, to all whose acts as such, full faith and credit are due and that the signature of said Judge to said Certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said District Court, at Butte, Mont., this 12th., day of February, A. D. 1904.

SAMUEL M. ROBERTS,

(L. S.) *Clerk of said Court.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

To John H. Leyson administrator with the will annexed, and to all persons interested in the estate of Andrew J. Davis late of Butte, in the State of Montana, deceased.

Whereas John E. Davis, of said Butte, has presented to said Court, his petition praying for the amendment and extension of the decree admitting the foreign will of said deceased to probate, or the revocation of the former decree and entry of proper order or decree in the premises and for the distribution of shares in Massachusetts.

You are hereby cited to appear at a Probate Court, to be held at Boston, in said County of Suffolk, on the thirty-first day of March A. D. 1904, at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted. And said petitioner is ordered to serve this citation by mailing, postpaid, or delivering a copy thereof to each of you twenty-one days at least, before said Court, and by publishing the same once in each week, for three successive weeks, in The Boston Traveler a newspaper published in Boston, the last publication to be one day at least before said Court,

Witness, John W. McKim, Esquire, Judge of said Court, this twentieth day of February in the year one thousand nine hundred and four.

ELIJAH GEORGE, *Register*.

I being employed by and acting in behalf of the petitioner have served the foregoing citation as therein ordered by publishing and mailing.

FREDERICK M. IVES.

SUFFOLK, ss. March 30, A.D. 1904. Personally appeared Frederick M. Ives and made oath to the truth of the above return by him subscribed. Before me,

EUGENE TAPPAN *Justice of the Peace*.

[Endorsed on back:]

No. 84785. Estate of Andrew J. Davis dec'd.

Petition, Citation and Decree for Amendment and extension of decree Admitting foreign will to Probate, or revocation of former decree and entry of proper order or decree in the premises, and for distribution of shares in Massachusetts.

Filed February 20th 1904.

Returnable Mar. 31, 1904.

For Petitioners: E. N. Harwood, Attorney, Butte, Montana.

For Respondents. { Elizabeth S. Bowdoin
D. E. Webster Springfield Mass { Lizzie A. Bowdoin
{ Calvin P. Davis
H. G. Allen for John H. Leyson
John Mack.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

No. 84785.

Estate of Andrew J. Davis deceased.

UNITED STATES OF AMERICA

STATE OF MONTANA

COUNTY OF SILVER BOW, ss.

John E. Davis being first duly sworn according to law deposes and says as follows:

My name is John E. Davis, I am over the age of twenty five years and a resident and citizen of the City of Butte, Silver Bow County, State of Montana, where I have resided since April, 1885. That I am the duly appointed, qualified and acting administrator of the

estate of John A. Davis deceased. That I was well acquainted with Andrew J. Davis in his lifetime, who was my uncle, and who died at said City of Butte on March 11, 1890, where he had been for many years a citizen and resident, leaving an estate consisting of real and personal property situate in Montana and Massachusetts of the value of from two to five million dollars. I also have personal knowledge of the presentation of a writing purporting to be the last will and testament of said Andrew, dated in the year 1866, for admission to probate in the District Court of the Second Judicial District of the State of Montana in and for said County of Silver Bow, and of the litigation, which ensued in the Courts of Montana in contests of said will and otherwise over the estate of my said uncle Andrew, and as to the final determination thereof, and the administration and distribution of said estate so far as the same has been distributed.

That the next of kin and heirs at law of said Andrew, were eleven brothers and sisters, who were entitled to succeed to his estate in shares of one-eleventh each, if living, and if deceased the children of his deceased brothers and sisters were entitled to succeed to their parent's share of said estate, in case it were not disposed of by a will of said Andrew duly proved and admitted to probate.

That very soon after the death of said Andrew contentions arose between some of his heirs residing in the east and others residing in the west, over said estate, the first of which contentions related to the appointment of an administrator thereof, which was litigated in the Courts of Montana, and in which Henry A. Root a nephew and heir at law of Andrew, supported by certain eastern heirs on one side, and my father John A. Davis a brother of said Andrew, on the other side, contended for appointment, and possession of said estate, as such administrator, the history of which contention is briefly set forth in Re Davis Estate Volume 11, Montana Reports page 196 et seq.

That during the progress of said litigation a writing purporting to be the last will and testament of said Andrew made and dated in the year 1866 at Van Buren County, State of Iowa, where said Andrew then resided, was discovered, by the terms of which all his estate

both real and personal was devised and bequeathed to said John A. Davis, with the exception of maintenance provided for three persons some of whom as affiant is informed and believes were deceased prior to the death of said Andrew; and in July 1890 said writing was presented by said John A. Davis, by proper petition, for admission to probate in said District Court of Montana.

That soon after the presentation of said writing for admission to probate as the last will and testament of said Andrew, objections thereto and contests of the validity thereof were instituted in said court in the name of said Henry A. Root a nephew, and Sarah Maria Cummings a sister, of said Andrew, in opposition to the admission of said will to probate, on alleged grounds set forth in said objections and contests to the effect that said Andrew J. Davis died intestate, that said alleged will was not his will, that it was never signed by said Andrew J. Davis, nor by the witnesses, or either of them, whose names are written thereon, and that neither of said witnesses signed said writing in the presence of each other or of said Andrew J. Davis, or at all, and that said writing was fictitious, fraudulent and void, and on the further ground that long after the time when said writing purports upon its face to have been made said Andrew made another will in the State of Montana whereby he expressly revoked all former wills, and that the terms of said latter will were also inconsistent with said will dated in the year 1866 and offered for probate; and that for said reasons and on said grounds said alleged will so offered for probate was not entitled to admission to probate as the last will and testament of Andrew J. Davis, deceased; which contests were prosecuted for a long period of time in said District Court of Montana by Robert G. Ingersoll late of Dobbs Ferry, New York, and some local attorneys residing in Montana, for and on behalf of said Henry A. Root and Sarah Maria Cummings named as contestants and on behalf of Elizabeth S. Ladd, Ellen S. Cornue, and Mary L. Dunbar, nieces and heirs at law of said Andrew; the said five heirs so associated in prosecuting said will contests being entitled as next of kin and heirs at law of said Andrew to succeed to shares of his estate as follows: Sarah Maria Cummings being a sister of said Andrew was entitled to one-eleventh (1/11) or

106/1100 of his estate: Henry A. Root and Ellen S. Cornue being the only heirs at law of Anna C. Root, a deceased sister of said Andrew were entitled to one-twenty second (1/22) or 50/1100 each of his estate: the said Elizabeth S. Ladd being the child and only heir of Sophronia Firman a deceased sister of said Andrew was entitled to one-eleventh (1/11) or 100/1100 of his estate: and the said Mary L. Dunbar being one of the two children and only heirs of Roxana Dunbar a deceased sister of said Andrew was entitled to one-twenty second (1/22) or 50/1100 of his estate: and said five heirs associated in said will contests prosecuted by said Robert G. Ingersoll were altogether entitled to 3½/11 or 350/1100 of Andrew's estate in case the same were not otherwise disposed of by his will, but none of said five heirs were named in, or given anything by the terms of said will so offered for admission to probate, and in case the same had been established and admitted to probate without effectual provision having been made allotting a portion of said estate to said five heirs associated in said will contests they would have been cut off by said will from sharing by virtue of their relationship as heirs at law of said Andrew in the distribution of his estate.

That a trial of said will contests instituted as aforesaid in the name of Henry A. Root, was had in said District Court of Montana sitting at the City of Butte, before a jury of twelve jurors which trial occupied about seven weeks of July August and September in the year 1891, and in which trial said Robert G. Ingersoll who had theretofore appeared on behalf of said Henry A. Root and associates in other litigations concerning the administration of said estate appeared and prosecuted said objections to the admission of said will to probate and contest thereof as attorney and counsel for and on behalf of said Henry A. Root and other heirs associated with him in said will contests: and at the conclusion of said trial on or about September third 1891, said Robert G. Ingersoll delivered an argument before said Court and jury on behalf of said contestants in support of their objection to said will and in opposition to the admission thereof to probate, which argument was not only heard by as many residents of Butte and other parts of Montana as could get access to the court room where said trial occurred, but said argument was reported and

published in newspapers at Butte, Montana, and affiant was informed through many sources of reliable information and verily believes said argument made a deep and lasting impression unfavorable to said will upon the minds of many members of said jury and generally upon the minds of the citizens of Butte and other parts of Montana where future trial of said contests might have been had. That the jury sitting in said trial failed to agree upon or return a verdict in favor of said will, and as affiant is informed and verily believes, seven members of said jury were opposed to finding that said writing offered for admission to probate as aforesaid was the last will and testament of said Andrew J. Davis deceased, and as a result of said trial John A. Davis proponent of said will after a large expenditure of money for attorneys and counsel and other expenses in the premises had failed and was defeated in his attempt to establish and secure the admission of said writing to probate as the last will and testament of said Andrew.

That thereafter while said contests were still pending and being prosecuted by said Robert G. Ingersoll, and on or about January 24, 1893, said John A. Davis proponent of said will died intestate leaving him surviving next of kin and heirs at law among whom is affiant, and thereafter by order duly made and entered of record in and by said District Court of Montana having jurisdiction of the estate of John A. Davis deceased, affiant was appointed administrator of the estate of John A. Davis deceased and duly qualified as such administrator and letters of administration were thereupon duly issued appointing and commissioning affiant as administrator of the estate and legal representative of said John A. Davis deceased, dated March 11, 1893, a duly authenticated copy of which letters is annexed to affiant's petition filed in this Court on February 20, 1904, and is referred to as part hereof, and the same have not been revoked or annulled, but are still in full force and effect and affiant has ever since been and now is the duly appointed qualified and acting administrator of the estate and legal representative of John A. Davis deceased; and as such administrator, affiant was thereafter by order of said District Court of Montana duly made and entered of record, substituted as proponent of said writing offered for probate as the

will of Andrew J. Davis deceased, in place and stead of said John A. Davis the deceased proponent thereof, and as such administrator and legal representative of John A. Davis deceased, affiant was made party adverse to the contestants of said will in all contests thereof herein mentioned.

That thereafter by reason and in consideration of the prosecution of said will contests involving said estate of Andrew and preventing the distribution use or enjoyment of any part thereof by any of his heirs or by the legatee and devisee named in said will, and in consideration of the fact that said Robert G. Ingersoll who was prosecuting said will contests on behalf of said Henry A. Root and other heirs was then insisting on another trial thereof at an early date, and in consideration of the force, effect and stress of said contests prosecuted by said Robert G. Ingersoll in preventing the admission of said writing to probate as the last will and testament of said Andrew J. Davis deceased and for the purpose of terminating said contests over said will and estate and for no other consideration whatever affiant acting as administrator of the estate and legal representative of John A. Davis the deceased proponent of said will and legatee and devisee thereunder, and his heirs, on or about April 28, 1893, were constrained to consent to and did consent to, and make stipulations in writing of that date, to and with the said heirs of Andrew represented by said Robert G. Ingersoll in the prosecution of said will contests, namely, Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue and her husband Joshua G. Cornue, Elizabeth S. Ladd and her husband Charles H. Ladd and Mary L. Dunbar, stipulating and providing to the effect that decree of said District Court of Montana should be entered in said will contests determining the same and dividing said estate of Andrew J. Davis deceased among the parties contending for shares thereof, and that said five heirs associated in said contests prosecuted by Robert G. Ingersoll should have directly two and a half elevenths (2½ 11) of said estate both real and personal in kind to be awarded, adjudged and decreed to them by decree of said District Court of Montana to be entered determining said will contests, and that said contestants should have another eleventh (1/11) of said estate both real and

personal in kind to be awarded and decreed by such decree determining said will contests and distributed to Charles H. Palmer and Andrew J. Davis Jr., as trustees appointed by the terms of said stipulations, in trust for the sole use and benefit of said five heirs represented by said Robert G. Ingersoll in the prosecution of said will contests, and that the residue and remainder of said estate of Andrew except two elevenths (2/11) thereof in kind reserved to the legal representative and heirs of said John A. Davis deceased, should be by decree of said District Court of Montana to be entered determining said will contests, allotted and distributed to Charles H. Palmer and Andrew J. Davis Jr., as trustees, in trust for the use and benefit of, and to be divided equally between, said five heirs represented by Robert G. Ingersoll in prosecuting said will contests on the one part, and the legal representative and heirs of said John A. Davis deceased on the other part, and that if said will were admitted to probate, said agreement and stipulations should operate as a defeasance and conveyance of the title to so much of said estate vested by said will in said John A. Davis and his heirs and legal representative, as was agreed and stipulated in and by said agreement and stipulations should go to said five contesting heirs directly and for their use and benefit to said trustees, and said agreement and stipulations were so made and executed in writing as to have that effect and operation, and the said agreement and stipulations were by the terms, tenor and effect thereof made dependent upon the carrying of the provisions thereof into effect by decree or decrees and orders of said District Court of Montana, after each and all contests and litigation therein brought by any person or persons claiming and seeking to acquire a share of said estate of Andrew, were finally disposed of and determined.

That thereafter on March 27, 1895, affiant as administrator of the estate and legal representative of John A. Davis the deceased proponent of said will and as his substitute in said proceedings for the admission thereof to probate, and contests thereof, and the said five contestants of said will, by their respective attorneys, procured and caused to be duly made and entered of record in and by said District Court of Montana in the matter of said estate, and contests of said

will, a decree and order in and by which it was ordered adjud
and decreed, among other things that said contestants represent
by Robert G. Ingersoll in the prosecution of said will conte
namely, Henry A. Root, Sarah Maria Cummings Ellen S. Corn
and her husband Joshua G. Cornue, Elizabeth S. Ladd and
husband Charles H. Ladd, and Mary Louise Dunbar, should ha
twenty-five forty fourths (25/44) of said estate of Andrew J. Da
deceased in kind on distribution thereof after one twenty fifth there
and some other small portions had been reserved out of said estat
and although said will was referred to in said decree as bei
admitted to probate in and by said District Court, it was subject
the other terms and provisions of said decree providing and decre
ing that said estate shall be divided and certain parts and parc
thereof in kind shall be distributed and delivered to said five co
testing heirs not named in or given anything by the terms of sa
will.

That other contests of said will and litigation were instituted
said District Court of Montana, on behalf of other heirs of sa
Andrew, for the purpose of securing shares of his estate, some
which contests were pending until on or about August 24, 189
prior to which date agreements were made by and between them
and all parties to said stipulations and agreements first above men
tioned, by and in which latter agreements it was stipulated an
agreed that said other heirs of Andrew who had interposed in sai
Court, contests and litigation to secure a share of said estate, shoul
have and that there should be allotted to them severally or in group
by decree of said District Court of Montana finally determining al
said contests and litigation herein mentioned, a certain *fractional* par
of the share of said estate of Andrew to which each of said last men
tioned contestants were entitled as next of kin and heirs at law o
said Andrew.

That said District Court of Montana also having jurisdiction o
said estate of John A. Davis deceased, and being advised in the
premises, duly made and entered of record its order approving the
acts of affiant as administrator of the estate and legal representative
of John A. Davis deceased, in consenting to and making each and

all of said stipulations and agreements for the determination of said will contests and litigation, and the division and distribution of said estate as therein provided, and duly ratified and confirmed each and all of said agreements and stipulations; and said District Court of Montana also found adjudged and decreed the value of each and all said bequests of maintenance or annuities mentioned in said will, at sums which do not exceed in the aggregate fifteen thousand dollars, and the same have been heretofore fully paid and discharged out of funds of said estate of Andrew.

And then said District Court of Montana on August 24, 1897, being fully advised in the premises, duly made and entered of record its order judgment and decree in the matter of said will contests and litigation brought in said District Court by heirs at law of said Andrew to secure shares of his said estate ordering adjudging and decreeing in accordance with said stipulations that said estate of Andrew J. Davis deceased, shall be divided and distributed in kind to the persons, and in shares, parts and parcels as follows: Two hundred eleven hundredths (200/1100) thereof in kind to John E. Davis as administrator of the estate of John A. Davis deceased; two hundred and fifty eleven hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar Elizabeth S. Ladd and her husband Charles H. Ladd, Ellen S. Cornue and her husband Joshua G. Cornue; forty four eleven hundredths (44/1100) thereof in kind to Harriet R. Shetfield and Henry A. Davis; fifty eleven hundredths (50/1100) thereof in kind to Calvin P. Davis; fifty eleven hundredths (50/1100) thereof in kind to Harriet Wood; twenty five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith; fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin; and four hundred and thirty-one eleven hundredths (431/1100) thereof in kind to Andrew J. Davis Jr., and Charles H. Palmer, trustees; a copy of which last mentioned decree is annexed to affiant's petition filed in this Court on February 20, 1904 marked "Exhibit C" and is hereby referred to as part hereof.

That said last mentioned decree is now and has been ever since the entry thereof on August 24, 1897, in full force and effect and binding and controlling upon the property both real and personal

of said Andrew J. Davis deceased situate in Montana and in
Commonwealth of Massachusetts, and vests in the persons nam
in said decree and their representatives, assigns and persons cla
ing under or through them, right to claim, demand, sue and rec
for, receive and enjoy or alienate the shares of said estate both r
and personal as in said last mentioned decree provided; that s
effect of said decree of August 24, 1897, has been declared by
Supreme Court of the State of Montana, the highest judicial co
of said State, in determining an appeal from an order of distributi
of property of said estate made in accordance with the provisio
and requirements thereof, in which appeal the validity of said dec
of August 24, 1897, determining said will contests and ordering a
decreeing the division and delivery of said estate on distributi
thereof contrary to the provisions of said will was drawn in qu
tion: that in its opinion and decision determining said appeal pu
lished under the authority of the State of Montana in volume 27
Montana Reports at page 490 et seq., the Supreme Court of Mo
tana holds and declares that said District Court had jurisdiction
make and enter said order judgment and decree of August 24, 18
that it is a valid and binding decree and became the basis of admi
istration and controling as to the devolution of the property of sa
estate of Andrew J. Davis deceased, and that each party named
said decree became entitled by the provisions thereof to such sha
of said estate as therein provided to the same effect as if named as
legatee and devisee to the same extent.

That said District Court of Montana having jurisdiction of sa
estate of Andrew J. Davis deceased has in all its proceedings touc
ing the administration and distribution of said estate given full for
and effect to said decree of August 24, 1897, and has ordered an
caused the distribution and delivery of all the property both re
and personal of said estate of Andrew situate in Montana in accord
ance with the provisions of said decree except a small part of th
property of said estate still remaining in the custody of the admin
istrator thereof in Montana, which is also subject to said decree
August 24, 1897.

That the conditions of said trust by which said 131 1100 of sa

estate were allotted by said decree of August 24, 1897 to said Charles H. Palmer and Andrew J. Davis Jr., trustees, are all set forth in said stipulations made and dated April 28, 1893, and accepted by said trustees, by the terms of which it is simply provided to the effect that out of said 431/1100 of said estate allotted to said trustees as provided by said decree of August 24, 1897, said trustees shall first apportion, transfer and deliver to said five heirs represented by Robert G. Ingersoll in the prosecution of said will contests one hundred eleven hundredths (100/1100) of said estate of Andrew, and that the residue and remainder of said 431/1100 of said estate allotted and distributed to said trustees pursuant to said decree shall be by them divided and apportioned into *two equal parts* in kind and one-half thereof shall be by said trustees transferred and delivered to said five heirs represented by Robert G. Ingersoll in the prosecution of said will contests, and the other half thereof shall be by said trustees transferred and delivered to the administrator and heirs of John A. Davis deceased.

That by reason of the prosecution of said will contests by said Robert G. Ingersoll the said stipulations and decrees were made and entered determining said contests, and said will was in fact and in law superseded and defeated thereby so that the administrator legal representative and heirs of John A. Davis deceased cannot lawfully claim, demand, take or hold, and they do not claim or demand, any part of the property of said estate of Andrew J. Davis deceased situate in Massachusetts or in Montana save and except said 200/1100 thereof to which affiant as administrator of the estate and legal representative of John A. Davis deceased is entitled directly as provided in said decree of August 24, 1897, and also 165½/1100 of said estate out of said 431/1100 thereof allotted by said decree to said trustees in accordance with the terms and conditions of said stipulations of April 28, 1893, and the other parts of said money and personal property of said estate of Andrew J. Davis deceased situate in Montana and Massachusetts must be distributed and delivered to said other persons mentioned in said decree of August 24, 1897 or their legal representatives, assigns or persons showing right thereto through or under them: and thereby said five heirs represented by

Robert G. Ingersoll in the prosecution of said will contests namely, Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary L. Dunbar, and their legal representatives assigns or those claiming under or through them, became and are entitled to 250/1100 directly, and also 265½/1100 through said trustees, aggregating 515½/1100 of all said estate of Andrew J. Davis, deceased both real and personal in kind situate in Montana and Massachusetts.

That in the determination of said will contests there was no compromise, concession or relinquishment on the part of said Robert G. Ingersoll or either of said five heirs represented by him in the prosecution of said will contests of any part of the shares of said estate to which they or either of them were entitled as next of kin and heirs at law of said Andrew J. Davis deceased; but on the contrary the portion of said estate acquired for said five heirs through the prosecution of said will contests by said Robert G. Ingersoll greatly exceeds the 350/1100 of all property both real and personal of which said Andrew J. Davis died seized and possessed wheresoever situate. But other heirs of said Andrew did compromise and make concession and relinquishment of part of the shares of said estate to which they were entitled as heirs at law of said Andrew.

That no distribution of any part of said estate of Andrew was made prior to the entry of said decree of August 24, 1897, but since the entry thereof personal property of said estate of Andrew consisting of money and bank stock situate in Montana of the value of about one million dollars and real estate consisting of mining property situate in Montana of great value, have been distributed, paid over and delivered pursuant to orders of said District Court of Montana duly made in accordance with the provisions of said decree of August 24, 1897 to the persons therein named and their legal representatives and assigns in shares and parcels as therein provided, and the said five heirs of Andrew J. Davis deceased represented by Robert G. Ingersoll in the prosecution of said will contests and their legal representatives and assigns have had and received directly and through said trustees 515½/1100 of said money and bank stock of the clear money value of over $374,000.00, and

also 515¼ 1100 of all said real estate situate in Montana of which said Andrew J. Davis died seized and possessed.

That there is now no dispute or controversy as to the share of said estate of Andrew J. Davis deceased, situate in Massachusetts or Montana or elsewhere to which each of his heirs or groups of heirs who were formerly contending in said litigation for a share thereof, are entitled, the same having been fully and finally settled and determined by said will contests, stipulations, and decree determining the same made and entered on August 24, 1897, and all property of said estate situate in the State of Montana has been distributed paid over and delivered pursuant to orders of distribution made in accordance with said decree, except a small portion of property of said estate in Montana also subject to said decree remaining in the custody of said John H. Leyson as administrator thereof. And all debts and liabilities of said Andrew J. Davis, deceased presented or claimed against his estate in Montana and Massachusetts have been fully settled, paid and discharged.

That the property of said estate of Andrew J. Davis deceased situate in Massachusetts is all personal property consisting of current money of the United States and bonds of the Butte & Boston Consolidated Mining Company all of the value of about five hundred thousand dollars; all of which is subject to the terms, provisions and conditions of said stipulations made as aforesaid and said decree of August 24, 1897, finally determining said will contests, and should be apportioned, distributed and delivered in shares as provided in said decree, to the said persons therein named or their legal representatives, assigns or others entitled thereto under or through them.

That in October 1897, after said stipulations, proceedings and decrees had been made and entered in and by said District Court of Montana determining said will contests as aforesaid, John H. Leyson, who had been appointed by said District Court of Montana, administrator of the estate of said Andrew in Montana, and had duly qualified as such, and was administering and distributing said estate in Montana pursuant to the provisions of said decree of August 24, 1897, presented to this Honorable Probate Court in and

for the County of Suffolk, Commonwealth of Massachusetts, his petition, together with a duly authenticated copy of said writing purporting to be the will of said Andrew and annexed thereto a duly authenticated copy of said decree rendered and entered in and by said District Court of Montana on March 27, 1895, in said will contests whereby it was ordered and decreed that the estate of which said Andrew died seized and possessed shall after administration thereof, be divided and distributed contrary to the provisions of said will: and thereupon said Leyson prayed this Honorable Probate Court in and for Suffolk County, to receive and admit said will to probate as a foreign will admitted to probate in the State of Montana, inadvertently as affiant is informed and believes, omitting to set forth in his said petition and show to this Court that said will although referred to in said decree of said District Court of Montana as having been admitted to probate, was in fact and in law superseded by the further terms and provisions of said decrees made and entered in said contests thereof: and thereupon said John H. Leyson further prayed this Court to appoint him as administrator of said estate of Andrew J. Davis deceased situate in Suffolk County Massachusetts.

That thereupon said will which had in fact and in law been superseded by said contests, and decrees made and entered in and by said District Court of Montana as aforesaid, with a duly authenticated copy of said decree of said Montana Court thereto annexed was received in and by this Honorable Probate Court of Suffolk County and filed and recorded, without as affiant is informed and believes through inadvertence, fully showing in said record that said will had been superseded by said decree made and entered in and by said District Court of Montana in said contests thereof, except in so far as the same is shown by said decree a duly authenticated copy of which is annexed to the copy of said will filed in this Honorable Probate Court.

That Erwin Davis then claiming, as affiant is informed and believes, some interest in the estate of Andrew J. Davis deceased, appeared in this Honorable Probate Court of Suffolk County, and objected to the appointment of said John H. Leyson as such admin-

istrator upon said showing presented by said Leyson in this Court on grounds to the effect: — that said Leyson would not perform the will of Andrew J. Davis, and that he would distribute said estate to persons not mentioned in the will or entitled thereunder: that the Montana decree purports to make distribution of the estate of Andrew J. Davis in a manner not warranted by the will, the statute of wills, the statute of distribution, or by any law whatsoever: and that said Leyson the administrator of that distribution and committed to it ought not to be appointed administrator in Massachusetts.

That said John H. Leyson was nevertheless on or about December 9, 1897, appointed by this Honorable Probate Court of Suffolk County administrator of the estate of Andrew J. Davis deceased, in Massachusetts, and thereafter he duly qualified as such and ever since has been and now is acting as such administrator in Massachusetts.

And said Erwin Davis appealed to the Supreme Judicial Court of Massachusetts from said order or decree of said Probate Court appointing said Leyson as such administrator, over said objections of Erwin, a copy of which objections and assignment of errors filed in said Supreme Judicial Court showing his contention on said appeal is hereto annexed marked "Exhibit A", as part hereof, in which among other things he says: "the appellant prefers that the will alone should be admitted to probate but rather than that the compromise distribution should take effect desires to have intestacy decreed, and contends that the alternative is between intestacy and the will alone." That appeal was dismissed on or about March 9, 1898.

That a duly authenticated copy of each of said decrees of said District Court of Montana determining said will contests and providing that said estate of Andrew shall be parceled and distributed contrary to the provisions of said will, has been presented and filed in this Honorable Probate Court of Suffolk County, and affiant is informed and believes that in all proceedings therein touching said estate of Andrew J. Davis deceased in Massachusetts said Probate Court of Suffolk County has recognized said decrees of the District Court of Montana made and entered determining said will contests as con-

trolling in place and stead of said will, and has recognized the rights of each and all persons in and to the property of said estate in Massachusetts as fixed and determined in and by said final decree of said District Court of Montana made and entered in said will contests on August 24, 1897, as ought to be done according to the laws of Massachusetts.

That there is no cause now existing why said funds and effects of said estate of Andrew J. Davis deceased, situate in Massachusetts should not, after administration and settlement thereof, be distributed, paid over and delivered in Massachusetts to said persons mentioned in said decree of August 24, 1897, or their legal representatives, assigns or others showing right thereto under or through the persons mentioned in said decree as soon as the controversies and litigation which may be pending in the Courts sitting in Massachusetts concerning claims upon said shares or any of them are finally determined and satisfied. And there is no reason or cause existing why the shares of said estate situate in Massachusetts not involved in any controversy or litigation in the Courts of Massachusetts, should not be distributed, paid over and delivered in Massachusetts by order of this Honorable Probate Court of Suffolk County, to the persons entitled thereto as provided by said decree of August 24, 1897, after administration and settlement of said estate in Massachusetts.

That heretofore as affiant is informed and believes when petition presented by said Henry A. Root to the Probate Court of Suffolk County, on or about September 7, 1900 praying distribution of said funds and effects of the estate of said Andrew situate in Massachusetts to him and others entitled thereto as provided in the said decree of the District Court of Montana of August 24, 1897, was heard, it was represented and shown to this Honorable Probate Court of Suffolk County in opposition to granting said petition, that at that time there were divers claims of liens on the portions of said funds and effects acquired for said Henry A. Root and others associated with him in said will contests, filed and claimed in Montana, which lien claims were then unsatisfied, and as affiant is informed and believes this Honorable Probate Court of Suffolk County

in the just exercise of its discretion, refused to order distribution as prayed by said Henry A. Root in said petition because of the pendency of said lien claims; that a copy of the opinion of the Honorable Robert Grant, Judge of said Probate Court in and for Suffolk County, dismissing said petition, is hereto annexed marked "Exhibit B", and made a part hereof. That since the hearing and dismissal of said petition for distribution, all of said lien claims have by order of said District Court of Montana been paid and satisfied out of funds of said estate of Andrew ordered distributed in Montana to said Root and his associates in said will contests, except said lien set up and claimed by Eva A. Ingersoll as administratrix of the estate of said Robert G. Ingersoll late of Dobbs Ferry, New York, to secure payment for his services in the prosecution of said will contests, to enforce payment of which by foreclosure of said lien the said Eva A. Ingersoll has brought and is prosecuting a suit in equity in the Circuit Court of the United States in and for the District of Massachusetts as this affiant is informed and believes.

And affiant further says that said shares of said estate of Andrew J. Davis deceased, to which said petition filed by affiant in this Honorable Probate Court of Suffolk County, Massachusetts, on February 20, 1904, relates, are not in any manner involved in, nor are they claimed to be involved in, said action pending in the Circuit Court of the United States within and for the District of Massachusetts, but the said shares of said estate to which affiant's said petition to the Probate Court of Suffolk County, relates are on the contrary entirely free and clear and outside of all demands and claims set up in complainant's bill in her said suit in the Circuit Court of the United States in and for the District of Massachusetts.

JOHN E. DAVIS

Subscribed and sworn to before me this 21st day of April, 1904.

RAYMOND M. PLACE,

(SEAL) *Notary Public within and for Silver Bow County, State of Montana.*

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, John Weston, County Clerk and ex-officio Recorder in and for the County of Silver Bow, State of Montana, do hereby certify that Raymond M. Place, Esquire, whose name is subscribed to the attached certificates of acknowledgment, proof or affidavit, was at the time of taking of said acknowledgment, proof or affidavit, a Notary Public, duly commissioned and sworn, and residing in said County, and was, as such Notary Public, an officer of said State, duly authorized by the laws thereof, to administer, take and certify proof of oaths and affirmations, to affidavits and depositions as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing and that his certificate or jurat to the affidavit hereto attached is in due form as provided by the laws of said State, and full faith and credit are due and ought to be given to his official acts as such Notary Public; and I further certify that I am well acquainted with his handwriting and verily believe that the signature subscribed to the attached certificate or jurat is his genuine signature.

In Witness Whereof I have hereunto set my hand and affixed my official seal this 21st day of April, 1904

JOHN WESTON,

(SEAL) *County Clerk and ex-officio Recorder.*

EXHIBIT A.

COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT.
IN PROBATE.

In the Matter of the Petition of John H. Leyson, for Ancillary Probate, Letters on the Estate of Andrew Jackson Davis.

OBJECTIONS TO DECREE APPEALED FROM

The appellant objects to the decree

I. Because the appellant appeared and representing all persons interested in the estate objected to the appointment of said John H. Leyson and because disregard of this objection was error.

II. Because the Court below erroneously declined to hear evidence that Leyson had entered into agreements in Montana which made it certain that he would not perform the will of Andrew Jackson Davis, and made it certain that he would distribute the estate to persons not named in the will or entitled thereunder.

The foregoing objections involve the contention of the appellant that the extraordinary clause in the Montana Decrees which purport to make a distribution of the estate of Andrew Jackson Davis not warranted by the will, the Statute of Wills, the Statute of Distributions or by any law whatsoever, are void and at any rate of no effect in this State, leaving the will to go to probate alone. In this case Leyson as the administrator of the distribution and committed to it ought not to be appointed administrator of the will. If however the extraordinary clauses are material parts of the decree and the foregoing contention is not sustained, then the appellant falls back on his right of next of kin and claims that the clauses vitiate the whole decree and in such case objects to the decree.

III. Because no will of Andrew Jackson Davis has been proved and allowed in Montana according to the laws of Montana and therefore Probate and letters testamentary ought not to granted here.

IV. Because the papers presented to the Court with the petition are not copies of the will of Andrew J. Davis and of the Probate thereof in the State of Montana.

The appellant prefers that the will alone should be admitted to probate, but rather than that the compromise distribution should take effect desires to have intestacy decreed, and contends that the alternative is between intestacy and the will alone.

ERWIN DAVIS,
By his Att'y, RICHARD W. HALE.

EXHIBIT B.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss:

At a Probate Court holden at Boston in and for the County of Suffolk, on the first day of November in the year of our Lord one thousand nine hundred.

On the petition of Henry A. Root of New York in the State of New York interested in the estate of Andrew J. Davis late of Butte in the State of Montana, deceased, praying for a partial distribution of the balance of the estate of said deceased in this Commonwealth in accordance with the decree of the Montana Court. All persons interested in the estate of said deceased having had due notice of said petition and objection being made at a hearing of the matter of said petition, and it appearing to the Court that even if the Court has power to order at this time a partial distribution here of the Massachusetts assets according to the terms of the compromise decree of the Court of Montana which disposes of the estate in terms different from the provisions of the will, it does not seem equitable to me as a matter of discretion to grant this petition at this time for the reason that the application appears to me to have been made partly for the purpose of evading liens filed in Montana against the interests of the petitioner and others.

It is decreed therefore that the petition be dismissed.

ROBERT GRANT, *Judge*.

[Endorsed on back:]

No. 84785
Commonwealth of Massachusetts. Suffolk, ss. Probate Court.
Affidavit of John E. Davis
In support of Petition of John E. Davis et al for distribution in Massachusetts.
Filed Aug. 25, 1904.
E. N. Harwood Hollis R. Bailey 53 State St

COMPLAINANT'S EXHIBIT LXV. IN REBUTTAL.

[Put in Evidence, page 452.]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the Honorable Marcus Perrin Knowlton, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Supreme Judicial Court of said Commonwealth, duly commissioned and qualified: to all of

whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this eighteenth day of August in the year of our Lord one thousand nine hundred and four.

JOHN NOBLE
Clerk

[SEAL]

COMMONWEALTH OF MASSACHUSETTS.

I, Marcus Perrin Knowlton, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John Noble, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this eighteenth day of August in the year one thousand nine hundred and four.

[SEAL] MARCUS PERRIN KNOWLTON.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPREME JUDICIAL COURT.

I, John Noble, Clerk of said Court, hereby certify that the papers hereunto annexed are true copies of all of the papers in the probate

appeal of John H. Leyson, Administrator of the estate of Andrew J. Davis, deceased, against Erwin Davis, appellant, to wit: —

Copy of the record of the Probate Court.

Objections to the decree of the Probate Court.

Appellant's Interrogatories to Appellee.

Answer to Interrogatories.

Final Decree.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of August, A. D. 1904.

JOHN NOBLE,
Clerk.

[SEAL]

To the Honorable the Judge of the Probate Court in and for the County of Suffolk.

Respectfully Represents Erwin Davis of the City, County, and State of New York, that he is one of the next of kin of Andrew Jackson Davis, late of Butte in the County of Silverbow and State of Montana, deceased, leaving estate in said County of Suffolk: that he is also by assignment from the sole legatee of said Andrew Jackson Davis the owner of one half share in said estate, and is the Attorney irrevocable duly authorized to represent the other one half share of said estate, and is interested in said estate of said deceased: that he is aggrieved by the decree of the Probate Court held at Boston in said County of Suffolk on the ninth day of December, A. D. 1897, whereby said Court allowed a certain paper presented to said Court as a copy of the Will of said Andrew Jackson Davis, and appointed John H. Leyson of said Butte to be administrator with the will annexed:

And he hereby gives notice that he claims an appeal from said Decree to the Supreme Judicial Court.

Dated this seventh day of January, A. D. 1898.

ERWIN DAVIS
by his atty. RICHARD W. HALL.

Upon which is endorsed the following:

"6133 Ep. John H. Leyson, Pet'r. v. Erwin Davis, Respondent
Claim of Appeal."

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents John H. Leyson, of Butte in the County of Silver Bow and State of Montana that the last will and testament of Andrew J. Davis late of Butte in the County of Silver Bow and State of Montana, deceased, testate, has been duly proved and allowed by the Supreme Judicial District Court in and for the said County of Silver Bow according to the laws of said State of Montana a copy of which will, and of the Probate thereof, duly authenticated, are herewith produced: that said testator at the time of his decease, had estate in said County of Suffolk, on which said will may operate: that the same ought to be allowed in this State as the last will and testament of said deceased: that the executors therein named, are dead, that your petitioner has been duly appointed administrator with the will annexed of the estate of said Andrew J. Davis by said Supreme Judicial District Court of Montana and therefore prays, that the copy of said will may be filed and recorded in the Registry of Probate in said County of Suffolk, pursuant to the statute in that case made and provided: and that letters of administration with the will annexed may be granted thereon to him and certifies that the statements made in the foregoing petition are true to the best of his knowledge and belief.

Dated this Eighth day of October A. D. 1897.

JOHN H. LEYSON.

SUFFOLK, ss.

Subscribed and sworn to this 8th day of October A. D. 1897.

Before me,

HORACE G. ALLEN

Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

To the heirs-at-law, next of kin and all other persons interested in the estate of Andrew J. Davis late of Butte in the County, Silver Bow and State of Montana deceased.

Whereas, a petition has been presented to said Court, by John H. Leyson, of said Butte with certain papers purporting to be copies of the last will and testament of said deceased, and of the probate thereof in said State of Montana duly authenticated, representing that at the time of his death, said deceased had estate in said County of Suffolk, on which said will may operate, and praying that the copy of said will may be filed and recorded in the Registry of Probate of said County of Suffolk, and letters of Administration with the will annexed thereon granted to him.

You are hereby cited to appear at a Probate Court, to be held at Boston, in said County of Suffolk, on the eleventh day of November A. D. 1897, at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And said petitioner is hereby directed to give public notice thereof, by publishing this citation once in each week, for three successive weeks, in the Boston Daily Advertiser a newspaper published in Boston, the first publication to be thirty days, at least, before said Court.

Witness, John W. McKim, Esquire, Judge of said Court, this eighth day of October in the year one thousand eight hundred and ninety.

ELIJAH GEORGE
Register.

I have served the foregoing citation as therein ordered on behalf of John H. Leyson.

HORACE G. ALLEN.

SUFFOLK, ss.

Boston Nov. 10, A. D. 1897. Then personally appeared Horace G. Allen on behalf of John H. Leyson and made oath that the above return by him subscribed is true. Before me,

RICHARD W. HALE
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

At a Probate Court holden at Boston, in and for said County of Suffolk, on the ninth day of December in the year of our Lord one thousand eight hundred and ninety-seven.

On the petition of John H. Leyson of Butte in the County of Silver Bow and State of Montana praying that a copy of the last will and testament of Andrew J. Davis late of Butte in the State of Montana deceased, testate, may be filed and recorded in the Registry of Probate of this County; and letters of administration with the will annexed issued to him the executors therein named, having deceased a copy of said will, and of the probate thereof, duly authenticated, having been produced therewith, and public notice having been given, according to law and the order of Court; and it appearing that there is estate of said deceased in said County of Suffolk, on which said will may operate; and that the original will has been proved and allowed in the State of Montana according to the laws of said State, and that it ought to be allowed in this Commonwealth as the last will and testament of said deceased; it is therefore ordered that the copy of said will be filed and recorded in the Registry of Probate of said County of Suffolk, pursuant to the statute in that case made and provided; and that letters of administration with the will annexed be granted to said petitioner he first giving bond with sufficient sureties for the faithful discharge of said trust.

ROBERT GRANT,
Judge of Probate Court.

Copy, attest:

EUGENE TAPPAN, *Asst. Register.*

[Endorsed on back:]
No. 84785
Andrew J. Davis
Allowance of Foreign Will and Letters
Petition Citation Decree
Filed Oct. 8 1897
Returnable Nov. 11 1897
Allowed Dec. 9 1897
Recorded Vol. 7 Page

Copy of a paper produced at the hearing and then filed.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis, Deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root et al, Contestants; and the contest of Harriet E. Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it Remembered that on the 24th. day of August, 1897, the petition in the above entitled proceeding coming on to be heard and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the Court has been heretofore made on the 24th day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contests now pending are represented by attorneys present in Court.

It is Ordered that the contests heretofore instituted in this Court by Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, be and the same are hereby dismissed, (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this Court heretofore made on the 27th day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this Court confirming the making, executing and delivering the same, It is Ordered Adjudged and Decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of said Andrew J. Davis, deceased, with the will annexed,

keep, retain and hold in his possession and under his control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreements, said order and the provisions thereof.

And it is Hereby Ordered, Adjudged and Decreed in pursuance of said petition, said compromise agreement and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis, deceased, and so held, retained and controlled by said administrator, and to be distributed by him, be, and the same are hereby established and declared to be as follows, to wit: That is to say:—

Subject to the bequests in said will of said Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate. The parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:—

Two hundred (and) eleven hundredths (200/1100) thereof in kind to John E. Davis, as administrator of the estate of John A. Davis, deceased, two hundred and fifty eleven hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty four eleven hundredths (44/1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven hundredths (50/1100) thereof in kind to Calvin P. Davis; fifty eleven hundredths thereof in kind to Harriet Wood; twenty five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith; fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer trustees appointed in and by the compromise agreement dated April 23, 1893 are entitled to have and receive as such trustees and for the purposes of such trust four hundred and thirty one eleven hundredths (431/1100) of said estate in kind.

It being Further Ordered, however, that no portion of the real estate owned by the said Andrew J. Davis, and situated in the State of Iowa, shall comprise any portion of said estate in estimating

and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be effected by this cause and proceeding are, by consent in open court, adopted and made the basis of this order and decree, according to the terms and provisions of said contract and agreements.

Done in Open Court this 24th day of August, A. D., 1897.

JOHN LINDSAY, *Judge*

Filed August 24th, 1897.

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Hereby Certify and Attest That the foregoing is a full, true and correct copy of an Order made and entered in and by the above entitled Court, in the matter of the estate of Andrew J. Davis, deceased, on the Twenty-fourth day of August, 1897.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court at Butte City, Silver Bow County, Montana, this Third day of September, 1897.

Attest:

CLINTON C. CLARK.
Clerk of the District Court of the Second Judicial
(SEAL) *District of the State of Montana, in and for*
the County of Silver Bow.

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I John Lindsay, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Hereby Certify that Clinton C. Clark is the Clerk of said Court, and that the foregoing certificate and attestation is in due form.

Witness my hand at Butte City, Silver Bow County, State of Montana, this third day of September, 1897.

JOHN LINDSAY, *Judge*.

SECOND JUDICIAL DISTRICT COURT, STATE OF MONTANA, SILVER BOW COUNTY.

In the Matter of the Estate of Andrew J. Davis, Deceased. (No. 285)

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

The last will of Andrew J. Davis, deceased, a copy of which is hereunto annexed, having been proved and recorded in the Second Judicial District Court of Montana, within and for Silver Bow County, and the executors named in said will being dead,

John H. Leyson, of Butte, Silver Bow County, Montana, is herey appointed administrator with the will annexed. Witness, H. A. Niedenhofen, Clerk of said Court, with the Seal thereof affixed, this, the twenty-third day of April, A. D. 1895.

By Order of the Court:

H. A. NIEDENHOFEN,

Clerk of said Court.

(COURT SEAL)

Know all men by these presence that I. A. J. Davis of the county of Van Buren & State of Iowa, being in good health & of sound & Desposing mind & memory do make & publish this my last will & testament & as to my worldly estate & all the property real personal and mixed of which I shall die seized & possessed or to which I shall be entitled at the time of my decease. I devise, bequeath and dispose thereof in the manner following, to wit.

My will is that I guive & bequeath to Thomas Jefferson Davis & Pet Davis & her mother Miss Bergett, all three of Van Buren Co., Iowa, a life maintainance. That is to say they shal have the necessaries of life out of my estate during their natural life. This amount of annuity to be set apart by my executors hereinafter named & the judgement of my executors as to the amount necessary to set apart for the support of the above named persons shal be final.

See I guive devise & bequeath to my beloved brother, John A. Davis reversion or remainder of my property whether real or per-

sonal or mixed to have and to hold the same forever together with all the profits & income thereof to the said John A. Davis, his heirs admintrator or assigns to his & their use & benefit forever

Third And lastly I do nominate and appoint James Davis & Job Davis of Davis County & State of Iowa to be the executors of this my last will and testament.

In testimony whereof I, the said A. J. Davis have to this my last will & testament contained on one sheat of paper, I have subscribed my name & affixed my seal this the twentieth day of July, in the year of our Lord one thousand eight hundred & sixty six (1866)

A. J. DAVIS.

Signed, sealed published and delivered by the said A. J. Davis as & for his last will and testament in the presence of us who at his request and in his presence & in the presence of each other have subscribed our names as witnesses thereto.

Witnessed

J. C. SCONCE
JAMES DAVIS
JOB DAVIS

SECOND JUDICIAL DISTRICT COURT, STATE OF MONTANA, SILVER BOW COUNTY.

In the Matter of the Estate of Andrew J. Davis, deceased. No. 285.

STATE OF MONTANA
COUNTY OF SILVER BOW, ss.

I do solemnly swear that I will support the Constitution of the United States of America and the Constitution of the State of Montana: that I will perform, according to law, the duties of administrator of the estate of Andrew J. Davis, deceased, with the will annexed.

J. H. LEYSON.

Subscribed and sworn to before me this twentieth day of April, A. D. 1895.

D'GAY STIVERS.

(NOTARIAL SEAL) *Notary Public, Silver Bow County, State of Montana.*

Filed Apr. 23 1895

THE STATE OF MONTANA,
COUNTY OF SILVER BOW ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Hereby Certify and Attest That the foregoing is a full, true and correct copy of the Letters of Administration with the Will Annexed, issued to John H. Leyson, in the matter of the Estate of Andrew J. Davis, deceased, on the twenty-third day of April, 1895, and the Oath of said John H. Leyson thereto attached, and that said Letters of Administration are still in force.

In Witness whereof I have hereunto set my hand and affixed the Seal of said Court at Butte City, Silver Bow County, Montana, this Third day of September, 1897.

Attest: CLINTON C. CLARK.
Clerk of the District Court of the Second Judicial
(SEAL) *District of the State of Montana, in and for*
the County of Silver Bow.

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, John Lindsay, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Hereby Certify That Clinton C. Clark is the Clerk of said Court, and that the foregoing certificate and attestation is in due form.

Witness my hand at Butte City, Silver Bow County, State of Montana, this third day of September, 1897.

JOHN LINDSAY,
Judge.

Copy of the decree filed with the will.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis Deceased.

Upon the contest of Henry A. Root and Maria Cummings against the probate of the proposed will of the said deceased, wherein John E. Davis is proponent, and said Henry A. Root et al., contestants. And the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, and wherein John E. Davis, administrator of said John A. Davis, deceased, has been substituted for said deceased.

The petition of John A. Davis, deceased, heretofore filed, praying for the admission to probate of a certain document, filed in this Court, purporting to be the last will and testament of Andrew J. Davis, deceased, and that letters testamentary be issued to said petitioner, this day, regularly coming on to be heard, and it appearing to the Court that John E. Davis has been duly appointed administrator of the estate of said petitioner, John A. Davis, deceased, and that letters of administration have been duly issued to him, and that he is duly qualified and acting as such, and that the said John E. Davis, administrator as aforesaid, has been duly substituted for and in place of the said John A. Davis, deceased, and said petition having, by leave of Court, been amended accordingly, and it appearing that the contests of the said Henry A. Root and Maria Cummings, and of Harriet R. Sheffield, and Henry A. Davis, have been compromised and settled, and the said contests this day dismissed and withdrawn in open Court, in pursuance of stipulations and agreements, and it appearing that there is no further contest or opposition to the probate of the said alleged will, and due proof having been made to the satisfaction of this Court that due notice had been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served as required by the previous order of this Court: and it further appearing to this Court that notice had been given according to law, to all parties interested, and after examining John C. Sconce and Mary A. Downey produced on behalf of said petitioner, whose testimony had been reduced to writing and filed herein, from which it appears that said document is the last will and testament of said Andrew J.

Davis, deceased; that it was executed in all particulars as required by law, and that said testator at the time of execution of the same was of sound and disposing mind, and not under restraint and not acting under duress, menace, fraud or undue influence; that said Andrew J. Davis, deceased, died on the 11th day of March, A. D. 1890, being a resident of the City of Butte, County of Silver Bow, State of Montana, at the time of his death, and leaving both real and personal estate in said County and State and elsewhere.

That said estate and effects, for and in respect of which the probate of said will is applied for, as aforesaid, does not exceed the value of Three Millions Dollars:

And all the parties hereto appearing in open Court by their respective attorneys, and in pursuance of the stipulations and agreements and consent in open Court, and upon the proofs aforesaid,

It is ordered that the said document heretofore filed, purporting to be the last will and testament of the said Andrew J. Davis, deceased, be admitted to probate, as the said last will and testament of the said deceased.

And it appearing by the said agreements and stipulations of the parties and by consent duly entered in open Court that Harriet R. Shefield, now of Northport, Suffolk County, State of New York, and Henry A. Davis, of the town of Monson, State of Massachusetts, are the sole heirs at law of Asa Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive each one fiftieth (1/50) in kind of said estate upon the distribution or distributions of said estate.

And it further appearing by said agreements and stipulations of the parties and by consent, duly had in open Court that Andrew J. Davis and John E. Davis, of the city of Butte and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morrill Allard Davis, all of the City of Chicago, and State of Illinois, are the sole heirs at law of John A. Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive upon final distribution of said estate nineteen forty-fourths (19/44) of the remainder of said estate after deducting one twenty-fifth (1/25) thereof hereinbefore provided for Harriet R. Shefield and Henry A. Davis, subject however, to the

bequests of said will, no part of which bequests are to be borne by said one twenty fifth (1/25) of said estate belonging to said Sheffield and Davis.

And it further appearing by said agreements and stipulations of the parties, and by consent duly had in open Court that Henry A. Root, of the City of Helena, State of Montana, and Ellen S. Cornue, of the town of Croton Falls and State of New York are the children and sole heirs of Anna C. Root, deceased, a sister of said Andrew J. Davis, and that Sarah Maria Cummings, widow, of the town of Ware and State of Massachusetts is a sister of said Andrew J. Davis, deceased, and Mary Louise Dunbar, an unmarried woman, of the City of Springfield and State of Massachusetts, is a niece of the said Andrew J. Davis, deceased, and Elizabeth S. Ladd, of the City of Springfield and State of Massachusetts, is a child and heir of Sophronia Firmin, deceased, who is also a sister of said Andrew J. Davis, deceased, and Charles H. Ladd, her husband, and Joshua G. Cornue, husband of the said Ellen S. Cornue, and are entitled to have and receive twenty-five forty fourths (25/44) of the remainder of said estate, after the one twenty-fifth (1/25) thereof above provided for said Harriet R. Sheffield and Henry A. Davis, subject to said bequests made in said will.

Now therefore, it is ordered, adjudged and decreed in pursuance thereof, that the said Harriet R. Sheffield, of the town of Northport, County of Suffolk and State of New York, and Henry A. Davis of the town of Monson, State of Massachusetts, sole heirs at law of Asa Davis, deceased, brother of Andrew J. Davis, deceased, have and receive each one fiftieth (1/50) of said estate in kind, on the distribution or distributions thereof: And that the said Andrew J. Davis and John E. Davis, of the City of Butte, State of Montana, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the City of Chicago, State of Illinois, have and receive nineteen forty-fourths (19/44) of the remainder of said estate, after providing for the one twenty-fifth (1/25) of said estate for Harriet R. Sheffield and Henry A. Davis as above, and subject to the bequests made in said will, and that said Henry A. Root of the City of Helena, State of Montana,

Sarah Maria Cummings, of the town of Ware, State of Massachusetts, Mary Louise Dunbar, of the City of Springfield, State of Massachusetts, Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Charles H. Ladd, husband of the said Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Ellen S. Cornue, and Joshua G. Cornue, her husband, of the town of Croton Falls, State of New York, have and receive twenty-five forty-fourths (25/44) of the remainder of said estate in kind after providing for the one twenty fifth (1/25) thereof for the said Harriet R. Sheffield and Henry A. Davis, as above, subject to the bequests of said will.

And the said stipulations and agreements of the parties in interest and to be effected by this cause and proceeding, is by consent in open Court, adopted and made the basis of this order and decree, according to the terms and provisions or said stipulations and agreements.

Done in Open Court this 27th day of March, 1895.

(signed) JOHN J. MCHATTON, *Judge.*

Filed Mar. 27, 1895, at 10:25 A. M.

H. A. NIEDENHOFEN, *Clerk,*
by C. V. HENDERSON, *Deputy.*

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Hereby Certify and Attest That the foregoing is a full, true and correct copy of the Order Admitting Will to Probate, etc., made and entered in the above entitled Court, in the matter of the estate of Andrew J. Davis, deceased, on the 27th day of March, 1895.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court at Butte City, Silver Bow County, State of Montana, this Eighth day of September, 1897.

Attest: CLINTON C. CLARK.
Clerk of the District Court of the Second Judicial
(SEAL) *District of the State of Montana, in and for*
the County of Silver Bow.

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, John Lindsay, Judge of the District Court of the Second J
cial District, of the State of Montana, in and for the County of Si
Bow, Hereby Certify that Clinton C. Clark is Clerk of said C
and that the foregoing certificate and attestation is in due form.

Witness my hand at Butte City, Silver Bow County, State
Montana, this Eighth day of September, 1897.

JOHN LINDSAY, *Jud*

Copy, attest: EUGENE TOFFAN, *Ass't. Register.*

Upon which is endorsed the following:

"6133 Eq. John H. Leyson, Adm'r. vs. Erwin Davis, App't.
Suffolk, ss. Supreme Judicial Court. Filed Jan. 7, 1898.
Attest: C. H. Cooper, Ass't. Clerk."

COMMONWEALTH OF MASSACHUSETTS. SUPREME JUDICIAL COURT.
IN PROBATE.

In the Matter of the Petition of John H. Leyson, for Ancillary Probate and
Letters on the Estate of Andrew Jackson Davis.

OBJECTIONS TO DECREE APPEALED FROM.

The Appellant objects to the Decree

I. Because the appellant appeared and representing all pers
interested in the estate objected to the appointment of said John
Leyson, and because disregard of this objection was error.

II. Because the Court below erroneously declined to hear evide
that Leyson had entered into agreements in Montana which made
certain that he would not perform the Will of Andrew Jackson Da
and made it certain that he would distribute the estate to persons
named in the will or entitled thereunder.

The foregoing objections involve the contention of the appell
that the extraordinary clauses in the Montana Decrees which p
port to make a distribution of the estate of Andrew Jackson Da
not warranted by the will, the Statute of Wills, the Statute of D
tribution, or by any law whatsoever, are void, and at any rate of

effect in this State, leaving the will to go to Probate alone. In this case Leyson as the administrator of that distribution and committed to it ought not to be appointed administrator of the will. If, however, the extraordinary clauses are material parts of the decree and the foregoing contention is not sustained, then the appellant falls back on his right of next of kin and claims that the clauses vitiate the whole decree, and in such case objects to the decree.

III. Because no will of Andrew Jackson Davis has been proved and allowed in Montana according to the laws of Montana, and therefore Probate and letters testamentary ought not to be granted here.

IV. Because the papers presented to the Court with the Petition are not copies of the will of Andrew J. Davis and of the Probate thereof in the State of Montana.

The appellant prefers that the will alone should be admitted to Probate, but rather than that the Compromise distribution should take effect desires to have intestacy decreed, and contends that the alternative is between intestacy and the will alone.

ERWIN DAVIS
by his atty. RICHARD W. HALE.

Upon which is endorsed the following:

"No. 6133 Eq. John H. Leyson, Pet'r. vs. Erwin Davis, Respondent.
Objections to decree
Suffolk, ss. Supreme Judicial Court. Filed Jan. 7, 1898.
Attest: C. H. Cooper, Ass't. Clerk."

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. Equity and Probate.

SUPREME JUDICIAL COURT.

JOHN H. LEYSON, Petitioner,
vs.
ERWIN DAVIS, Respondent, Appellant.

INTERROGATORIES PROPOUNDED BY SAID ERWIN DAVIS TO BE ANSWERED ON OATH BY SAID JOHN H. LEYSON.

(1). State whether or no any assent of Erwin Davis to the Decrees, which you present as having been entered in Montana, is on file with the papers in the Montana Court or Courts.

(2). State to the extent of your knowledge and informat whether or no Erwin Davis ever assented to these Decrees; and your answer is that he did, state when and where and how and the information which you have.

(3). Are you the Administrator charged by the Montana C with the duty of putting these decrees into execution?

(4). Have you made any partial or other distribution of the est of Andrew J. Davis in Montana?

(5). If your answer to the foregoing question is that you hav state fully what you have distributed, and to whom paid or tra ferred, and how much, and when and where.

(6). Is it your intention to distribute or to claim a right or a du to distribute the property which will come into your hands, if t present Petition is granted, in accordance with the terms of t instrument which you present as a copy of the will of Andrew Davis? State fully what you intend to do with the property whi will so come into your hands.

(7). If you propose or expect to distribute said property accor ing to said will, state how and in what proportion and to whom and state how and why the person or persons to whom you inte to distribute are understood to be beneficiaries under said will.

(8). If your answer is that you do not intend or expect to di tribute such property according to said will, state to whom y intend or expect to distribute it and why, and why not according said will.

(9). Please examine the papers which are filed herewith, marke "A" and "B", returning them with your answers, and after su examination state whether and if so when first you have be informed of the existence of the original papers of which these a copies.

(10). Do you know where and when John A. Davis executed t same? State fully all your knowledge on that point, and when su knowledge was acquired, including in your answer as well everythi which you have been informed by your agents or other persons an believe to be true, as matters which you are able to testify to as

witness, distinguishing all facts stated on your personal knowledge from those stated on your information and belief.

Please also now search all sources of information on this point which are under your control as Administrator in Montana and state what information these sources now afford you.

ERWIN DAVIS
by his atty. RICHARD W. HALE.

I, Richard W. Hale, Attorney for Erwin Davis, make oath that I have reason to believe that said Erwin Davis will derive some material benefit in the above entitled action from the discovery which he seeks by the foregoing Interrogatories if the same is fairly made, and that the discovery is not sought for the purpose of delay.

RICHARD W. HALE.

Subscribed and sworn to before me this thirteenth day of January 1898.

LASELL E. PARTRIDGE
Justice of the Peace.

Upon which is endorsed the following:
(1633. J. H. Leyson, Pet'r, v. Erwin Davis, Respondent and Appellant.
Interrogatories propounded by Davis to Leyson.
Suffolk, ss. Supreme Judicial Court. Filed Jan. 19, 1898.
Attest: C. H. Cosgrove, Ass't Clerk.)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. In Equity.

SUPREME JUDICIAL COURT

JOHN H. LEYSON, Petitioner,
vs.
ERWIN DAVIS, Respondent, Appellant.

ANSWERS OF JOHN H. LEYSON TO INTERROGATORIES PROPOUNDED BY ERWIN DAVIS, IN THE ABOVE ENTITLED CASE.

1. In answer to the 1st interrogatory he says that he understands this is an inquiry as to a matter of record in the Montana Courts or Courts and that as such, it is not a proper matter of inquiry in this form; and having no personal knowledge of or on the subject, he is not

required to search the files of the Montana Court or Courts for the purpose of ascertaining whether such a paper is on file therein, and respectfully declines to make such a search unless ordered so to do by the Court.

2. In answer to the 2nd. interrogatory, he says that he has no personal knowledge or information upon the subject, and never saw nor had any communication with Erwin Davis.

3. In answer to the 3rd. interrogatory, he says that he is the administrator with the will annexed of the estate of Andrew J. Davis in Montana; that as such he intends to collect the property of the testator, and the debts due his estate, including one owned by Erwin Davis, this respondent, now amounting to nearly one million dollars, upon portions of which judgments have been recovered; that as such administrator with the will annexed, he is advised that he is subject to the orders or decrees of the Court of last resort having jurisdiction in the matter.

4. In answer to the 4th. interrogatory he says that he is advised that this is not a proper matter of inquiry in this form, and respectfully declines to answer same unless ordered so to do by the Court.

5. In answer to the 5th. interrogatory, he says that he respectfully refers to his answer to the 4th. interrogatory.

6. In answer to the 6th. interrogatory, he says that he is informed that this is not a proper subject of inquiry in this form, and states that if appointed administrator with the will annexed of the estate of Andrew J. Davis in Massachusetts his only intention is to hold said property and dispose of same in accordance with the orders and decrees of the Courts of Massachusetts having jurisdiction thereof, and that he intends to give a good and sufficient bond, in accordance with the decree of the Probate Court.

7. In answer to the 7th. interrogatory, he says that he is advised that this is not a proper subject of inquiry in this form, that his intention in relation to the subject matter thereof, is as stated in answer to interrogatory 6, and he declines to make any further answer unless ordered so to do by the Court.

8. In answer to the 8th. interrogatory, see answers to 6 and 7.

9. In answer to the 9th. interrogatory, he says that he has no

personal knowledge as to any originals of which papers marked "A" and "B" are, or purport to be copies.

10. In answer to the 10th. interrogatory, he says that he has no personal knowledge upon the subject inquired about: that he has heard of Erwin Davis' claim that such papers existed, and has also heard that no such paper or papers existed: that at the present time he is unable to state further his information or belief upon the subject matter: that he has not the custody or control of any such papers, if any such are in existence, and is advised that he is not called upon to "search all sources of information on this point" and answer as to information from these sources and respectfully declines so to do unless ordered so do by the Court hereafter. He further says that nearly three years ago he was appointed administrator with the will annexed of the estate of Andrew J. Davis, deceased, by the District Court of Silver Bow County, State of Montana, and gave a large bond to perform his duties as such administrator, and has ever since acted and is now acting as such administrator in Montana: that said Court has jurisdiction of said estate in Montana: that he has no interest in said estate except as such administrator, and has taken no part, except as he was obliged to do so as administrator, in any of the contests or disputes between persons claiming said estate, nor has he in any way favored or assisted one against the others, but has endeavored at all times to administer said estate for the best interests of those entitled to the same: that he has at all times acted under advice of counsel and has reported to the Court all his acts and doings in reference to said estate, and has in all matters acted under and in accordance with the orders and decrees of the Court: that all his acts as administrator appear in the files and records of said Court, which are open to examination and inspection by any one interested: that he knows nothing of his own knowledge of the alleged claims of Erwin Davis against said estate or against John A. Davis or his heirs, and so far as he knows or is informed said Erwin Davis has never made in said Silver Bow County District Court any claim against the estate of said Andrew J. Davis or against the estate of said John A. Davis: and that if he is appointed administrator of the estate of said Andrew J. Davis in Massachusetts, he intends to

and will administer said estate for its best interests and according to law, and under the orders and decrees of the Courts of said Commonwealth.

And further he saith not.

JOHN H. LEYSON.

Subscribed and Sworn to before me this ninth (9) day of February, A. D. 1898.

Witness, my hand and the Seal of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

CLINTON C. CLARK,
Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

(SEAL)

STATE OF MONTANA,
COUNTY OF SILVER BOW ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, the same being a Court of Record and having a Seal, and the Clerk thereof having authority under the laws of the State of Montana to administer oaths,

Do Hereby Certify, that John H. Leyson appeared before me this 9th. day of February, A. D. 1898, and in my presence subscribed his name to the foregoing answers and made oath that the matters and things therein stated were true.

Witness, my hand and Seal of said Court hereunto affixed this 9th. day of February, A. D. 1898.

CLINTON C. CLARK,
Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

STATE OF MONTANA,

COUNTY OF SILVER BOW ss.

I, John Lindsay, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow,

Do Hereby Certify, that said Court is a Court of Record and has a Seal; that Clinton C. Clark, whose genuine signature appears to the foregoing certificate, is the duly authorized Clerk of said Court, and has authority under the laws of Montana to administer oaths; and that said certificate is in due form of law, and that the Seal thereto attached is the Seal of said Court.

Witness, my hand this 9th. day of February, A. D. 1898.

JOHN LINDSAY,
Judge of said District Court.

Upon which is endorsed the following:

"6133 Eq. John H. Leyson, Pet'r, v. Erwin Davis, Resp't. Appt.
Answers of John H. Leyson to Interrogatories propounded by Erwin Davis.
Suffolk, ss. Supreme Judicial Court. Filed Feb. 28, 1898.
Attest: C. H. Cooper, Ass't Clerk."

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. In Equity & Probate.

SUPREME JUDICIAL COURT.

6133

JOHN H. LEYSON, Petitioner, Appellee,

vs.

ERWIN DAVIS, Respondent, appellant.

DECREE.

This case came on to be heard and was argued by counsel and thereupon, on consideration thereof, it is ordered, adjudged and decreed that said appeal be dismissed; that the decree of the Probate Court admitting to probate the will of Andrew J. Davis late of Butte, Montana, and appointing John H. Leyson of said Butte, administrator with said will annexed, be and the same hereby is

affirmed: that said cause be remitted to the Probate Court for further proceedings not inconsistent herewith.

By the Court,

JOHN NOBLE, *Clerk.*

March 9, 1898.

Upon which is endorsed the following:

"6133 Decree

It is agreed that the within decree may be entered, all appeal from it is waived.

H. G. Allen.
Solicitor for John H. Leyson.
R. M. Saltonstall
Richard W. Hale
Solicitors for Erwin Davis."

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the four volumes, entitled as follows:

Volume I., Record for Complainant (pages 1 to 165);

Volume II., Record for Complainant (pages 1001 to 1291);

Volume III., Record for Defendants (pages 1501 to 1682);

Volume IV., Proceedings in said Circuit Court with References to Volumes I., II., and III. (pages 2001 [1701] to 2058 [1741]);

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings of said Circuit Court in the cause in equity entitled,

No. 1757.

EVA A. INGERSOLL, ADMINISTRATRIX, COMPLAINANT,

v.

JOSEPH A. CORAM ET AL., DEFENDANTS,

in said Circuit Court determined, the Opinion of the Circuit Court of March 22, 1905, the Petition for Appeal, the Assignment of Errors, the Summons and Severance, and the Bond to Party on Appeal, and also the original Citation issued upon the appeal of the defendants, Joseph A. Coram, Henry A. Root and Charles H. Palmer, trustee, in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this thirtieth day of August, A.D. 1905.

[SEAL] ALEX. H. TROWBRIDGE, *Clerk.*

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD.

FILED IN CIRCUIT COURT OF APPEALS JULY 20, 1905.

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Friday, September 1, 1905.

FRANCIS C. LOWELL,

U. S. Circuit Judge.

CERTIFICATE OF CLERK OF CIRCUIT COURT OF APPEALS.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,

v.

EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

CLERK'S CERTIFICATE.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the four volumes, entitled in the above cause, namely:

Volume I., Record for Complainant, — Pleadings, Court Records, Proofs, etc.;

Volume II., Complainant's Exhibits;

Volume III., Record for Defendants;

Volume IV., Transcript of Record of Circuit Court and Proceedings in Circuit Court of Appeals;

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of November, A.D. 1906.

[SEAL.] JOHN G. STETSON, *Clerk*

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1757.

EVA A. INGERSOLL, ADMINISTRATRIX,

v.

JOSEPH A. CORAM ET AL.

EVIDENCE FOR DEFENDANTS.

TAKEN PURSUANT TO SECTION 863 OF THE REVISED STATUTES OF THE UNITED STATES, BEFORE ME.

CHARLES L. APFEL,
Notary Public.

NEW YORK, July 22, 25, 26, 1904.

Present: E. N. HARWOOD, Esq., *of Counsel for Complainant;*
THADDEUS D. KENNESON, Esq., *of Counsel for Defendants.*

DEPOSITION OF SIMON H. STERN.

[NOTE BY CLERK OF COURT. By direction of Thaddeus D. Kenneson, Esq., of counsel for defendants, November 21, 1904, the deposition of Simon H. Stern is not printed.]

EVIDENCE FOR ALL DEFENDANTS

EXCEPT ANDREW J. DAVIS, JR., TRUSTEE.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED.

BEFORE ME.

BENJAMIN H. BRADLEE,

Special Examiner.

BOSTON, August 3, 1904.

Present: E. N. HARWOOD, Esq., *of Counsel for Complainant;*
THADDEUS D. KENNESON, Esq., *of Counsel for all Defendants except Andrew J. Davis, Jr., Trustee.*

Counsel for defendants offers in evidence judgment roll in an action in the District Court of the Second Judicial District for the State of Montana in and for the County of Silver Bow, wherein John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, was plaintiff, and Henry A. Root, Joseph A. Coram and others were defendants, which action came on for trial in said court on the eleventh day of December, 1902, and which action was, by order of said court, made December 11, 1902, and by judgment of said court, made December 12, 1902, dismissed with costs.

Counsel for defendants also offers order and judgment in said action by the Supreme Court of the State of Montana, affirming the judgment of said district court entered on the twelfth day of December, 1902, and the orders made and entered in said court on the twelfth day of December, 1902, with costs, said judgment being dated May 11, 1902; also the mandate of said Supreme Court demanding that such execution and further proceedings be had in said cause as according to right and justice and the laws of the State of Montana ought to be had, said appeal, notwithstanding said mandate, being dated May 28, 1903.

Counsel for defendants also offers, in connection with the preceding papers, the certificate thereto annexed of Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, signed and sealed the fourteenth day of July; also the certificate of William Clancy, judge of said court, dated July 14, 1903, certifying that Samuel M. Roberts was at the time of making said certificate the clerk of said district court; also the certificate of Samuel M. Roberts, signed and sealed July 14, 1903, certifying that William Clancy

was at the time of the making of the said certificate judge of said district court.

Copies of these papers have already been printed and form a part of Exhibit A annexed to the affidavit of Henry A. Root filed in the office of the clerk of the United States Circuit Court for the District of Massachusetts on August 14, 1903, and are to be found at pages 128 to 212 inclusive of the printed papers herein on motion for temporary injunction, filed January 25, 1904, being the printed papers submitted to Judge Putnam on the argument of said motion on May 5, 1904.

To the introduction or reception in evidence of the matters mentioned in the foregoing offer or either of them, counsel for complainant objects on the ground that the same is irrelevant, immaterial, and incompetent to prove or tend to prove any estoppel or bar or any other defence pleaded or attempted to be pleaded in this cause; and on the further ground that the same is irrelevant, immaterial and incompetent for any purpose in this action; and on the further ground that the so-called mandate of the Supreme Court of Montana mentioned in the foregoing offer is no part of any judgment roll therein mentioned; and on the further ground that neither defence set up in the answers of defendants or either of them embrace allegations to which said foregoing offered matter applies, or any defence which warrants the introduction of the matter mentioned in the foregoing offer.

Counsel for defendants offers in evidence an opinion of the Supreme Court of the State of Montana, March term, 1903, rendered by Theodore Brantly, chief justice of said court, and concurred in by George R. Milburn and William L. Holloway, associate justices of said court, in the action of John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, plaintiff and appellant, against Henry A. Root, Joseph A. Coram and others, defendants and respondents, said opinion being the opinion of said court on the appeal taken by John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, from the judgment of the District Court of the Second Judicial District for the State of Montana in and for the County of Silver Bow, entered December 12, 1902, dismissing his action in said court, to the Supreme Court for the State of Montana.

Counsel for the defendants also offers in evidence the certificate of Henry G. Rickerts, Clerk of the Supreme Court of the State of Montana, annexed to said opinion, dated July 21, 1903, and sealed with the seal of the Supreme Court of the State of Montana; also the certificate of Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana, dated July 21, 1903, certifying that Henry G. Rickerts was at the time of signing said certificate clerk

of said court; also certificate thereto annexed of Henry G. Rickerts, Clerk of the Supreme Court of the State of Montana, dated July 21, 1903, sealed with the seal of said Supreme Court, certifying that Theodore Brantly was at the time of the signing of said certificate the duly elected chief justice of said Supreme Court.

To the introduction or reception in evidence of the matters mentioned in the last foregoing offer, counsel for complainant objects on the ground that the same is irrelevant, immaterial and incompetent to prove or tend to prove any defence set up in the answers of defendants or either of them; and on the further ground that the same is irrelevant, immaterial and incompetent for any purpose in this action; on the further ground that the matter set forth in said so-called opinion is palpably *obiter dicta*, and irrelevant to the subject-matter presented said court on said appeal, and manifestly an attempt without authority of law to prejudge a case not before the court; and on the further ground that the answers of defendants nor either of them contain any defence to which the matter mentioned in the last foregoing offer applies or is at all relevant; and on the further ground that the action of said Supreme Court sought to be shown by the exhibition of said so-called opinion merely shows an opinion expressed therein that a certain order and judgment of non-suit, according to the author of said opinion, ought to be affirmed, and the same, if so shown, is irrelevant, immaterial and incompetent to affect any matter at issue in this cause.

Counsel for defendants asks the special examiner to mark the papers included in his first offer "Defendants' Exhibit No. 5", and the opinion mentioned in his last offer as "Defendants' Exhibit No. 6", and thereupon the special examiner marks the same accordingly.

Counsel for defendants offers in evidence the objections filed by the defendant herein Henry A. Root, on August 9, 1890, in the office of the Clerk of the District Court of the Second Judicial District in and for the County of Silver Bow and State of Montana, in opposition to the probate of the paper writing which had been previously propounded by John A. Davis for probate as the last will and testament of Andrew J. Davis, deceased. Counsel for defendants also offers in evidence the certificate thereto annexed of Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, dated August 6, 1903, and sealed with the seal of said District Court, certifying that the same is a full, true and correct copy of the contest and opposition of Henry A. Root to probate of will of Andrew J. Davis, deceased; also certificate of William Clancy, judge of said District Court, dated August 8, 1903, thereto

annexed, certifying that the said Roberts was at the time of making such certification clerk of said district court.

Counsel for defendants asks the special examiner to mark the paper just offered "Defendants' Exhibit 7", and the special examiner marks the same accordingly.

Counsel for defendants offers in evidence the objections filed by Maria Cummings on September 11, 1890, in the office of the Clerk of the District Court of the Second Judicial District in and for the County of Silver Bow and State of Montana in opposition to the probate of the paper writing which had been previously propounded by John A. Davis for probate by said court as the last will and testament of Andrew J. Davis, deceased. Counsel for defendants also offers in evidence the certificate thereto annexed of Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, dated August 6, 1903, and sealed with the seal of said District Court certifying that the same was a full, true and correct copy of contest and opposition to probate of will filed by Maria Cummings in his office in the matter of the estate of Andrew J. Davis, deceased; also certificate of William Clancy, judge of said District Court, dated August 8, 1903, thereto annexed, certifying that the said Roberts was at the time of making such certification clerk of said district court.

Counsel for defendants asks the special examiner to mark the paper just offered "Defendants' Exhibit 8", and the special examiner marks the same accordingly.

Counsel for defendants offers in evidence duly authenticated copies of the following papers: Order of Second Judicial District Court, State of Montana, Silver Bow County, in the matter of the estate of Andrew J. Davis, deceased, dated April 23, 1895, appointing John H. Leyson, of Butte, Silver Bow County, Montana, administrator of the will annexed of Andrew J. Davis, deceased; copy of paper writing purporting to be the will of A. J. Davis, dated July 20, 1866; copy of oath of said John H. Leyson, subscribed and sworn to April 20, 1895; copy of certificate of Clinton C. Clark, clerk of the District Court of the Second Judicial District of the State of Montana, thereto annexed, dated September 3, 1897, sealed with the seal of said district court, certifying that the foregoing was a full, true and correct copy of the letters of administration with the will annexed issued to said John H. Leyson in the matter of the estate of Andrew J. Davis, deceased, April 23, 1895; also copy of certificate of John Lindsay, judge of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, dated September 3, 1897, certi-

fying that said Clinton C. Clark was the clerk of said court; also copy of decree made by the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow on the twenty-seventh day of March, 1895, which, among other things, admitted to probate as the last will and testament of Andrew J. Davis, deceased, the document theretofore filed in said court by John A. Davis; also copy of certificate of Clinton C. Clark annexed to the copy of said decree, said Clark being clerk of the District Court of the Second Judicial District, and certifying that the foregoing was a full, true and correct copy of the order admitting will to probate, etc., made and entered in said district court in the matter of the estate of Andrew J. Davis, deceased, March 27, 1895, said certificate bearing date of September 8, 1897, and sealed with the seal of said district court; also copy of certificate of John Lindsay, judge of said district court, dated September 8, 1897, and certifying that said Clinton C. Clark was the clerk of the said judicial district court, said certificate being annexed to the copy of said decree; also copy of petition of John H. Leyson, dated October 8, 1897, presented to the judge of the Probate Court in and for the County of Suffolk in the Commonwealth of Massachusetts, praying that a copy of the will of Andrew J. Davis which had been proved in the State of Montana might be filed and recorded in the Registry of Probate in said County of Suffolk, pursuant to the statute in that case made and provided, and that letters of administration with the will annexed be granted to him; also copy of citation issued October 8, 1897, by the said Probate Court of Suffolk County; also copy of the decree of said Probate Court of Suffolk County made December 9, 1897, ordering that the copy of said will be filed and recorded in the Registry of Probate of said County of Suffolk, pursuant to the statute in that case made and provided, and that letters of administration with the will annexed be granted to the petitioner, John H. Leyson, he first giving bond with sufficient sureties for the faithful discharge of said trust; also notice of Erwin Davis, dated January 7, 1898, of appeal from said decree of said Probate Court of Suffolk County made December 9, 1897, to the Supreme Judicial Court of the Commonwealth of Massachusetts; and also copy of decree of the said Supreme Judicial Court dated March 9, 1898, which decree affirmed the decree appealed from and remitted said cause to the probate court for further proceedings not inconsistent therewith. Counsel for defendants also offers in evidence the following certificates annexed to the foregoing papers, namely, certificate of Elijah George, Register of Probate Court for the County of Suffolk in the Commonwealth of Massachusetts, dated July 28, 1904, certifying that the papers thereto annexed were true copies of papers appertaining to said cause and on file and of record in the office of said court, said certificate being under the seal of the Probate

Court of Suffolk County, Massachusetts; also the certificate of John W. McKim, judge of the said probate court, dated July 28, 1904, certifying that the said Elijah George was the register and proper certifying officer of the said court, etc.; also the certificate of Elijah George, Register of the Probate Court of Suffolk County, Commonwealth of Massachusetts, dated July 28, 1904, sealed with the seal of the said probate court, certifying that the said John W. McKim was the senior presiding judge of said probate court.

Counsel for complainant objects to the statements interpolated in the foregoing offer of documents by counsel for defendants, asserting what he claims to be the contents or the effect of certain of said documents, as irrelevant and improper affirmations for counsel to insert in said offer; and complainant's counsel moves the court to strike out and disregard such affirmations of defendants' counsel, attempting to characterize and state the purport or effect of the writings which he has offered in the last foregoing offer.

Counsel for complainant objects to the introduction in evidence of the writings mentioned in the last foregoing offer on the ground that the same are manifestly and only purport to be a certified copy or copies of certain documents and are not duly or properly authenticated, and on the further ground that under the allegations of complainant's bill and the admissions in defendants' answers the said writings mentioned in the last foregoing offer embrace only a part of the authenticated copies of records, orders and proceedings of said Montana District Court in relation to the alleged will of Andrew J. Davis, deceased, duly had and made in said District Court of Montana, authenticated copies of which have been filed in said Probate Court of Suffolk County, Massachusetts, and said writings mentioned and offered in the last foregoing offer, when considered in connection with the allegations of complainant's bill and the admission of defendants' answers, manifestly present a partial and incomplete showing of the proceedings, orders and decrees of said District Court of Montana touching said alleged will of Andrew J. Davis, deceased, and decreeing to the defendants in this action the portions of the estate of Andrew J. Davis, deceased, acquired for them through contests of said will and the decrees of said District Court of Montana determining said contests; and on the further ground that said writings mentioned in the last foregoing offer, severally or together, do not prove or tend to prove any defence set up in the answers of defendants; and that said writings mentioned in the last foregoing offer and each and all of them are irrelevant and immaterial to the issues in this cause; and complainant's counsel objects to the admission in evidence of that certain writing which purports to be and is alleged to be a copy of a decree of the Supreme Judicial Court of the Commonwealth of

Massachusetts, on the ground that it is not properly or at all authenticated or duly certified as required by law to authorize the admission or consideration thereof in evidence in this court.

Counsel for defendants requests the special examiner to mark the papers last offered by him in evidence "Defendants' Exhibit 9", and the special examiner marks the same accordingly.

Counsel for defendants offers in evidence the following papers: A copy of an original complaint filed in the office of the Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, in an action wherein Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, was plaintiff, and Henry A. Root, Joseph A. Coram and others were defendants, being the action referred to in paragraph 25 of the bill of complaint in present suit, as an action begun in said District Court in the State of Montana by Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, appointed as such administratrix by the Surrogates Court in New York State, wherein John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, appointed in the State of Montana, was subsequently substituted as plaintiff in place of the said Eva A. Ingersoll, as administratrix, etc.; also copy of the summons issued in said action; copy of journal entry showing order of court changing title of action made and entered December 6, 1901; also order of said district court, dated December 6, 1901, permitting John S. Harris as administrator in the State of Montana to intervene in and be substituted as plaintiff in said action in the place of Eva A. Ingersoll, named as plaintiff therein; also copy of amendment to complaint verified by said John S. Harris on December 6, 1901; also certificate of Samuel M. Roberts, annexed to the foregoing papers, dated December 7, 1901, sealed with the seal of said Second Judicial Court of Silver Bow County, certifying that the foregoing was a full, true and correct copy of the papers therein enumerated; also copy of certificate of E. W. Harney, judge of the District Court of the Second Judicial District of the State of Montana, dated February 6, 1904, certifying that the said Samuel M. Roberts was at the time of making said certificate the clerk of said district court; and also the certificate of Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, dated February 6, 1904, sealed with the seal of said second judicial court, certifying that the said E. W. Harney was at the time of making said certificate judge of the said district court.

Counsel for complainant objects to the introduction or reception in evidence of the writings mentioned in the last foregoing offer on

the ground that the same and each and all of them are irrelevant and immaterial, and do not tend to prove any allegation or fact in issue in this cause; and on the further grounds that under the allegations of complainant's bill of complaint and the admission of defendants' answers thereto the writings mentioned in the last foregoing offer and each and all of the same are immaterial and irrelevant; and on the further ground that under the rules of law and procedure the matters and things embraced in the writings mentioned in the last foregoing offer appertaining to an action brought in the State of Montana and non-suited by order of said District Court of Montana are irrelevant and immaterial to the matters in issue in this cause pending in the Circuit Court of the United States, on the ground that no trial or adjudication of the matters and things set up in said Montana action was ever had as shown by the records and papers offered in evidence by the defendants in this cause, and as also appears by the allegations in complainant's bill of complaint and the answers of defendants in this cause; and on the further ground that the writings mentioned in the last foregoing offer are not authenticated or properly certified as provided by law so as to authorize the reception thereof in evidence in this cause.

Counsel for defendants requests the special examiner to mark the papers specified in the last offer made by him in evidence "Defendants' Exhibit 10", and the special examiner marks the same as requested.

Adjourned.

Boston, Mass., August 4, 1904.

DEPOSITION OF CHARLES E. HELLIER.

Direct Examination by Thaddeus D. Kenneson, Esq., *of Counsel for Defendants.*

Int. 1. Please state your name, age, residence and occupation.

Ans. Charles E. Hellier; forty years; Boston; attorney.

Int. 2. Where is your office?

Ans. 57 Equitable Building, Boston.

Int. 3. How long have you had an office there?

Ans. Something over fifteen years.

Int. 4. Were you acquainted with Gideon Wells, of Springfield, Mass., in his lifetime?

Ans. Yes.

Int. 5. Had you occasion to meet him frequently?

Ans. During several years I saw Judge Wells quite frequently.

Int. 6. Are you acquainted with Robert M. Morse?

Ans. I am; I have been associated with him in practice ever since I have been at the bar.

Int. 7. Can you state whether Robert M. Morse and Gideon Wells were special administrators of the estate of Andrew J. Davis in the State of Massachusetts?

Ans. They were.

[*Counsel for complainant objects to the testimony given by the witness in answer to the last foregoing question on the ground that the same is not responsive thereto, goes beyond what was called for by said interrogatory; and further objects to this witness stating that said persons were special administrators in the matter mentioned on the ground that his testimony is not the best evidence of that fact; and objects on the further ground that the testimony called for is immaterial and irrelevant to the issues in this cause; and if it were intended that the witness in answer to the foregoing interrogatories should state that said persons mentioned were special administrators, his testimony in that behalf is incompetent.*]

Int. 8. Please state where Gideon Wells resided.

Ans. Springfield, Massachusetts.

Int. 9. Can you state about when Gideon Wells died?

Ans. I do not know the exact date when he died; I do know that we had business relations with him up to a certain time which I have in mind.

Int. 10. Will you state that time?

Ans. The time which I have in mind is March, 1898.

Int. 11. I show you an instrument which has been marked in evidence in this suit as "Complainant's Exhibit A" [*printed Complainant's Record, page 13*]; I will ask you to glance at that.

Ans. I have done so.

Int. 12. Can you state after reading that whether the Gideon Wells whom you have testified you knew in his lifetime and who lived in Springfield, Massachusetts, and who, with Robert M. Morse, was one of the special administrators in this commonwealth of the

estate of Andrew J. Davis, deceased, is the Gideon Wells named as trustee in the instrument shown you, namely, "Exhibit A"?

[*To which question counsel for complainant objects on the ground that the same is leading in that it embraces several assumptions of fact which have not been proved by any testimony offered in this case, and as to which the witness has not been questioned or shown any knowledge to qualify him to testify thereof.*]

Ans. I can.

Int. 13. Will you state whether they were one and the same person?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.*]

Ans. They were.

Int. 14. Did you act as attorney for Robert M. Morse and Gideon Wells as special administrators of the estate of Andrew J. Davis in this commonwealth?

Ans. I did.

Int. 15. For how long a period?

[*To which question counsel for complainant objects on the ground that the testimony called for is immaterial and irrelevant to the issues in this cause.*]

Ans. I should say for a year or two: perhaps longer.

Int. 16. Did you during that time meet Gideon Wells personally?

[*Same objections.*]

Ans. I did.

Int. 17. Did you have written communications during that time with said Gideon Wells?.

Ans. I presume I did.

[*Counsel for complainant moves the court to strike out the last foregoing answer on the ground that it is uncertain and manifestly shows that the witness is not testifying in his last foregoing answer to a fact of which he has knowledge.*]

Int. 18. Have you seen Gideon Wells write?

Ans. I have.

Int. 19. I show you an instrument in writing already marked in evidence in this case as "Complainant's Exhibit LV." [*printed*

Complainant's Record, page 1131], and will ask you to look at the signatures thereto and state whether or not any of the signatures are in the handwriting of Gideon Wells.

[*To which question counsel for complainant objects on the ground that the testimony called for thereby is irrelevant and immaterial.*]

Ans. The signatures of Sarah Cummings, M. Louise Dunbar and Gideon Wells are in the handwriting of Gideon Wells.

Int. 20. Do you know whether Gideon Wells whom you have testified you knew and who lived in Springfield, Massachusetts, went to Chicago in the year 1893?

Ans. Yes, I remember that he told me he did.

[*Counsel for complainant objects to the testimony given in response to the last foregoing question on the ground that the same is hearsay, and moves the court to strike the same out and disregard it on said ground and on the further ground that the answer is not responsive to the question and goes beyond the inquiry made.*]

Mr. KENNESON: *The witness is yours.*

[*Counsel for complainant requests counsel for defendants, Mr. Thaddeus D. Kenneson, who examined this witness, Mr. Hellier, to state for what purpose and as applicable to what allegations or statements in the pleadings he introduces the testimony of said witness.*

Counsel for defendants feels that he is under no obligation to disclose the purpose of this testimony at this time, and therefore respectfully declines the information requested.

Counsel for complainant states upon the record to counsel for defendants that he made the foregoing inquiry in good faith in order to be enabled to cross-examine this witness if his testimony is to be used and insisted on as applicable to any issue in this cause or as materially affecting any question to be adjudicated therein, or affecting the rights or liabilities of the parties to this cause or either of them, and again requests counsel for defendants to state upon the record the purpose for which he has elicited and put into the record the foregoing testimony of the witness, Mr. Hellier, it not being apparent from either the allegations of complainant's bill or the matters or things set forth in defendants' answers that any issue is involved in this cause as to which the foregoing testimony of Mr.

Hellier is applicable or relevant: and if counsel for defendants refuses to state the purpose of the introduction of said testimony, under such circumstances as appears in this cause from the pleadings, counsel for complainant will move the court to strike out and exclude from consideration the testimony of this witness under the authorities and rules for procedure in such cases.

Counsel for defendants certainly intends to insist that the evidence of this witness is applicable to the issues made in this action and he does not feel called upon to instruct counsel for complainant as to its applicability, even though he might thereby be assisted in cross-examining the witness.

Counsel for complainant moves the court to strike out and disregard the foregoing testimony of said witness, Mr. Hellier, on each and all of the grounds mentioned in the several objections recorded thereto, on the ground that counsel for defendants refuses to disclose the purpose for which he introduces the same.

In view of the position taken by counsel for complainant, counsel for defendants informs said counsel that by the testimony of this witness he has sought to show that Gideon Wells, the co-trustee with Henry A. Root in "Complainant's Exhibit A", lived until after the making of the contract of August 17, 1891, on which this suit is based. Further than that counsel feels no obligation to disclose the purpose of the examination of this witness.

Deposition closed.

CHARLES E. HELLIER.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

[*Adjourned.*]

Boston, Mass., August 6, 1904.

DEPOSITION OF WILLIAM W. McCLENCH.

Direct Examination by Thaddeus D. Kenneson, Esq., *of Counsel for Defendants.*

Int. 1. Please state your name, age, residence and occupation.

Ans. William W. McClench: fifty years old: residence, Springfield, Mass.: occupation, attorney at law.

Int. 2. How long have you been an attorney at law and where have you practiced your profession?

Ans. Since 1878: have practiced in Chicopee, Mass., and in Springfield, Mass.

Int. 3. Are Chicopee and Springfield both in Hampden County?

Ans. They are.

Int. 4. Did you know in his lifetime a man named Gideon Wells?

Ans. I did.

Int. 5. What was his profession?

Ans. He was, at the time of his death, counsel for the Massachusetts Mutual Life Insurance Company, of Springfield, Mass., and president of the Holyoke Water Power Company, of Holyoke. Formerly and for many years he was judge of the police court of Springfield, and during all the time an attorney at law.

Int. 6. When did he die?

[*To which question counsel for complainant objects on the ground that the testimony called for thereby is immaterial and irrelevant to any issue in this cause, and on the further ground that there is no allegation in any pleading therein to which said testimony is pertinent or applicable in any respect whatever.*]

Ans. In March, 1898.

Int. 7. Did you attend his funeral?

Ans. I did, and was one of the bearers.

Int. 8. How long had you known him before his death?

Ans. More than twenty years. He was one of the examiners when I was admitted to the bar.

Int. 9. Were you ever associated with him in business; and, if so, in what capacity?

Ans. I was. We were partners, together with a man by the name of Jonathan Barnes, a nephew of Judge Wells, under the firm name of Wells, McClench & Barnes. The partnership was formed in December, 1889, and continued until about the first day of January, 1893.

Int. 10. Did you meet Gideon Wells between the date of the cessation of your partnership and the date of his death; and, if so, where and how frequently?

Ans. I did, almost daily; when Mr. Wells was in Springfield, as early in 1893, I became associated with him as counsel for the Massachusetts Mutual Life Insurance Company, and saw him constantly in the offices of that company, in court and elsewhere, both in business and socially. I succeeded him as counsel for the Massachusetts Mutual Life Insurance Company in March, 1898.

Int. 11. Have you ever seen Gideon Wells write?

Ans. Very often.

Int. 12. I show you a written instrument, already marked in evidence in this case as "Complainant's Exhibit LV." [*printed Complainant's Record, p. 1134*], and will ask you to look at the signatures thereto, and state whether any of the signatures are in the handwriting of the said Gideon Wells; and, if so, what signatures?

[*To which question counsel for complainant objects on the ground that the testimony called for is irrelevant and immaterial, and on the further ground that there is no allegation of any pleading in this cause to which the same is applicable or pertinent.*]

Ans. Sarah M. Cummings and M. Louise Dunbar, both signed by Gideon Wells and Henry A. Root, attorneys; the words Sarah M. Cummings, M. Louise Dunbar, by Gideon Wells, and Gideon Wells again were written by Mr. Wells.

Int. 13. I show you another written instrument, already marked in evidence in this case as "Complainant's Exhibit A" [*printed Complainant's Record, p. 13*], and will ask you to examine the same.

Ans. I have examined the instrument.

Int. 14. Can you state whether the Gideon Wells named in Complainant's Exhibit A as co-trustee with Henry A. Root was

the same-Gideon Wells who, as you have testified, was an attorney at law and lived in Springfield, Massachusetts, and died in March, 1898, and who was formerly a partner with you in the practice of the law?

[*To which question counsel for complainant objects on each and all of the grounds stated in the last foregoing objection.*]

Ans. He was the same person as described by me in my former answers.

Int. 15. Do you know whether or not said Gideon Wells was a special administrator of the estate of Andrew J. Davis in the Commonwealth of Massachusetts?

[*To which question counsel for complainant objects on the ground that the same is immaterial, impertinent and irrelevant, because there is no issue nor any fact alleged in the pleadings to which such testimony is applicable or pertinent; and on the further ground that the testimony called for is not the best evidence available to prove the fact mentioned, if it were necessary to be proved.*]

Ans. I understood that he was such special administrator.

Int. 16. Did you know Sarah Maria Cummings in her lifetime?

Ans. I knew Sarah Maria Cummings, of Ware, Massachusetts.

Int. 17. And Ware, Massachusetts, is in Hampshire County, is it not?

Ans. It is.

Int. 18. Did you know Elizabeth S. Ladd in her lifetime?

Ans. I did; she resided in Springfield, and I saw her many times in the office in connection with the Davis estate.

Int. 19. Do you know Mary Louise Dunbar?

Ans. I do; I saw her frequently also in Springfield in connection with the same estate.

Int. 20. And when you say you saw Elizabeth S. Ladd and Mary Louise Dunbar in connection with the Davis estate, do you mean that you saw them at the offices of your firm while you were in partnership with Gideon Wells?

[*To which question counsel for complainant objects on the ground that it is leading, and on the further ground that the testimony called*

for is irrelevant, immaterial and impertinent to the issues and allegations of the pleadings in this case.]

Ans. I do.

Int. 21. State whether or not Gideon Wells knew the three persons whose names I have just mentioned to you.

[*To which question counsel for complainant objects on the ground that the testimony called for is irrelevant, immaterial; and also that it is impertinent to the issues and pleadings in this cause.*]

Ans. He did.

Mr. KENNESON—*That is all.*

[*Counsel for complainant requests counsel for defendants to state for what purpose he has introduced in evidence the foregoing testimony of Mr. McClench, and to what allegation or allegations of the pleadings in this cause he expects to apply same, so that counsel for complainant may be enabled to cross-examine this witness properly in case his testimony is to be insisted on as applicable to any issue or allegation of the pleadings in this cause.*

Counsel for defendants certainly intends to insist that the evidence of this witness is applicable to the issues made in this action, and informs counsel for complainant that by the testimony of this witness he has sought to show that Gideon Wells, the co-trustee with Henry A. Root in Complainant's Exhibit A, was alive after the making of the contract of August 17, 1891, on which this suit is based, and was also alive after the making and entering of the decree of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow on August 24, 1897, a copy of which said decree is annexed to the bill of complaint herein, an authenticated copy of which decree has already been offered in evidence by complainant and marked "Exhibit XLIX. and C." [printed Complainant's Record, p. 1146].

Counsel feels under no obligation to make any further disclosure of the purpose of the examination of this witness and does not recognize that complainant's counsel is entitled to the disclosure already made.

Counsel for complainant moves the court to strike out each and all statements made by said witness, Mr. McClench, in his foregoing

testimony on the ground that the same is irrelevant, immaterial and impertinent to the issues in this cause as shown by the pleadings therein.

Examination of witness closed.

WM. W. McCLENCH.

Attest: BENJAMIN H. BRADLEE, *Special Examiner.*

Counsel for defendants calls attention to the fact that the deposition of Simon H. Stern, taken in the City and County of New York before Charles L. Aptel, a notary public duly commissioned in and for the County and City of New York, pursuant to notice duly given, on July 22, 1904, and days thereafter, to which the taking of said deposition was duly adjourned, has been returned and is on file in the office of the clerk of the United States Circuit Court for the District of Massachusetts, the same having been filed in said clerk's office on July 28, 1904.

As Henry A. Root and Joseph A. Coram are both defendants in this action and, under section 858 United States Revised Statutes, are not competent to testify to personal transactions had by them with Col. Robert G. Ingersoll in his lifetime, and as complainant's counsel has already indicated in the taking of testimony in this case that he will object to such testimony being given by them, counsel for defendants has decided not to call them, and now and here closes the testimony and evidence for the defendants in this action.

Counsel for complainant moves the court to strike out and disregard the foregoing observations of counsel for defendants, commencing with the words "As Henry A. Root and Joseph A. Coram are both defendants," etc., down to the commencement of the statement that defendants now and here close the introduction of testimony on their part, as irrelevant, immaterial and improper interpolation into this record.

Counsel for complainant calls attention of counsel for defendants to Complainant's Exhibit LIX. [printed Complainant's Record, p. 1195], the same being certified copy of three several deeds recorded in the office of the County Clerk and Recorder of Silver Bow County, State of Montana, and heretofore introduced in evidence on behalf of complainant, marked "Complainant's Exhibit LIX.", and to the fact that certain certificates thereto annexed, certifying the official character of officers whose certificates are annexed thereto, are incomplete in that the name of the presiding judge of the court of record in said county is not inserted in the certificate of said presiding judge, and also in the certificate of the clerk of said court of record, and asks counsel for defendants whether he will waive said defect on the record or consent that the special

examiner herein may return said exhibit to the officer whose duty it is to certify the same, so that the said certificates may be properly completed and returned forthwith to the special examiner herein.

Counsel for defendants withdraws for the purposes of this trial in this action the objections heretofore made to these certificates and waives, for the purpose of this trial, these defects.

It is hereby stipulated and agreed by and between counsel for complainant and for defendants in this action that in case Benjamin H. Bradlee, special examiner herein, is absent from the City of Boston or otherwise unable to appear and act as such special examiner herein during the time in which complainant may introduce testimony in rebuttal, then Alexander H. Trowbridge may and he is hereby authorized to act as special examiner in this cause in the place and stead of Benjamin H. Bradlee during his absence.

It is hereby stipulated and agreed by and between counsel for complainant and counsel for defendants in the above-entitled cause that complainant may have to and including the fifteenth day of September, 1904, within which time to introduce and take testimony and proofs on behalf of complainant in rebuttal in this cause.

Adjourned subject to notice.

DEFENDANTS' EXHIBITS.

DEFENDANTS' EXHIBIT No. 1*

(Being such part of letter as defendants' counsel read into the record.)

[Put in Evidence in Complainant's Record, page 166.]

STERN & RUSHMORE,
Attorneys and Counsellors,
40 Wall St. New York.
Simon H. Stern. Chas. E. Rushmore.

May 21st, 1900.

My dear Mrs. Ingersoll:

Mr. Farrell asked me the other day when I call at your house, if I would not write a letter to you and state just the situation of the relations between your late husband and myself in so far as the Davis Estate matter is concerned.

I wrote him that I would see Mr. Coram in a few days and talk the subject over with him, and then I would be able to say definitely and with more exactness just what the situation was then and is at this time, because I wanted to see if Mr. Coram's recollection confirmed my own.

Now, the situation is exactly this:

The original agreement with Col. Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis Estate for his services. That agreement was made at the time the will was first offered for probate. At that time the Estate amounted to upwards of five million dollars, and that agreement was made on account of the magnitude of the estate, and was a very reasonable one, considering what the estate then amounted to.

As you know, Col. Ingersoll went out there, I think three or four times: the cause was tried and the result was a mis-trial. Then came attacks on the body of the estate. A. J. Davis, Jr., claimed that the First National Bank in Butte which was then worth over a million and is now worth over two million, had been given to him by A. J. Davis, the deceased. He succeeded in this contention and the estate lost that bank.

The Butte & Boston mining stock, amounting to 90,000 shares,

*See also pages 166, 167, complainant's printed record.

was worth at the time of Judge Davis' death, about $1,500,000. That company failed, and the estate was fortunate in being able to sell that stock altogether for the sum of $180,000.

The first National Bank of Helena, one-half of the stock of which was owned by the estate, we then supposed was perfectly good, and we estimated the interest of the estate in that bank to be worth very nearly half a million dollars. That bank failed, and the estate was obliged to pay $175,000 assessment, because of its ownership of this stock, and never received a penny for the stock, and never will.

After all these things had occurred, Col. Ingersoll favored and urged a settlement in compromise with the heirs of John A. Davis, and I, after many efforts, succeeded in effecting a settlement. I had prepared a draft on the compromise settlement which was signed by all the heirs. Col. Ingersoll went over it and changed it in many respects, and thoroughly approved of it. By this compromise agreement a certain, and very considerable proportion of the shares of my aunt and sister and cousins and myself, were turned over to Captain C. H. Palmer, who was selected by us as the trustee to receive those interests, and with such interests pay off the obligations which we had incurred, including the fee to Col. Ingersoll.

A partial distribution was had and I received a certain considerable amount of money from this fund and from my own interest in the estate, and with it I came to New York, first, however, paying off a fractional part of the money which had been advanced for the litigation. There was about twenty per cent. paid to the creditors who had advanced moneys for our side. I had, as I recollect it something like $30,000 in my possession when I came to New York.

I saw Col. Ingersoll and told him the situation. I told him that it was utterly impossible for the agreements which we had made to be carried out, because of the fact that the estate had been so depleted by the inroads made upon it and which I have referred to.

Col. Ingersoll said that under the circumstances, of course he would not and could not possibly claim that the fee which I had

agreed to pay him should be paid, because it was impossible to do it. He said that for my work of years I should have some compensation, and that he was willing to do what was very reasonable and fair under the circumstances, which, of course, I knew he would do. I said to him "Colonel, how much do you think you should receive in this first distribution?" He said to me, "How much do you think?" I said to him, "I would rather for you to say." He then said he would rather have me say. Then I asked him if he thought it would be fair for him to receive a fee of $5,000 from this distribution. He said he thought that would be very generous. I then suggested to him that I had borrowed in Ithaca $800, from him, which I would, of course, pay, and he said all right, it would be perfectly satisfactory to him to receive this $5,000. I thereupon sent him a check for the $800, and also for $5,000.

He met Mr. Coram about the same time and had a long talk with Mr. Coram on the subject, and told Mr. Coram that of course he could not expect to receive the $100,000 which he would have been entitled to had the estate not so much diminished, but that he was perfectly willing to take what was fair and reasonable, and that he told me so, and that was the arrangement then in existence.

There is now a substantial fund in Boston, amounting to between $400,000 and $500,000 which I am using every effort in my power to get. An application to distribute that came before the Probate Court in Boston yesterday. I was present and urged that the cause be heard, but the other side secured a postponement of it until the 5th day of September, but the Judge said then he surely would dispose of the matter, and I would suggest to you that you have somebody on your own account take an interest in that and ascertain all of the facts in regard to it; ascertain how much money will be then or whenever it is, distributed to our side; see what the claims on it are, and I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money. There is besides now in Butte belonging to the estate $100,000, and there are some bank shares in Butte, which will be distributed later, but there seems to be a disposition on the part of the administrators and

of his lawyers, to grab everything they can get hold of and distribute nothing. Still, we may get something out of that.

The portion of the estate which, in my judgment, is of very great value, and of very much more value than the money, is the mining property, and when we realize upon that, which I hope we shall do before long, I have every reason to think that there will be a very substantial amount to which you will be entitled, and I suggest that you also have that looked into, so that you may know from sources other than myself that you are fairly treated.

I make these suggestions to you as to having someone look into the subject, not because I think that you would fail to have confidence in my word, but because it would be very much more satisfactory to me if you ascertain the facts from a source entirely outside of myself.

The whole Davis estate has been a sad, unfortunate experience as far as I am concerned. I spent ten of the best years of my life in it, and I greatly regret it. Mrs. Cornue, whom you know, and who would be entitled to a very substantial sum of money, has received up to the present time only a pittance and is as anxious as I that you should receive as much as possible, and I have not up to the present time received pay enough, or anything like pay enough, out of the estate to pay the carfare which I have expended in trying to get our interests in the estate.

If I can tell you, or anyone whom you desire to have investigate the subject, anything further, I am at your service at any time.

Among the great regrets which I have is the fact that Col. Ingersoll devoted so much time to this cause and that there is so little for you out of it, but as I said before, I do really believe that from the mining properties we will, as soon as they can be properly handled, receive very large benefits.

Very truly yours,

HENRY A. ROOT.

Mrs. Robert G. Ingersoll, 117 East 21st Street, New York City.

DEFENDANTS' EXHIBIT No. 2.

[Put in Evidence, Complainant's Record, page 237.]

George C. Hazelton, Sr. John H. Hazelton.
LAW OFFICES HAZELTON & HAZELTON ST. PAUL BUILDING—220 BROADWAY
Telephone: 5085 Cortlandt Cable Address: Tonhazel

NEW YORK, July 13, 1901.

Mr. C. H. Palmer, 307 Exchange Building, Boston, Mass.

Dear Sir: I herewith return to you by registered letter, on Mrs. Ingersoll's behalf, the written promise bearing your signature as trustee (and that of H. A. Root), by which you agree to pay Mrs. Ingersoll, as administratrix of the estate of Col. Robert G. Ingersoll, deceased, "the sum of ten thousand dollars ($10,000) out of such portion of said personalty [of the estate of Andrew J. Davis] as shall come into my hands". I am writing to-day to Mr. Root and to Mr. J. A. Coram also, likewise on Mrs. Ingersoll's behalf, that I have returned this to you.

Mrs. Ingersoll is unwilling to accept this promise for a number of reasons, among them the fact that it contains the provision, viz:
it being understood that she is to make no claim beyond said sum against said personalty;
and she has asked and directed me, therefore, to give, and I hereby give, you notice to that effect.

I do not imagine that this clause would under any circumstances bind her, or that she would be bound in any way by the promise in any other particular, until she had actually received and accepted the $10,000 mentioned, and certainly not when it is borne in mind that the promise does not bear her signature. Notwithstanding this, however, Mrs. Ingersoll being unwilling to accept the promise does not wish even to be understood or considered as accepting it even impliedly or that she may hereafter accept it or even to be understood or considered as bound by it or as so considering herself; and she has, therefore, as I have stated, directed me to notify you explicitly as above.

Besides, this promise, as you will notice, has never been signed by Mr. Coram. Mr. Root told me that he would secure Mr. Coram's

signature before he saw you on his way west. He did not, however, do so. Later, Mr. Root wrote me from Butte, that Mr. Coram would be there on July 1st and would then sign. This date, however, has passed and, as stated, Mr. Coram has never signed, and I am advised that he has not offered to sign; and certainly, so far as I know except from Mr. Root, he has never signified a willingness to sign, at any time or place.

I, therefore, hereby (again) give you notice, on Mrs. Ingersoll's behalf, that she refuses to accept said promise and will so refuse, even if it should be signed hereafter by Mr. Coram.

Kindly acknowledge the receipt of the enclosed, above referred to, at your early convenience and much oblige,

Yours very truly,

JOHN H. HAZELTON

DFFENDANTS' EXHIBIT No. 3.

[Put in Evidence, Complainant's Record, page 251.]

Whereas a contract of employment was formerly entered into by Henry A. Root and J. A. Coram with Colonel Robert G. Ingersoll, Attorney, in the matter of the contest of the will of Andrew J. Davis, deceased;

Whereas it appears that the personalty still undistributed belonging to the estate of the said Davis consists of some $116,000 and 100 shares of the stock of the First National Bank of Butte in Montana and some $400,000 in Massachusetts, petitions for the distribution of which are now pending in Montana and Massachusetts, respectively;

and Whereas the said Root and Coram desire the better to protect the estate of said Colonel Ingersoll, now deceased;

Now, therefore,

I, C. H. Palmer, trustee under the decree of settlement of the estate of said Davis, hereby agree to pay to Eva A. Ingersoll, administratrix of the estate of said Colonel Ingersoll, deceased, the sum of ten thousand dollars ($10,000) out of such portion of said personalty as shall come into my hands, upon its receipt, it being

understood that she is to make no claim beyond said sum against said personalty, as a consideration heretor, but that her rights as to the realty or the proceeds thereof of the estate of said Davis are to be in no way prejudiced hereby.

C. H. PALMER *Trustee*.

We hereby jointly and severally authorise, direct and consent to the payment above set forth.

H. A. ROOT [SEAL]

[SEAL]

STATE OF :

COUNTY OF : ss.

Before me, , a , this day of , 1901, personally appeared Henry A. Root, to me personally known and known to me to be the person who signed the foregoing instrument, and duly acknowledged that he executed the same as his free act and deed.

STATE OF :

COUNTY OF : ss.

Before me, , a , this day of , 1901, personally appeared J. A. Coram, to me personally known and known to me to be the person who signed the foregoing instrument, and duly acknowledged that he executed the same as his free act and deed.

Defendants' Exhibit No. 4.

[Put in Evidence, Complainant's Record, page 243.]

Law Offices of
JOHN H. HAZELTON,
St. Paul Building—220 Broadway,
New York.

11720

Mr. C. H. Palmer,

Forwarded

307 Exchange Building,

1323 Pine Grove Ave Port Huron Mich

Boston,

New York, N.Y. Jul 13 1901 Reg. No. 62576

Massachusetts.

6664 Second Notice Jul 17 1901 Third Notice Jul 20 1901

[On back of envelope:]

BOSTON, MASS. REGISTRY DIV. JUL 14 1901

Registered Aug 5 01 Port Huron, Mich.

New York Reg

BOSTON, MASS. REGISTRY AUG 1 1901

MASS. REGISTRY

DEFENDANTS' EXHIBIT No. 5.

[Put in Evidence, page 1504.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

JOHN S. HARRIS, as administrator of the Estate of Robert G. Ingersoll, Deceased, Plaintiff,

v.

HENRY A. ROOT, JOSEPH A. CORAM, ELIZABETH S. LADD, CHARLES H. LADD, ELLEN CORNUE, otherwise known as Ellen S. Cornue; JOSHUA G. CORNUE, M. LOUISE DUNBAR, otherwise known as Mary Louise Dunbar; HENRY A. ROOT and GIDEON WELLS, Trustees; HENRY A. ROOT as administrator with the will annexed of the Estate of Sarah Maria Cummings, Deceased; CHARLES H. PALMER and ANDREW J. DAVIS, JR., Trustees; JOHN H. LEYSON as administrator with the will annexed of the Estate of Andrew J. Davis, deceased; JOHN B. CLAYBERG and N. W. McCONNELL, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. TOOLE and WILLIAM WALLACE, JR., individually and as former copartners in the firm name of Toole & Wallace; J. K. TOOLE and T. C. BACH, individually and as former copartners in the firm name of Toole & Bach; E. T. WILSON as Receiver of the Merchants National Bank of Helena, Montana; ADELAIDE CORBETT as executrix of the last will and testament of Frank E. Corbett, Deceased; G. W. STAPLETON; WINFIELD S. STERN; ROSINE B. ROOT, wife of said Henry A. Root; —— CORAM, wife of said Joseph A. Coram; —— STERN, wife of said Winfield S. Stern; and W. M. BICKFORD, Defendants.

AMENDED COMPLAINT.

Plaintiff John S. Harris, as administrator of the Estate of Robert G. Ingersoll, deceased, by leave of court, files this amended complaint herein, and for cause of action against said defendants alleges:

I. That he the said John S. Harris is the duly appointed, qualified and acting administrator, in the State of Montana, of the estate of Robert G. Ingersoll, deceased, by virtue of appointment and issuance of letters of administration to him of and upon said estate of Robert G. Ingersoll, deceased, by order of the above-entitled court duly made and entered, as hereinafter more fully alleged, and that he the said John S. Harris prosecutes this action as plaintiff in his representative capacity as such administrator.

II. That on the eleventh day of March, A. D. 1890, Andrew J. Davis, a citizen and resident of the city of Butte, County of Silver Bow, State of Montana, died at said place leaving a large estate consisting of real and personal property of great value, to wit, of the value of five millions of dollars or more, and leaving him surviving next and nearest of kin to him the said Andrew J. Davis, among others, the said defendants Henry A. Root and Ellen Cornue, otherwise known and mentioned herein as Ellen S. Cornue, children and heirs of Anna C. Root, a deceased sister of said Andrew J. Davis, said M. Louise Dunbar, otherwise known and mentioned herein as Mary Louise Dunbar, daughter and heir of Roxana Dunbar, deceased sister of said Andrew J. Davis; and said Elizabeth S. Ladd, child and heir of Sophronia Firman, a deceased sister of said Andrew J. Davis; and said Sarah Maria Cummings, a sister of said Andrew J. Davis; and that by reason of their nearest kinship as aforesaid to him, the said Andrew J. Davis, deceased, in the event he died intestate, the said Henry A. Root, Ellen Cornue, M. Louise Dunbar, Elizabeth S. Ladd and Sarah Maria Cummings, claim to be, and were, entitled to succeed to certain parts or shares of said estate of Andrew J. Davis, deceased, to wit, to three and one-half elevenths, or three hundred and fifty eleven-hundredths, thereof.

III. That thereafter, on or about the _____ day of July, A. D. 1890, John A. Davis, a surviving brother of said Andrew J. Davis, deceased, propounded for admission to probate in and by the above-entitled court having jurisdiction of said estate of Andrew J. Davis, deceased, and the administration and distribution thereof, a certain instrument of writing purporting to be the last will and

testament of said Andrew J. Davis, deceased, by the terms of which writing all and singular the said estate of Andrew J. Davis, deceased, except a life maintenance thereby given to Thomas Jefferson Davis, Pet Davis and Mrs. S. Bergett, was devised and bequeathed to said John A. Davis, and that by the terms and effect of said writing, it established and admitted to probate as the last will and testament of said Andrew J. Davis, deceased, without provision having been made by grant or assignment from said John A. Davis, the principal legatee and devisee of said estate under said will, or his successors in interest, granting and assigning to said Henry A. Root, Ellen Cornue, M. Louise Dunbar, Elizabeth S. Ladd and Sarah Maria Cummings certain shares or portions of said estate, their claims as such heirs of said Andrew J. Davis, deceased, and all their rights and claims in and to said estate left by said Andrew J. Davis, deceased, would have been cut off, and neither of them would have received any part of said estate as such next of kin and heirs of said decedent; and thereupon said John A. Davis, and his heirs, successors and legal representatives, prosecuted in said court for a long period of time proceedings to establish and cause to be admitted to probate in and by said court the said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis, deceased.

IV. That on or about the day of August, A. D. 1890, as their cause of action and for the purpose of opposing and defeating the admission to probate of the said alleged will, and thereby securing and obtaining the said shares of, in and to said estate of Andrew J. Davis, deceased, claimed by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, as such heirs and next of kin of said decedent, as an intestate, the said Henry A. Root and Sarah Maria Cummings instituted or caused to be instituted in the above-entitled court, in their names respectively, objections to and contests of the validity of the said writing as the alleged last will and testament of said Andrew J. Davis, deceased, which objections and contests were pending and prosecuted in said court from the time of the institu-

tion thereof as aforesaid, until finally disposed of as hereinafter alleged.

V. That said Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, as well as said Henry A. Root and Sarah Maria Cummings, named as said contestants, were each and all of them interested to the extent of their respective claims of shares in and to said estate as next of kin to said decedent, in the successful prosecution of said objections to, and contests of the validity of, said alleged will, in opposition to the admission thereof to probate in and by said court until the probate thereof were defeated, or the distribution and delivery of said shares in and to said estate claimed by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar were duly provided for and secured by proper and lawful compromise agreement, grant and assignment to them, by said John A. Davis, the principal legatee and devisee of said estate under said will, or his heirs and legal representatives; and that in order to aid in the prosecution of said objections and contests and in procuring counsel and attorneys to prosecute the same, and for that purpose and in consideration of the employment of attorney or attorneys and counsel by said Henry A. Root to prosecute said objections and contests, and the prosecution thereof, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, on or about the twenty-fifth day of September, A. D. 1890, by certain instrument of writing of that date, duly assigned, transferred and set over to said Henry A. Root and Gideon Wells, in trust, an entire one-third part of the interests of each of them, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, respectively, in and to said estate of Andrew J. Davis, deceased, to which they were or should become entitled, out of the avails of which interests so assigned to said Root and Wells, to aid in paying for services and expenses of attorneys and counsellors at law employed and rendered in the prosecution of said objections to and contests of the validity of said alleged last will and testament of said Andrew J. Davis, deceased, in opposition to the admission thereof to probate. And by the terms, tenor and effect of said writing assigning part of their said

claims and interests to said Root and Wells as aforesaid, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar severally constituted, appointed and empowered the said Henry A. Root and Gideon Wells, by irrevocable commission and authority, to represent them, the said Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, in the prosecution of said objections to and contests of the validity of said alleged will, in opposition to the admission thereof to probate, and to demand, sue for, collect, compound, receive and receipt for each and all of the said shares and interests of, in and to said estate by them and each of them claimed or to which they or either of them should become entitled. And that in and by the terms, tenor and effect of said instrument of writing, assigning said interest to said Root and Wells as aforesaid, the said Henry A. Root on his part undertook, promised and agreed, in consideration of said assignment to him and said Wells, to procure and employ counsel to prosecute said objections and contests in opposition to the admission of said alleged will to probate, and as between him, the said Henry A. Root, and the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, the said Henry A. Root promised and agreed to pay the compensation of counsel and attorneys so employed for services rendered in that behalf.

That a copy of said instrument of writing last above mentioned is hereto annexed, marked "Exhibit A", and made a part hereof by reference, to the same effect as if set forth at large herein.

VI. That during the times mentioned the said defendant Joseph A. Coram acquired and still has, owns and holds all the remaining interests and shares acquired by said Mary L. Dunbar, being the same person as herein mentioned as M. Louise Dunbar, and of Elizabeth S. Ladd, in and to said estate of Andrew J. Davis, deceased; and also some interest in the shares, parts and parcels of said estate claimed and acquired by said Ellen Cornue, Sarah Maria Cummings and Henry A. Root, or some of them, as plaintiff is informed and believes, the extent of which interest of said Joseph A. Coram in and to the said shares of the three persons last above mentioned is to plaintiff at this time unknown; which rights and

interests of said Joseph A. Coram were dependent upon the prosecution of said objections to and contests of the validity of said alleged last will and testament of Andrew J. Davis, deceased, in opposition to the probate thereof, until the probate thereof were defeated, or the said shares in and to said estate claimed by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar were duly provided for and secured to them by proper and lawful compromise agreement, grant and assignment thereof made to them by said John A. Davis, the principal legatee and devisee under said will, or his heirs and legal representatives, granting and assigning to said Henry A. Root Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar the said shares and interests claimed by them in and to said estate.

VII. That prior to August 17, 1891, while said objections to and contests of the validity of said alleged last will and testament of said decedent were pending in the above entitled court, said defendants Henry A. Root and Joseph A. Coram engaged and employed the said Robert G. Ingersoll, late of Dobbs Ferry in the State of New York, an attorney and counsellor at law, to act as attorney and counsel for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections and contests in opposition to the admission of said alleged will to probate: that said Robert G. Ingersoll accepted said employment, and in pursuance and fulfillment thereof rendered valuable services and counsel to and in behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections and contests: and that on or about August 17, 1891, during said employment and the rendition of said services, and in consideration of such services rendered and to be rendered by said Robert G. Ingersoll as attorney and counsel for said contestants and the said persons interested with them as aforesaid in the prosecution of said objections and contests, the said defendants Henry A. Root and Joseph A. Coram made and entered into an agreement and contract with

the said Robert G. Ingersoll, evidenced by a writing signed by said Root and Coram and by them delivered to the said Robert G. Ingersoll, whereby the said Root and Coram promised and agreed to and with the said Robert G. Ingersoll to the effect that in the event said alleged will should be defeated as to the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, and they succeeded in securing and obtaining the said shares by them respectively claimed of in and to said estate, to which they were entitled as next of kin to the said Andrew J. Davis, deceased, as an intestate, then the said Robert G. Ingersoll should have and be paid by said Henry A. Root and Joseph A. Coram one hundred thousand dollars as compensation for said services rendered and to be rendered by said Robert G. Ingersoll in the prosecution of said objections to and contests of the validity of said alleged will, in opposition to the admission thereof to probate, and further promised and agreed that in any event the expenses and disbursements of said Robert G. Ingersoll in and about said prosecution should be paid by the said Root and Coram; the said agreement being conditioned as to the said Joseph A. Coram to the effect that in case said parties interested in the prosecution of said objections to and contests of the validity of said alleged will, to wit, the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and M. Louise Dunbar, represented by said Henry A. Root in carrying on said prosecutions, were unsuccessful and failed of obtaining the said shares in said estate by them claimed as next of kin and heirs of said Andrew J. Davis, deceased, then there should be no personal obligation on the part of said Joseph A. Coram to pay for said services so rendered by said Robert G. Ingersoll, and that said Coram should not in any event be liable or obligated for the payment of said compensation so agreed and promised to be paid to said Robert G. Ingersoll beyond or in excess of the funds and other property obtained from said estate of Andrew J. Davis, deceased, by said Henry A. Root, Elizabeth S. Ladd, Sarah Maria Cummings, Ellen Cornue and M. Louise Dunbar, or to which they became entitled.

That the said agreement as expressed in said writing last above

mentioned was signed by said Joseph A. Coram by the use of the initial letter "J" for and as representing his first Christian name "Joseph". That a copy of said writing last above mentioned is hereto annexed marked "Exhibit B", and is hereby referred to and made a part hereof to the same effect as if set out at large herein.

VIII. That said Robert G. Ingersoll fully performed and rendered the said services for which it was promised and agreed as aforesaid he should be paid said sum of one hundred thousand dollars as compensation therefor.

That said contest of the validity of said alleged will instituted in said court in the name of said Henry A. Root, in opposition to the admission thereof to probate as aforesaid, was tried in and by said court sitting with a jury, in the year 1891, which trial was of long duration, occupying about six weeks, at which trial the said Robert G. Ingersoll attended, and, by leave of said court duly granted, took part in said trial and rendered great and valuable services in the prosecution of said objections to and contest of the validity of said writing so propounded for admission to probate as the last will and testament of said decedent, in opposition to the admission thereof to probate, for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, each and all of whom were interested in the prosecution of said objections and contest as aforesaid; that the jury empanelled and sitting in the said trial, to whom was submitted by said court the question of fact as to the due execution and validity of said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis, deceased, disagreed upon said question and failed to find and return a verdict as the result of said trial.

IX. That thereafter, while said objections to and contests of the validity of said alleged will were pending in said court, said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, and her husband Charles H. Ladd joining therein with her, M. Louise Dunbar, and Ellen Cornue and her husband Joshua G. Cornue joining therein with her, denominated as the parties of the second part therein, entered into and made a compromise contract in writing,

dated April 28, 1893, with the heirs, successors in interest and legal representatives of said John A. Davis, the principal legatee and devisee under said will, he then being deceased, whose said heirs, successors in interest and legal representatives were denominated the parties of the first part in and to said compromise contract; whereby and by the terms, conditions, tenor and effect of which contract the said parties of the first part thereto, as heirs, successors in interest and legal representatives of said John A. Davis, deceased, in consideration of the compromise and settlement of the said contests and litigation then pending in said court between said parties of the first part and parties of the second part to said compromise contract, in regard to the validity of said alleged will, and for the purpose of compromising and settling said contests and litigation, and in contemplation thereof and of the final admission of said will to probate in and by said court, as an expedient method of effectuating said compromise and settlement, and conditioned upon that event, granted, assigned, set over and conveyed to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, M. Louise Dunbar and Ellen Cornue two and one-half elevenths (2 1-2/11) of all and singular the property of said estate of Andrew J. Davis, deceased, in kind, and also granted, assigned, conveyed and set over to said Charles H. Palmer and Andrew J. Davis, Jr., as joint trustees, another one eleventh (1/11) of the property of said estate, both real and personal, in kind, and also the sum of five hundred thousand dollars of the moneys and funds of said estate of the proceeds of the property thereof, in trust for the use and benefit of said parties of the second part to said compromise contract, to wit, for the use and benefit of said Henry A. Root, Saria Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, each and all of which interests so assigned and conveyed as last aforesaid were, according to the terms and conditions of said compromise contract, to be apportioned and distributed, paid and delivered to them the said parties of the second part to said compromise contract out of the property of said estate of Andrew J. Davis, deceased, or the proceeds thereof, on the final admission of said will to probate, and after all contests and litigation in respect thereto had been

determined, and upon the final settlement and distribution of said estate; and that all of the residue and remainder of said estate, over and above those certain parts and portions thereof assigned and conveyed as aforesaid, and two elevenths thereof reserved to the said parties of the first part to said compromise contract, was, by the terms, provisions, conditions and effect of said compromise contract, also granted, assigned, conveyed and set over to said trustees Charles H. Palmer and Andrew J. Davis, Jr., in trust for the use and benefit of, and to be divided equally between, the said parties of the first part, and that parties of the second part to said compromise contract, according to the terms, conditions, provisions and effect thereof.

That said compromise contract and the agreements, stipulations, assignments and grants therein made and provided, and the taking effect thereof, were conditioned and made dependent upon, and in consideration of, the dismissal of said objections to and contests of the validity of said alleged will interposed and prosecuted in said court on behalf of said parties of the second part to said compromise contract, in opposition to the admission of said will to probate, at such time as said parties to said compromise contract should deem the dismissal thereof advisable, and also upon the final admission of said will to probate, if so finally established and admitted to probate as the last will and testament of said Andrew J. Davis, deceased, after all contests thereof, and petitions to revoke the probate thereof, if any such petitions to revoke the probate thereof should be interposed and prosecuted, were finally disposed of and determined.

That prior to the time of making said compromise contract said John A. Davis, the principal legatee and devisee under the said will, had departed this life intestate, being at the time of his decease a resident and citizen of Silver Bow County, State of Montana, and John E. Davis had been, by order of the above-entitled court, duly appointed administrator of the estate of said John A. Davis, deceased, and had duly qualified, and letters of administration upon the estate of John A. Davis, deceased, had been duly issued out of and under the seal of said court to said John E. Davis as such administrator,

and he was at the time of making, signing, executing and delivery of said compromise contract the duly appointed, qualified and acting legal representative and administrator of said John A. Davis, deceased, and as such said John E. Davis joined in said compromise contract as one of the parties of the first part thereto as the legal representative, and administrator of the estate of John A. Davis, deceased, and that said court having jurisdiction of the estate of John A. Davis, deceased, thereafter, by order duly made and entered of record, approved, ratified and confirmed the said action of said John E. Davis as such legal representative, and administrator of the estate of John A. Davis, deceased, in entering into and making and delivering said compromise contract in his said representative capacity.

That said Charles H. Palmer and Andrew J. Davis, Jr., accepted said trust created and vested in them jointly by the terms and provisions of said compromise agreement, and they, ever since the taking effect of said compromise agreement, have been and still are joint trustees thereunder and thereby vested with title to and have and hold certain parts, parcels, portions and interest of, in and to the property of said estate of Andrew J. Davis, deceased, in trust for the use and benefit of said Henry A. Root, Sarah Maria Cummings, Ellen Cornue, Elizabeth S. Ladd, M. Louise Dunbar and Joseph A. Coram, as provided in said compromise contract as aforesaid.

X. That pursuant to said stipulation and agreement set forth in said compromise contract, said objections to and contests of the validity of said alleged will so instituted in the names of said Henry A. Root and Sarah Maria Cummings, and prosecuted on their behalf and on behalf of said Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, as aforesaid, were, on or about the ____ day of March, A. D. 1895, withdrawn and dismissed, and said will was thereupon, on or about the said date, proved and admitted to probate in and by the above-entitled court by decree thereof duly made and entered of record.

XI. That thereafter and within the time provided and allowed by law, other objections to and contests of the validity of said alleged will, accompanied by petitions to revoke the probate thereof, were instituted and prosecuted in the above-entitled court by and on

behalf of other persons besides those hereinabove mentioned, to wit: by and on behalf of Elizabeth S. Bowdoin, a sister of said Andrew J. Davis, and Calvin P. Davis, a brother of said Andrew J. Davis, and Harriet Wood, a sister of said Andrew J. Davis, and Elizabeth A. Smith, a sister of said Andrew J. Davis, and others, each and all of whom were heirs of said Andrew J. Davis, and entitled to succeed to and have and receive certain shares respectively of his said estate in case he died intestate; which last mentioned objections, contests and petitions to revoke the probate of said will were pending and prosecuted in said court until on or about August 24, 1897, when the same were also compromised and settled by certain compromise contracts, agreements, stipulations, assignments and grants of portions of said estate to said last above mentioned contestants and petitioners to revoke the probate of said will, made in said year 1897 and shortly prior to the date last above mentioned, by and between the said contestants and petitioners, to revoke the probate of said will, and each and all of said parties to said other compromise contract mentioned in paragraph numbered IX. of this complaint, and also joined in by said trustees, Charles H. Palmer and Andrew J. Davis, Jr., as such trustees, and that in consideration of said grants and assignments last above mentioned the said contest and petition to revoke the probate of said will, instituted and prosecuted as last aforesaid, were withdrawn and dismissed on or about the date last aforesaid, and thereupon and not prior to said date last above mentioned each and all contests, controversies and litigation between the said persons herein mentioned as next of kin and heirs of said Andrew J. Davis, deceased, in respect to the title to said estate left by him, were settled and determined, and each and all of said compromise contracts herein mentioned, and the grants and assignments therein made and provided, went into force and effect and became effectual according to the terms and conditions thereof, and ever since have been and now are in full force and effect.

XII. That by the terms, conditions and effect of said compromise contracts, grants and assignments taken altogether, there was thereby granted, assigned and secured to said Henry A. Root, Sarah

Maria Cummings, M. Louise Dunbar, or to the same person as Mary L. Dunbar, Elizabeth S. Ladd and her husband Charles H. Ladd, Ellen Cornue and her husband Joshua G. Cornue, directly, two and one-half elevenths (2 1-2/11) or two hundred and fifty eleven-hundredths (250/1100) of all and singular the property of said estate of Andrew J. Davis, deceased, both real and personal, and moreover, by the terms, conditions, tenor and effect of said compromise contracts, grants and assignments, taken altogether, there was granted, assigned, conveyed and set over to said Charles H. Palmer and Andrew J. Davis, Jr., joint trustees in trust for the use and benefit of said parties of the first part and parties of the second part to said compromise contract herein first above mentioned in paragraph IX. of this complaint, four hundred and thirty-one eleven-hundredths (431/1100) of all and singular the property of said estate of Andrew J. Davis, deceased, both real and personal, of which four hundred and thirty-one eleven-hundredths of the property of said estate so granted, assigned, conveyed and set over to said trustees, Charles H. Palmer and Andrew J. Davis, Jr., in trust as aforesaid, the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar became and are entitled to have and receive and have the use and benefit of one half thereof, or two hundred fifteen and one-half eleven-hundredths (215 1-2/1100) thereof, according to the terms, conditions and effect of said compromise contracts.

That by the terms, conditions and effect of said compromise contracts and agreements herein mentioned, taken altogether, there was granted, assigned, conveyed and secured to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly and in trust for their use and benefit, to said trustees, more than three and one-half elevenths (3 1-2/11) of said estate of Andrew J. Davis, deceased, to which they were entitled as his next of kin and heirs in case he died intestate, to wit, they acquired and became entitled and are now entitled through the prosecution of said contests of and objections to the validity of said alleged will, and said compromise contracts in settlement thereof, more than three and one-half elevenths of said estate, to wit, five

hundred and fifteen and one-half eleven-hundredths (515 1-2/1100) of said estate.

XIII. That the said annuities by the terms of said will given to said Thomas Jefferson Davis, Pet Davis and Miss Bergett were, on or about the date last above stated, ascertained, determined and fixed by the decree of said court, and settled at an expense to said estate of not exceeding seventy thousand dollars.

XIV. That finally, on or about August 24, 1897, upon proper showing and proceedings in the matter of said estate of Andrew J. Davis, deceased, and the exhibition of said compromise contracts, and the withdrawal or dismissal of said contests of and petitions to revoke the probate of said will, the above-entitled court duly made and caused to be entered in its records its decree confirming the admission of said will to probate, but accompanied by provisions and conditions recited in said decree, in accordance with the terms, provisions, grants, assignments and stipulations made and evidenced by said compromise contracts, to the effect that the several portions, parts and parcels of the funds and other property of said estate of Andrew J. Davis, deceased, shall, on the distribution thereof, be distributed and delivered to the several persons mentioned and provided for in and by said compromise contracts as therein stipulated, granted and assigned, and reciting in said decree, among other provisions thereof, that said Henry A. Root, Sarah Maria Cummings, M. Louise Dunbar therein mentioned as Mary L. Dunbar, Elizabeth S. Ladd and her husband Charles H. Ladd, Ellen Cornue and her husband Joshua G. Cornue, shall have, and that there shall be distributed, paid and delivered to them directly, two hundred and fifty eleven-hundredths (250/1100) of all and singular the funds and other property of said estate, both real and personal, on the distribution thereof, and that four hundred and thirty-one eleven-hundredths (431/1100) of the funds and other property of said estate, both real and personal, shall, on the distribution of the property of said estate, be distributed, paid and delivered to said trustees, Charles H. Palmer and Andrew J. Davis, Jr., in trust for the use and benefit of said parties of the first part and parties of the second part to said compromise contract of date April 28, 1903,

mentioned in paragraph numbered IX. of this complaint, according to the terms, conditions and stipulations thereof.

That a copy of said decree last above mentioned is hereto annexed marked "Exhibit C" and made a part hereof by reference to the same effect as if set forth at large herein.

XV. That by virtue and as a result of the prosecution of said objections to, and contests of the validity of, said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis, deceased, instituted and prosecuted in the above-entitled court in the names and on behalf of said Henry A. Root and Sarah Maria Cummings, and on behalf of said Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, as next of kin and heirs of said Andrew J. Davis, deceased, as aforesaid, and of the services on their behalf so rendered by the said Robert G. Ingersoll in the prosecution of said objections and contests, the said compromise contract mentioned in paragraph IX. hereof, and decree last above mentioned, conditioned as aforesaid, were procured, made and are now effectual in defeating said alleged will in so far as it could affect the rights of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar in and to said estate as next of kin and heirs of said Andrew J. Davis, deceased, and in securing and getting for them respectively each and all rights, interests, parts, parcels and shares of, in and to said estate to which they were entitled as next of kin and heirs of said Andrew J. Davis, deceased; whereby and by virtue of said contract with him and the facts aforesaid the said Robert G. Ingersoll became entitled to the payment of said sum of one hundred thousand dollars, besides his expenses and disbursements in and about the premises, as compensation for said services by him rendered as aforesaid for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections to, and contests of the validity of, said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis, deceased, and entitled in law and equity to a lien on the

interest in said estate so acquired by them, as security for the payment for his said services, as herein alleged.

That said compensation to which said Robert G. Ingersoll so became entitled for said services so rendered by him as aforesaid has not been paid, nor has any part thereof been paid, except the sum of five thousand dollars heretofore paid on account thereof; that there is now owing and due for and on account of said services, and wholly unpaid, the sum of ninety-five thousand dollars ($95,000), although payment thereof has heretofore been demanded from said Henry A. Root and Joseph A. Coram, but they have neglected and refused to pay the said balance so owing and due for said services, and have also failed, neglected and refused to make proper and effectual provision for the payment thereof out of the said funds, property and proceeds of said shares, lots and parcels of the property of said estate so granted, assigned and decreed to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly and for their use and benefit, in trust, to the said Charles H. Palmer and Andrew J. Davis, Jr., trustees as aforesaid, and out of the interest therein now owned and held by said Joseph A. Coram.

XVI. That on or about the twenty-first day of July in the year A. D. 1899, at the village of Dobbs Ferry in the County of Westchester, State of New York, said Robert G. Ingersoll, then a resident and citizen of said place, departed this life intestate; that thereafter, on the twenty-first day of August in said year A. D. 1899, his widow, Eva A. Ingersoll, was duly appointed administratrix of his estate in said State of New York by the surrogate of said county last above mentioned, and letters of administration were duly issued out of and attested by the seal of said Surrogate's Court, and delivered to said Eva A. Ingersoll, appointing and commissioning her as administratrix of the estate of said Robert G. Ingersoll, deceased, in the State of New York.

That heretofore, to wit, on November 30, A. D. 1901, the said above-named plaintiff, John S. Harris, was, by order of the said first above entitled court, duly given, made and entered of record, appointed administrator of the estate of said Robert G. Ingersoll,

deceased, in the State of Montana, and thereupon the said John S. Harris duly qualified as such administrator, and letters of administration of and upon the estate of said Robert G. Ingersoll, deceased, were, on December 2, A.D. 1901, pursuant to the order of the said first above entitled court, duly given, made and entered, attested by the seal thereof, duly issued to the said John S. Harris, plaintiff herein, appointing and commissioning him as administrator of the estate of said Robert G. Ingersoll, deceased, in the State of Montana, and the said John S. Harris ever since has been and now is the duly appointed, qualified and acting administrator of the estate of Robert G. Ingersoll, deceased, in the State of Montana, and as such administrator was, by order of this first above entitled court heretofore duly given, made and entered of record, substituted as plaintiff in the place of said Eva A. Ingersoll, administratrix as aforesaid, in the original complaint in this action.

XVI½. That as between themselves (aside from said assignment and transfer of a third part of certain of said shares to said Henry A. Root and Gideon Wells, as mentioned in paragraph numbered V. hereof), the said Henry A. Root, Elizabeth S. Ladd, Ellen Comme, Sarah Maria Cummings and M. Louise Dunbar are entitled to take of said shares, portions and parcels of the property of said estate of Andrew J. Davis, deceased, so granted and allotted to them, and for their use and benefit, to said trustees, Charles H. Palmer and Andrew J. Davis, Jr., as aforesaid, in the following proportions respectively, to wit: the said Henry A. Root is entitled to one seventh (1/7) thereof; said Sarah Maria Cummings or her heirs and legal representatives are entitled to two sevenths (2/7) thereof; said Ellen Comme is entitled to one seventh (1/7) thereof; said Elizabeth S. Ladd is entitled to two sevenths (2/7) thereof; and said M. Louise Dunbar is entitled to one seventh (1/7) thereof.

That the one-third part of the said shares of said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Comme and M. Louise Dunbar or, in and to said estate, by them assigned, transferred and set over by said assignment mentioned in paragraph numbered V. of this complaint to the said Henry A. Root and Gideon Wells, for the purpose of securing and aiding in paying the compensation of

counsel employed to prosecute said objections to and contests of the validity of said alleged will, are parts or proportion of their said shares respectively as follows: Sarah Maria Cummings assigned two twenty-firsts (2/21) of her said share: Elizabeth S. Ladd assigned two twenty-firsts (2/21) of her said share: and said Ellen Cornue assigned one-twenty first (1/21) of her said share: and said M. Louise Dunbar assigned one twenty-first (1/21) of her said share: each and all of which portions last above recited are subject to the said lien in favor of said Robert G. Ingersoll and of his estate and legal representatives as security for the payment of said compensation for said services rendered by him for and on behalf of said Henry A. Root, Sarah Maria Cummings, Ellen Cornue, Elizabeth S. Ladd and M. Louise Dunbar, in the prosecution of said objections to and contests of the validity of said alleged will as aforesaid.

XVII. That by virtue of the law and facts aforesaid the said Robert G. Ingersoll acquired and held, and his estate, and plaintiff as his legal representative and administrator of his estate, now have, hold, claim and are entitled to the enforcement of, a lien upon said shares, lots and parcels, of the funds and other property of said estate so assigned and allotted as aforesaid to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, both directly and for their use and benefit, to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees as aforesaid, and upon all interest therein acquired by said Joseph A. Coram, to secure payment of said amount owing and now due as compensation for said services so rendered by said Robert G. Ingersoll as attorney and counsellor at law in the prosecution of said objections to and contests of the validity of said alleged will, for and on behalf of them as their cause of action to acquire, secure and get the respective shares of said estate to which the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar were entitled as next of kin and heirs of said Andrew J. Davis, deceased, which lien rests upon and adheres to their respective shares in and to the funds and property of said estate, both real and personal, so granted and assigned to them by said compromise contracts, and allotted to them by said decree pursuant to said compro-

mise contracts, and upon said shares and proportions of said shares as follows, to wit:

Upon all and singular the share and interest so acquired by said Henry A. Root of, in and to the property of said estate of Andrew J. Davis, deceased, both real and personal, directly, and for his use and benefit through said trustees Charles H. Palmer and Andrew J. Davis, Jr., as aforesaid; and upon one-third part of all and singular the said shares and interests of, in and to the property of said estate, both real and personal, so acquired by said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, and each of them directly, and for their use and benefit by said grant and assignment to said trustees in trust as aforesaid, being the same one-third part of said shares of said four last above named persons, by them assigned to Henry A. Root and Gideon Wells, in trust to aid in procuring and paying for the services of counsel engaged and employed and rendered in the prosecution of said objections to and contests of the validity of said alleged will as aforesaid; and upon all and singular the right, title and interest of said Joseph A. Coram in and to the said shares of the funds and other property of said estate of Andrew J. Davis, deceased, so acquired by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly and for their use and benefit through said Charles H. Palmer and Andrew J. Davis, Jr., trustees, as aforesaid.

XVIII. That said John H. Leyson is the administrator with the will annexed of the said estate of Andrew J. Davis, deceased, by virtue of the appointment as such by the order of the first above entitled court duly given, made and entered of record and commissioned by letters of administration of and upon said estate with the will annexed, duly issued to him by order of said court duly given, made and entered, attested by the seal thereof, on the
day of April, A. D. 1895, and he has ever since been and now is the duly qualified and acting administrator with the will annexed of the said estate of Andrew J. Davis, deceased.

That as such administrator with the will annexed of said estate of Andrew J. Davis, deceased, said John H. Leyson has in his custody

and control, subject to the orders of the first above entitled court, a large amount of funds and other property belonging to said estate, of which a large portion as aforesaid has been granted, assigned and allotted to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly, and for their use and benefit, to said Charles H. Palmer and Andrew J. Davis, Jr., trustees as aforesaid, and in which the said Joseph A. Coram has acquired certain interests as aforesaid, and other interests as plaintiff is informed and believes, the extent of which said other interests so acquired by said Joseph A. Coram plaintiff does not know and cannot at the time of filing this complaint definitely allege.

That in the course of the administration and settlement of said estate of Andrew J. Davis, deceased, said funds and other personal property belonging to said estate will be subject to distribution by order of the first above entitled court to the persons appearing to be entitled thereto according to the terms of said compromise contracts and the said decree of August 23, 1897, a copy of which is hereto annexed, marked "Exhibit C", or to such persons as may establish their right thereto; and that a large portion of said funds and other personal property belonging to said estate of Andrew J. Davis, deceased, now in the custody of said John H. Leyson as such administrator with the will annexed, subject to the orders of said court, and other funds and personal property belonging to said estate now in the State of Massachusetts, will be subject to distribution to and on account of the said shares so granted, assigned and allotted as aforesaid to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar, Joseph A. Coram, or their successors in interest, and the same is subject to said lien in favor of said Robert G. Ingersoll and his estate as aforesaid.

XIX. That besides said funds and other personal property belonging to said estate in the custody of said John H. Leyson as administrator with the will annexed of said estate, subject to the orders of this court, and said funds and personal property belonging to said estate in the State or Commonwealth of Massachusetts,

there are certain lots, pieces and parcels of real estate, situate in the County of Silver Bow, State of Montana, which were a part and parcel of said estate of Andrew J. Davis, deceased, when said objections to and contests of the validity of said alleged will were prosecuted by said Robert G. Ingersoll, and said compromise contracts herein mentioned and said proceedings and decree, copy of which is hereto annexed, marked "Exhibit C", were entered into, procured and made as aforesaid, in and to which real estate, by virtue of said contests, compromise contracts, grants, assignments, and decree the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Corbne and M. Louise Dunbar acquired directly and for their use and benefit through said trustees, Charles H. Palmer and Andrew J. Davis, Jr., the same shares and interests as aforesaid, to and upon which shares and interests in said real estate the said lien in favor of said Robert G. Ingersoll, and plaintiff as his legal representative as administrator of his estate, attached as aforesaid, to secure payment for said services of said Robert G. Ingersoll rendered as attorney and counsellor at law on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Corbne, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections to and contests of the validity of said alleged will; which real estate is more particularly described as follows:

That certain quartz lode mining claim located, recorded and known as the "Baltic" lode mining claim, the same being lot numbered 63, survey numbered 567, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Blue Jay" quartz lode mining claim, being lot numbered 96, survey numbered 610, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Broker" quartz lode mining claim, being lot numbered 210, survey numbered 955, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known

as the "Charlotta" quartz lode mining claim, being lot numbered 80, survey numbered 594, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Centerville" quartz lode mining claim, being lot numbered 271, survey numbered 1082, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Gem" quartz lode mining claim, being lot numbered 38A, survey numbered 91, in township 3 north of range 8 west; and the "Gem" mill site, being lot numbered 38B, in township 3 north of range 7 west;

That certain quartz lode mining claim located, recorded and known as the "Great Republic" quartz lode mining claim, being lot numbered 69, survey numbered 578, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Pawnbroker" quartz lode mining claim, being lot numbered 79, survey numbered 593, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "New Era" quartz lode mining claim, being lot numbered 223, survey numbered 974, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Mount Moriah" quartz lode mining claim, being lot numbered 94A, and lot numbered 94B, survey numbered 622 in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Hibernia" quartz lode mining claim, being lot numbered 188, survey numbered 1864, in township 3 north of range 8 west.

That certain quartz lode mining claim located, recorded and known as the "Last Chance" quartz lode mining claim, being lot numbered 285, survey numbered 1115, in township 3 north of range 8 west.

Also those certain town or city lots, numbered eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27), in block numbered thirteen (13); and

lots numbered five (5), six (6), and seven (7), in block numbered forty-six (46); all in the original townsite of Butte, as shown by the original survey and plat thereof filed and of record in the office of the County Clerk and Recorder of Deer Lodge County, and of record in the office of the County Clerk and Recorder of Silver Bow County, in the State of Montana.

Also lot numbered six (6) in block numbered one (1); and lots numbered nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), in block numbered four (4); and lots numbered three (3), four (4), five (5), six (6), seven (7), and eight (8), in block numbered seven (7), all situate in what is known as Davis and Barnard's Addition to the City of Butte, in said County of Silver Bow, as the same appear by the original plat and survey of said addition filed and of record in the office of the County Clerk and Recorder of said County of Silver Bow.

Also that certain tract of land, situate and described as follows: the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter, and lot numbered one (1), all in section numbered thirty (30), in township three (3), north of range seven (7), west, together with all water and water rights thereto belonging and used in connection therewith or appurtenant thereto.

Also each and all right, easements, hereditaments and appurtenances belonging or appertaining to each and every of the said pieces and parcels of real property above described.

That said John H. Leyson is now in possession of said real estate as Receiver by order of the first above entitled court to manage, take care of and preserve the same, for said persons mentioned in said compromise contracts and decree, or their successors in interest as joint owners and tenants in common, according to their respective interests therein.

XX. That on the day of April, A.D. 1901, said Sarah Maria Cummings departed this life, testate, a resident of the County of Hampshire, in the Commonwealth of Massachusetts, and that since said date letters testamentary have been issued out of and attested by the seal of the Probate Court in and for said county last mentioned, having jurisdiction of her estate, to Herbert P.

Cummings named in her last will and testament admitted to probate in and by said court last above mentioned, as executor of said will; that said defendant Henry A. Root has heretofore, on or about the day of June, A. D. 1901, by order of this first above entitled court duly given, made and entered on record, been appointed administrator with the will annexed of said estate of Sarah Maria Cummings, deceased, situate in the State of Montana, and letters of administration with the will annexed of the said estate of Sarah Maria Cummings, deceased, in the State of Montana, have been heretofore duly issued to him out of and attested by the seal of this first above entitled court, and said Henry A. Root has qualified and is acting as such administrator with the will annexed of the said Sarah Maria Cummings, in the State of Montana.

XXI. On information and belief, that said defendant Winfield S. Stern has, or claims to have, some interest in, or claim upon, said real estate or some part thereof, as assignee or grantee, or pretended assignee or grantee, of said Henry A. Root and his wife, Rosine B. Root, but that said assignment or grant, or pretended assignment or grant, if any there be, was made without consideration; and plaintiff further alleges that all said interest and claims of the said defendant Winfield S. Stern in and to said real estate are subsequent and subject to the said lien existing in favor of said Robert G. Ingersoll, deceased, in his lifetime, and of his estate and legal representatives, upon said real estate, as aforesaid.

XXII. On information and belief, that said defendants John B. Clayberg and N. W. McConnell, as former copartners in the firm name of McConnell & Clayberg, or otherwise, have or claim to have some interest in, or lien upon, said shares and interest in and to said property of said estate of Andrew J. Davis, deceased, or some part thereof acquired by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cormac, M. Louise Dunbar otherwise known and called Mary Louise Dunbar, and Joseph A. Coram, or some of them; which lien was asserted and claimed by said McConnell and Clayberg by delivery of a notice to said John H. Leyson, as administrator with the will annexed of said estate of

Andrew J. Davis, deceased, on the twenty-eighth day of August, A. D. 1897, in writing, of which the following is a copy:

"JOHN H. LEYSON, Administrator of the estate of ANDREW J. DAVIS, deceased:

You will please take notice that the undersigned claim an attorney's lien for the balance of our fees upon all interest of Maria Cummings, Ellen S. Cornue, Henry A. Root, Elizabeth S. Ladd and Mary L. Dunbar, and each of them, in the estate of Andrew J. Davis, deceased, and that you pay no further moneys to them, or either of them, without our consent, until said attorney's fees are fully paid.

Dated Butte, Montana, August 26, A. D. 1897.

McCONNELL & CLAYBERG."

and by a further notice in writing delivered by said Clayberg and McConnell to said John H. Leyson as such administrator, on February 11th, A. D. 1898, of which the following is a copy:

"J. H. LEYSON, Esq., Administrator of the Estate of ANDREW J. DAVIS, deceased:

You are hereby notified that the undersigned claim an attorney's lien on all and singular the interests of Henry A. Root, Maria Cummings, Ellen S. Cornue, Elizabeth Ladd and Mary Louise Dunbar, in and to their part of the estate of Andrew J. Davis, deceased, whether as heirs at law, under settlements, compromises, contracts, or otherwise; that the amount of said lien is as follows, to wit:

Balance due for services	$15,000.00
Balance due for Expenses	2,500.00

You are further notified that you are looked to to protect said lien upon any moneys or other property coming into your hands belonging to either of the above persons, or in which they, or either of them, have any interest, and that if you disburse or pay over any moneys, or turn over any property to either of said persons out of or coming through the said estate without the satisfaction of said lien, or without our written consent thereto, that we shall hold you responsible.

Respectfully,

McCONNELL & CLAYBERG."

That said or any lien or claim of lien by said John B. Clayberg and N. W. McConnell, in the name of McConnell & Clayberg, or otherwise, upon said shares and interests in and to the property of said estate of Andrew J. Davis, deceased, was not claimed or asserted by them or either of them prior to the dates last aforesaid

or in any other manner than as herein above alleged: nor has said lien or claim of lien by said McConnell & Clayberg been adjudicated by any court of competent jurisdiction in any suit or action in which said Robert G. Ingersoll or his legal representative, or administrator of his estate, has been impleaded or made a party, or at all.

That said lien claimed by said McConnell & Clayberg or their assigns is not superior or prior, but is inferior and subject to said lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives, or said liens last mentioned are co-ordinate and equal, and entitled to share pro rata in said funds and proceeds of said property subject thereto, after marshalling the same and taking account of the respective amounts of said liens and the amounts heretofore paid thereon respectively, out of said funds, property and proceeds of said shares subject to said liens, in case the same upon the facts appearing be adjudged and decreed to be co-ordinate and equal in right and equity. And plaintiff, on information and belief, further alleges that said McConnell & Clayberg, or their assignee, have had and received payment of a large sum out of the proceeds heretofore distributed on account of said shares in said estate subject to said lien of plaintiff, and largely in excess of the amount heretofore paid to plaintiff's intestate on account of his said claim and lien for services aforesaid, the exact amount of which payments to said McConnell & Clayberg, or their assignee, plaintiff does not know and is at this time unable to allege.

Plaintiff further alleges, on information and belief, said said defendant E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana, is assignee of said McConnell & Clayberg, of said claim and lien or some part thereof or interest therein, by them claimed as aforesaid upon said shares, funds and property of said estate of Andrew J. Davis, deceased; and that said claim, rights and interest of said E. T. Wilson as such receiver, or otherwise, as assignee thereof from said McConnell & Clayberg, are subject to each and all of the rights and conditions aforesaid respecting said claim and lien in its relation to the said claim and lien existing in favor of plaintiff's said intestate and of the estate and legal representatives of Robert G. Ingersoll, deceased.

XXIII. On information and belief, that said defendants E. W. Toole and William Wallace, Jr., as former copartners in the firm name of Toole & Wallace, or otherwise, have or claim some interest in or lien upon the said shares and interests in and to said property of said estate of Andrew J. Davis, deceased, or some part thereof, subject to said claim and lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives as aforesaid; which lien was asserted and claimed by said Toole and Wallace by delivery of a notice to said John H. Leyson as administrator with the will annexed of said estate of Andrew J. Davis, deceased, on the thirtieth day of August, A. D. 1897, in writing, of which the following is a copy:

"J. H. LEYSON, Administrator of the Estate of ANDREW J. DAVIS, deceased:

You will please take notice that the undersigned claim and have an attorney's lien for the balance of our fees, upon all of the interest of Maria Cummings, Ellen S. Cornue, Henry A. Root, Elizabeth S. Ladd and Mary Louise Dunbar, and each of them, separately and severally, in the estate of Andrew J. Davis, deceased, for the sum of seventeen thousand five hundred ($17,500) dollars — two thousand five hundred ($2500) dollars of which said sum is for expense money, according to the terms of our contract; and you are therefore notified to pay no further money to them or either of them, without our consent, until said attorney's fees are fully paid. This 30 day of August, A. D. 1897.

TOOLE & WALLACE, *Attorneys.*"

That said lien claimed by said E. W. Toole and William Wallace, Jr., in the name of Toole & Wallace, or otherwise, has not been claimed or asserted by them or either of them prior to the date last aforesaid, or in any other manner, or by any other notice, nor by filing any notice whatever in the matter of said estate of Andrew J. Davis, deceased; nor has said lien claimed by said Toole & Wallace been adjudicated by any court of competent jurisdiction, in any suit or action in which said Robert G. Ingersoll or his legal representative or administrator of his estate has been impleaded or made a party. That said lien claimed by said Toole & Wallace is not prior or superior, but is subject to said lien existing in favor of said

Robert G. Ingersoll and his estate and legal representatives for services rendered as aforesaid, or said liens last mentioned, on said shares in and to said property, are co-ordinate and equal and entitled to share pro rata in the funds and proceeds of said property subject thereto, after marshalling the same and taking account of the respective amounts of said liens and of the amounts heretofore paid thereon respectively out of said funds and property and proceeds of said shares subject to said liens, in case the same upon the facts appearing be adjudged to be co-ordinate and equal; and on information and belief plaintiff further alleges that said Toole & Wallace have had and received payment of a large sum out of the funds heretofore distributed on account of said shares of, in and to said estate subject to said lien of plaintiff, and largely in excess of the said amount heretofore paid to plaintiff's intestate on account of his said claim and lien for services and counsel rendered as aforesaid, the exact amount of which payments to said Toole & Wallace plaintiff does not know and is at this time of filing this complaint unable to allege.

XXIV. That on or about the fourteenth day of March, A. D. 1901, Frank E. Corbett, a resident and citizen of Silver Bow County, State of Montana, died at said place, testate, and thereafter, on or about the thirteenth day of April, 1901, his last will and testament was duly admitted to probate in and by the first above named entitled court, by order and decree thereof duly given, made and entered of record, and letters testamentary were thereupon issued out of and under the seal of said court by order thereof duly given, made and entered of record on or about the date last aforesaid, to said Adelaide T. Corbett, named as executrix of said decedent in his said will, and she qualified as such executrix, and ever since has been and now is the duly qualified and acting executrix of the will of said Frank E. Corbett, deceased.

That said Adelaide T. Corbett as such executrix of the last will and testament of said Frank E. Corbett, deceased, has or claims to have some interest in, or lien upon, the said shares of, in and to said property of the estate of Andrew J. Davis, deceased, or some part thereof, subject to the said claim and lien existing in favor of said

Robert G. Ingersoll and his estate and legal representatives as aforesaid: which lien was asserted and claimed by said Frank E. Corbett by delivery of notice in writing to said John H. Leyson as administrator with the will annexed of said estate of Andrew J. Davis, deceased, on or about the 21 day of June, A. D. 1899, and by filing in the first above entitled court in the matter of said estate of Andrew J. Davis, deceased, on the day of June, 1899, a similar notice, of which notice so delivered to said John H. Leyson as such administrator the following is a copy:

"IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW.

In the matter of the ESTATE OF ANDREW J. DAVIS, deceased.

To JOHN H. LEYSON, Administrator of said estate:

You will please take notice that Frank E. Corbett performed services as attorney in said estate for Henry A. Root, Ellen S. Cornue, Maria Cummings, Elizabeth Ladd and Louise Dunbar in looking after the interests of said parties in said estate, and were retained and employed by the said parties. That said services are reasonably worth the sum of $20,000. That the sum of $2500 has been paid upon the said amount, and that there is now due and unpaid on said sum of $20,000 the balance of $17,500, which the undersigned claims as an attorney's lien upon all the interest of the said above-named parties, or their successors or assigns, in and to the property, moneys, credits and effects of Andrew J. Davis, deceased, now in your hands or which may hereafter come into your hands as such administrator.

And you are hereby notified that you must not pay to either of said above-named parties, or the successor or assigns of either of them, any further moneys, or turn over to them or either of them any other properties or interests in said estate until the balance of said fee is paid or satisfied. In default of which I shall hold you responsible for the amount thereof.

FRANK E. CORBETT.

THE STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Frank E. Corbett, being first duly sworn, on his oath doth say: That he is the person named in the foregoing statement of lien; that he has read the same and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge.

FRANK E. CORBETT.

Subscribed and sworn to before me this 21 day of June, 1899.

HARRY A. HOLP,

[NOTARIAL SEAL] *Notary Public in and for Silver Bow County, Montana.*"

That said lien claimed by said Frank E. Corbett and now claimed by his executrix as aforesaid was not claimed or asserted prior to said date last above stated, nor in any other manner than as aforesaid, nor has said lien been adjudicated by any court of competent jurisdiction in any suit or action in which said Robert G. Ingersoll or the administrator of his estate or legal representative has been impleaded or made a party. That said lien claimed by said Frank E. Corbett, and now claimed by his executrix as aforesaid, is not superior or prior, but is subject to said lien existing in favor of said Robert G. Ingersoll and his estate and legal representative as aforesaid, or said liens last mentioned are co-ordinate and equal and entitled to share pro rata in the funds and proceeds of said property subject thereto after marshalling the same and taking account of the respective amounts of said liens and of the amounts heretofore paid thereon respectively out of the funds, property and proceeds of said shares of the property of said estate of Andrew J. Davis, deceased, subject to said liens, in case the same, upon the facts appearing, be adjudged and decreed to be co-ordinate and equal; and on information and belief, plaintiff further alleges that said Frank E. Corbett in his lifetime received payment of a sum of money out of the funds distributed from said estate of Andrew J. Davis, deceased, on account of said shares, subject to said lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives, largely in excess of the pro rata amount which would have been due to said Frank E. Corbett, according to the amount of his said claim and lien in relation to that existing on the same funds in favor of said Robert G. Ingersoll and his estate and legal representatives, the exact amount of which payment or payments heretofore made to said Frank E. Corbett plaintiff does not know and cannot at the time of filing this complaint allege.

XXV. Plaintiff further alleges on information and belief that defendant G. W. Stapleton has, or claims to have, some interest in

or lien upon said shares and interests of, in and to the property of said estate of Andrew J. Davis, deceased, or some part thereof which is subject to said claim and lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives as aforesaid, which lien claimed by said Stapleton was asserted and claimed by delivery of a notice in writing to said John H. Leyson as administrator with the will annexed of the estate of Andrew J. Davis, deceased, on the thirty-first day of August, A. D. 1897, of which the following is a copy:

"J. H. LEYSON, Administrator of the Estate of ANDREW J. DAVIS, deceased:

You will please take notice that the undersigned claims and has an attorney's lien for a fee upon all the interests of Maria Cummings, Ellen S. Cornue, Henry A. Root, Elizabeth S. Ladd and Mary Louise Dunbar, and each of them separately and severally, in the estate of Andrew J. Davis, deceased, for the sum of five thousand dollars, according to the terms of a contract made with the said parties for legal services in and about said estate. And you are therefore notified to pay no further money to said parties, or to either or any of them, without the consent of the undersigned, until said attorney's fee is fully paid.

This 31st day of August, A. D. 1897.

G. W. STAPLETON."

That said lien claimed by said G. W. Stapleton was not claimed or asserted by him prior to the date last aforesaid, nor by any other notice nor in any other manner than as last aforesaid; nor has said lien claimed by said G. W. Stapleton been adjudicated by any court of competent jurisdiction in any proper action, or in any suit or action in which said Robert G. Ingersoll or his legal representatives or administrator of his estate has been impleaded or made a party, or at all. That said lien claimed by said G. W. Stapleton is not prior or superior, but is subject to the said lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives for the services rendered as aforesaid, or said liens last mentioned on said shares of, in and to said property as aforementioned, are co-ordinate and equal and entitled to share pro rata in the funds and proceeds of said property subject thereto, after marshalling the

same and taking account of the respective amounts of said liens and of the amounts heretofore paid thereon respectively out of said funds and property and proceeds thereof subject to said liens in case the same, upon the facts appearing, be adjudged to be co-ordinate and equal in right touching said property; and on information and belief plaintiff further alleges that said G. W. Stapleton has received payment of a large sum of money out of the funds heretofore distributed on account of said shares of said estate subject to said lien existing in favor of said Robert G. Ingersoll and his estate as aforesaid, largely in excess of the amount which would have been due to said Stapleton pro rata considering the amount of his said claim and lien in relation to that existing on the same funds in favor of said Robert G. Ingersoll and his estate and legal representatives as aforesaid, the exact amount of which payment or payments heretofore made to said Stapleton this plaintiff does not know and cannot at the time of filing this complaint allege.

XXVI. On information and belief that said defendants J. K. Toole and T. C. Bach, as former copartners in the firm name of Toole & Bach or otherwise, have or claim to have some interest in or attorney's lien upon the said shares and interests in and to the property of said estate of Andrew J. Davis, deceased, or some part thereof which is subject to the said claim and lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives as aforesaid; which lien or claim or interest of the said Toole and Bach, if any they have, is subsequent and subject to the said lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives as aforementioned.

XXVII. On information and belief that said defendant Charles H. Ladd is the husband of said defendant Elizabeth S. Ladd, and as such husband or otherwise has or claims to have some right, title or interest in said property which is subject to the said lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives as aforesaid, or some part thereof; but plaintiff alleges further that such right, title, interest or claim of the said Charles H. Ladd in and to said property or any part thereof is subject to the said

lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives.

XXVIII. On information and belief that said defendant Joshua G. Cornue is the husband of said defendant Ellen S. Cornue, and as such husband or otherwise has or claims to have some right, title or interest in or to the said property which is subject to the said lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives as aforesaid, or some part thereof; but that such right, title, interest or claim of the said Joshua G. Cornue in or to said property or any part thereof is subject to the said lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives.

XXIX. That said defendant Rosine B. Root is the wife of said defendant Henry A. Root, and as such has or claims to have some right, title or interest in or to the said property which is subject to the said lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives as aforesaid, or some part thereof; but that such right, title, interest or claim of the said defendant Rosine B. Root, if any she have, is subject to the said lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives.

XXX. That said defendant Coram, whose Christian name is to the plaintiff unknown, is the wife of said defendant Joseph A. Coram, and as such wife has or claims to have some right, title or interest in or to the said property which is subject to the said lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives as aforesaid, or some part thereof; but that such right, title, interest or claim of the said Coram, wife of the said defendant Joseph A. Coram, if any she have, is subsequent and subject to the said claim and lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives.

XXXI. On information and belief, that the said defendant Stern, whose Christian name is to plaintiff unknown, is the wife of said defendant Winfield S. Stern, and as such wife has or claims to have some right, title or interest in or to the said

property which is subject to the said claim and lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives as aforesoid, or some part thereof: but that such right, title, interest or claim of the said Stern, wife of the said Winfield S. Stern, if any she has, is subsequent and subject to the said claim and lien existing in favor of said Robert G. Ingersoll and his estate and legal representatives.

XXXII. On information and belief, that said defendant W. M. Bickford has or claims to have some right or interest in, or claim or lien upon, the said shares and interests in the property of said estate of Andrew J. Davis, deceased, or some part thereof, which is subject to the said claim and lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives as aforesaid: but plaintiff alleges that any and all such right, interest, claim or lien of the said defendant Bickford, if any he has, is subsequent and subject to the said claim and lien existing in favor of the said Robert G. Ingersoll and his estate and legal representatives.

XXXIII. That prior to the filing of this complaint plaintiff John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, served on John H. Leyson as administrator with the will annexed of the estate of Andrew J. Davis, deceased, and filed in the first above entitled court in the matter of the said estate of Andrew J. Davis, deceased, a notice in writing notifying the said John H. Leyson, and all others whom it may concern, of the said lien claimed and existing in favor of said estate and legal representatives of said Robert G. Ingersoll, deceased, upon said shares and interest in and to the property of said estate of Andrew J. Davis, deceased, both real and personal, as herein alleged and described, to secure payment of said sum of $95,000 and interest thereon at the rate of ten per cent per annum from August 24, 1897, until February 28, 1899, and thereafter at the rate of eight per cent per annum until paid, owing and due the said estate and legal representatives of Robert G. Ingersoll, deceased, on contract for services and counsel as attorney and counsellor at law rendered by the said Robert G. Ingersoll to and for and on behalf of the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A.

Coram, in securing and getting for them the said shares and interests to which they were entitled of, in and to said estate of Andrew J. Davis, deceased, as aforesaid.

Wherefore plaintiff, as administrator of the estate and legal representative of said Robert G. Ingersoll, deceased, demands and prays relief herein as follows:

I. Judgment against said defendant Henry A. Root for the recovery of said sum of ninety-five thousand dollars, owing and due as aforesaid as compensation for said services so rendered by said Robert G. Ingersoll in the prosecution of said objections to and contests of the validity of said alleged will and testament of said Andrew J. Davis, deceased, for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, to the end of getting and securing the said shares of said persons in and to said estate, together with interest on said sum of ninety-five thousand dollars from August 24, 1897, at the rates allowed by the laws of this State, and costs of this action; and judgment in favor of this plaintiff as such administrator of the estate of said Robert G. Ingersoll, deceased, against said Joseph A. Coram to the extent of all the interest acquired, owned and held by him in and to said shares acquired by said Root, Cummings, Ladd, Cornue and Dunbar, or either of them, in and to said estate; and that said debt and judgment be adjudged and decreed by this court to be a lien upon and adhering to all and singular the said shares and interest so acquired by said Henry A. Root in and to said estate of Andrew J. Davis, deceased, and in and to the funds and property thereof, both real and personal, directly and through said trustees, Charles H. Palmer and Andrew J. Davis, Jr., and upon one-third part of all and singular the said shares and interests of, in and to the property of said estate, both real and personal, so acquired by said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, and each of them, directly and through said grant and assignment to said trustees, Charles H. Palmer and Andrew J. Davis, Jr., and by said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, assigned to said Henry A. Root and Gideon

Wells in trust for the purpose of securing and paying for services of counsel employed and rendered in the prosecution of said objections to and contests of the validity of said alleged will, for and on behalf of said persons aforesaid; and also upon all and singular the rights and interests acquired by said defendant Joseph A. Coram in and to the said shares of the funds and other property of said estate of Andrew J. Davis, deceased, assigned and allotted and decreed as aforesaid to Elizabeth S. Ladd, M. Louise Dunbar, Ellen Cornue, Sarah Maria Cummings or Henry A. Root, or either of them, directly or for their use and benefit to said Charles H. Palmer and Andrew J. Davis, Jr., trustees as aforesaid; and that all interest acquired by said Henry A. Root in and to said estate, either directly or by assignment for his use and benefit to said Charles H. Palmer and Andrew J. Davis, Jr., trustees; and all and singular the interest of said Joseph A. Coram in and to said shares of said estate assigned and allotted to said Elizabeth S. Ladd, M. Louise Dunbar, Ellen Cornue, Sarah Maria Cummings and Henry A. Root, or either of them, directly or for their use and benefit to said trustees; and all interest in and to said shares of said estate assigned by said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar to said Henry A. Root and Gideon Wells, in trust for the purposes aforesaid; and all interest in and to said estate of Andrew J. Davis, deceased, so assigned and allotted to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, for the use and benefit of said Henry A. Root, and one-third part and portion of all interest in said estate assigned and allotted to said trustees last above mentioned in trust for the use and benefit of said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, as well as one-third part of all interests in said estate assigned and allotted to them directly, be by the decree of this court herein, and by proper orders, proceedings, sales and application of the proceeds of said interests, subjected to said lien in favor of said Robert G. Ingersoll and plaintiff as his legal representative and administrator of his estate, and that a sufficient portion of said shares and interests in the funds and property of said estate, and the proceeds thereof in the custody of said John H. Leyson as adminis-

trator with the will annexed of said estate of Andrew J. Davis, deceased, be sequestered by proper orders of this Honorable Court, and that the moneys distributed to the credit or on account of said shares and interests subject to said lien be required to be first applied to the payment of such judgment, interest and costs of this suit, and that the personal property other than money in the custody of said John H. Leyson, as such administrator, subject to said lien as aforesaid, be by this court ordered sold by said John H. Leyson, or by a receiver appointed by this court, and the proceeds thereof applied to the payment of said claim, judgment and interests and costs in favor of this plaintiff as such administrator of the estate of Robert G. Ingersoll, deceased, and that in case such funds and personal property subject to said lien be insufficient to pay in full said judgment, interest and costs in favor of plaintiff, then that said shares, parts and parcels of said real estate subject to said lien be by this court ordered sold and that the proceeds thereof be applied to the payment of whatever may remain unpaid of said judgment, interest and costs in favor of plaintiff.

2. That there be ascertained through proper proceedings herein all and singular the right, title and interests of said Joseph A. Coram in and to said shares of Elizabeth S. Ladd, M. Louise Dunbar, Ellen Cornue, Sarah Maria Cummings and Henry A. Root, and each of them, in and to the property of said estate of Andrew J. Davis, deceased, and that all his interests therein be subjected to and applied to the payment of said claim of plaintiff in this action set forth.

3. That said John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased, be required by the orders of this Honorable Court to reserve, hold and retain in his custody all moneys and other property of said estate, subject to said lien in favor of plaintiff, and that he be required by proper orders of this court to apply all moneys in his custody belonging to said persons and shares, subject to said lien, to the payment of the claim of plaintiff, set forth in this action, and that in case said moneys be insufficient to pay the same with interest, and costs of this action, that the other property of said estate, in the custody of said John H. Leyson as such administrator with the will annexed, subject to said

lien in favor of plaintiff as aforesaid, be, pursuant to the decree and orders of this court, sold and the proceeds thereof applied to the payment of any balance owing on said claim of plaintiff as such administrator of said estate of Robert G. Ingersoll, deceased, herein set forth.

4. That said Charles H. Palmer and Andrew J. Davis, Jr., as trustees as aforesaid, be required by proper orders of this court to keep, reserve and hold in their possession and under their control all moneys and other property, real and personal, now in their custody, and which may hereafter come into the custody or control of them or either of them, as such trustees, by virtue of said compromise contracts and decree made in conformity thereto, a copy of which is hereto annexed marked "Exhibit C", and any other orders or decree of this court, in trust for the use and benefit of said Henry A. Root and Joseph A. Coram, from said estate of Andrew J. Davis, deceased, and one-third part of all moneys and other property of said estate which has heretofore or which may hereafter come into the custody or control of said trustees, or either of them, in trust for the use and benefit of said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, or either of them, and all interest of said Joseph A. Coram in and to their said shares or the shares of either of them, and that the same and the proceeds thereof, or so much thereof as may be necessary to satisfy said claim and lien existing in favor of plaintiff, be, by the orders of this court in this action subjected to said lien in favor of plaintiff as such administrator of the estate of Robert G. Ingersoll, deceased, and be applied or sold and the proceeds thereof applied to the payment of any balance of said claim and demand of plaintiff set forth in this action, which may remain unpaid, with interest thereon and costs of this action.

5. That a receiver be appointed to take charge of all or any part of said funds and other property to which said lien in favor of said Robert G. Ingersoll and his estate, and of plaintiff as administrator of his estate, attaches as aforesaid, and that such receiver be, by proper orders of this court, empowered to take and be put into possession thereof, subject to the orders of this court, if at any time

it appears necessary to appoint such receiver to preserve and protect said funds or other property from being lost or removed, or to make the same, or any part thereof, available, and to apply the same to the payment of said demand in favor of plaintiff as such administrator herein set forth.

5. That a receiver be appointed to take charge of all or any part of said funds and other property to which said lien in favor of said Robert G. Ingersoll and his estate, and of plaintiff as administrator of his estate, attaches as aforesaid, and that such receiver be, by proper orders of this court, empowered to take and be put into possession thereof, subject to the orders of this court, if at any time it appears necessary to appoint such receiver to preserve and protect said funds or other property from being lost or removed, or to make the same or any part thereof available, and apply the same to the payment of said demand in favor of plaintiff as such administrator herein set forth.

6. That in the event of the above-named defendants appearing in this action and set up claim to any right or interest in or to, or lien upon, said property shares or interests, or any part thereof, which is subject to said lien in favor of said Robert G. Ingersoll and his estate as aforesaid, then that said lien existing in favor of said Robert G. Ingersoll and his estate be declared and decreed to be prior and superior to any such other rights, claims, interest or liens, according to the principles of equity and provisions of law, and that in case any other lien or claim of lien upon said shares, interests and property, subject to plaintiff's said lien, be set up and established in favor of any of said defendants, or any other person who may be made party to this action, that the priorities, or co-ordinate rights, in relation thereto, be ascertained, declared and decreed as may be just and equitable, after taking account of the payments heretofore made on such claims and liens, and that the said property and funds subject to said liens, if any are found to be co-ordinate and equally entitled to share pro rata therein, be marshalled, and that the manner of pro rata application of said funds, property and proceeds thereof subject to such liens be declared, decreed and carried into execution. And that in case any or either of said defendants fail to appear after

service of process, and answer and set up or establish a claim, right, interest or lien, respectively, in or upon said property, subject to said lien existing in favor of plaintiff as such administrator as aforesaid, then, that the said lien existing in favor of plaintiff as said administrator as aforesaid be adjudged and decreed to be prior, paramount and superior to any and all claims, rights, interests or liens of each and all said defendants so failing to appear and set up or establish the same, if any they or either of them have, and that said claim and lien of plaintiff shall be satisfied out of the funds and proceeds of said shares in and to the property of said estate subject thereto, prior to any lien, right, interest or claim of each and all defendants so failing to appear.

7. And that plaintiff, as administrator of the estate of Robert G. Ingersoll, deceased, may have all such relief both provisional and final to which he may in law or equity be entitled in the premises, to the end of the complete protection, security and enforcement of the payment of said claim, lien and demand herein set forth.

E. N. HARWOOD *and*
JOHN LINDSAY,
Attorneys for Plaintiff.

Exhibit A.

Know all men by these presents, that whereas, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar claim to be interested in the estate of Andrew J. Davis, late of Butte, Montana, about which controversies have arisen; and whereas Henry A. Root, also a party claiming to be interested in said estate, has rendered services and expended moneys in the matter of the administration thereon, and whereas there is offered for probate a will purporting to be the will of said Andrew J. Davis, in opposing the allowance of which all the above parties are interested; and whereas said Henry A. Root has undertaken to procure evidence, counsel and such other things as are necessary for opposing said will and obtaining for the parties above named their respective rights and shares of said estate, as against all parties other than

the brothers and sisters and nephews and nieces of said Andrew J. Davis.

Now, therefore, in consideration as aforesaid, we, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar hereby severally sell, assign, transfer and set over to Henry A. Root and Gideon Wells one-third part of each of our interests in said estate, in trust, out of the avails thereof to reimburse said Henry A. Root for all sums by him heretofore or hereafter expended, and liabilities incurred by him on account of the settlement of said estate and opposing the probate of said will, as well as all sums which he may hereafter incur on account thereof, the entire residue of said one third to be paid to said Root as compensation for his own time and service in that behalf used and employed. It being understood and agreed that this assignment shall be in full for all of such claims and demands, and that no further liability shall exist against the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar on account thereof. And the said Root shall not be authorized in any way to hold or render either of the above named personally liable or responsible for any of said matters or things.

And the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar severally agree that they will not make any sale, transfer or settlement of their several and respective interests in said estate, or either of them, without the assent thereto of said Henry A. Root and Gideon Wells.

And the said Root on his part agrees to procure counsel, pay their charges, and do all things necessary properly to secure the interests of the parties above named in said estate, as heirs at law and next of kin of said Davis, and agrees that he will not sell, transfer, or in any way dispose of his interest in said estate without the consent of the said Wells thereto.

And we the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar do hereby severally constitute and appoint the said Henry A. Root and Gideon Wells our attorneys in fact, irrevocable, for us and each of us, and in our and each of our names, place and stead, jointly to demand, sue for, collect,

receive, compound, receipt for and full acquittance give for our and each of our interests in said estate.

In witness whereof, we the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Henry A. Root have set our hands and seals to this and one other instrument of like tenor, this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and ninety.

SARAH MARIA CUMMINGS. [SEAL]
ELIZABETH S. LADD. [SEAL]
M. LOUISE DUNBAR. [SEAL]
ELLEN CORNUE. [SEAL]
HENRY A. ROOT. [SEAL]

Exhibit B.

BUTTE CITY, MONT., Aug. 17, 1891.

R. G. INGERSOLL, Esq., Butte City, Montana.

Sir: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred thousand (100,000) dollars, and that your expenses and disbursements shall be paid in any event.

There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

HENRY A. ROOT.
J. A. CORAM.

Exhibit C.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

In the matter of the ESTATE OF ANDREW J. DAVIS, deceased:

Upon the contest of Henry A. Root, Sarah Maria Cummings against the probate of the will of said deceased, wherein John A. Davis is proponent, and Henry A. Root *et al.* contestants: and the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased: and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it remembered that on the twenty-fourth day of August, 1897, the petition in the above-entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the court has been heretofore made on the twenty-fourth day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contests now pending are represented by attorneys present in court.

It is ordered that the contests heretofore instituted in this court by Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith be and the same are hereby dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this court heretofore made on the twenty-seventh day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this court confirming

the making, executing and delivering the same. It is ordered, adjudged and decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of said Andrew J. Davis, deceased, with the will annexed, keep, retain and hold in his possession and under his control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreements, said order and the provisions thereof.

And it is hereby ordered, adjudged and decreed in pursuance of said petition, said compromise agreement and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis, deceased, and so held, retained and controlled by said administrator, and to be distributed by him, be, and the same are hereby established and declared to be as follows, to wit: That is to say: Subject to the bequests in said will of said Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate. The parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:

Two hundred eleven-hundredths (200/1100) thereof in kind to John E. Davis, as administrator of the estate of John A. Davis, deceased; two hundred and fifty eleven hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua Cornue; forty-four eleven hundredths (44/1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven hundredths (50/1100) thereof in kind to Harriet Wood; twenty-five eleven hundredths (25/1100) thereof in kind to Elizabeth A. Smith; fifty eleven hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed in and by the compromise agreement, dated April 23, 1893, are entitled to have and receive as such trustees and for the purposes of such trust four hundred and thirty-one eleven hundredths (431/1100) of said estate in kind.

It being further ordered, however, that no portion of the real estate owned by said Andrew J. Davis and situate in the State of Iowa shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be effected by this cause and proceeding are, by consent in open court, adopted and made the basis of this order and decree according to the terms and provisions of said contracts and agreements.

Done in open court this twenty-fourth day of August, A. D. 1897.

JOHN LINDSAY, *Judge*.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

John S. Harris, being first duly sworn according to law, deposes and says: I am the duly appointed, qualified and acting administrator, in the State of Montana, of the estate of Robert G. Ingersoll, deceased, and that as such administrator I am plaintiff in the above-entitled action; that I have read and know the contents of the above and foregoing amended complaint and that the facts therein stated are true to the knowledge of this deponent, except as to the matters therein stated on information and belief, and that as to those matters he believes the same to be true.

JOHN S. HARRIS.

Subscribed and sworn to before me this sixth day of February, A. D. 1902.

E. N. HAZWOOD,
NOTARIAL SEAL. *Notary Public within and for the County of Silver Bow, State of Montana.*

We hereby acknowledge service of the foregoing amended com-

plaint on us by copy delivered this sixth day of February, A. D. 1902.

CLAYBERG & GUNN,
CHAS. R. LEONARD,
Attorneys for HENRY A. ROOT, *individually, and* HENRY A. ROOT, *as administrator with the will annexed of the Estate of* SARAH MARIA CUMMINGS, *deceased, and* HENRY A. ROOT *as trustee, Defendants above named.*

[*Endorsed:*]

State of Montana, County of Silver Bow. In the District Court of the Second Judicial District. John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff, vs. Henry A. Root, Joseph A. Coram *et al.*, Defendants. Amended Complaint. Filed Feb. 6, 1902. Samuel M. Roberts, Clerk. By James F. Wilkins, Deputy Clerk. E. N. Harwood and John Lindsay, attorneys for plaintiffs.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue, Joshua G. Cornue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, Trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., Trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; Coram, wife of said Joseph A. Coram; —— Stern, wife of said Winfield S. Stern; and W. M. Bickford, Defendants.

Comes now the plaintiff in the above-entitled action and, by leave of court first granted, amends his amended complaint heretofore filed in this action by adding thereto the following:

XXXIV. That plaintiff is informed and believes, and on his information and belief alleges, that said Gideon Wells, joint trustee mentioned in paragraph V. of plaintiff's amended complaint, herein heretofore since the creation of said trust as aforesaid, departed

this life, and that no successor of him as such trustee has been named, appointed or authorized to act as joint trustee in the behalf mentioned in paragraph V. of plaintiff's amended complaint herein, and in the instrument therein referred to.

XXXV. Plaintiff further alleges that there has been heretofore, to wit, on or about August 26, 1897, distributed pursuant to the order of this court, from the moneys belonging to said estate of Andrew J. Davis, deceased, the sum of six hundred and seventy thousand (670,000) dollars, in accordance with the provisions of the decree of the above entitled court, copy of which is annexed to plaintiff's amended complaint in this action, marked "Exhibit C", of which sum there was distributed and paid directly to said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, and to Elizabeth S. Ladd and Mary Louise Dunbar, or to their assignee, Joseph A. Coram, the sum of one hundred and fifty-two thousand two hundred seventy-two and 73/100 (152,272.73) dollars, and that out of and from the same distribution there was also distributed and paid to said Charles H. Palmer and Andrew J. Davis, Jr., trustees, the sum of two hundred and sixty-two thousand five hundred eighteen and 18/100 (262,518.18) dollars in trust under the trust created for the purposes mentioned in plaintiff's amended complaint in this action, for the use and benefit of said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and Mary L. Dunbar, to the extent of one half of the sum last above mentioned, which sums heretofore distributed from said estate of Andrew J. Davis, deceased, to, and for the use and benefit of, said Henry A. Root, and his associates in the contest of said will, as aforesaid, aggregate $283,531.82.

E. N. HARWOOD,
JOHN LINDSAY,
Attorneys for Plaintiff.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

John S. Harris, being first duly sworn according to law, deposes and says: I am the duly appointed, qualified and acting administrator, in the State of Montana, of the estate of Robert G. Ingersoll,

deceased, and that as such administrator I am plaintiff in the above-entitled action; that I have read and know the contents of the above and foregoing amendment to plaintiff's amended complaint in said action and that said pleading is true to the knowledge of the deponent, except as to those matters therein stated on information and belief, and that as to those matters he believes the same to be true.

JOHN S. HARRIS.

Subscribed and sworn to before me this seventh day of July, A. D. 1902.

JOHN E. CORETTE,

[NOTARIAL SEAL.] *Notary Public within and for the County of Silver Bow, State of Montana.*

Service of the foregoing amendment on us, this July 7th, 1902, is hereby acknowledged.

CLAYBERG & GUNN *and*
CHAS. R. LEONARD,
Attorneys for HENRY A. ROOT, JOSEPH A. CORAM, *and other answering defendants as shown by their answers in said action.*

[*Endorsed.*]

No. 9346. State of Montana, County of Silver Bow. In the District Court of the Second Judicial District. John S. Harris as Adm'r of estate of Robert G. Ingersoll, dec'd., Plaintiff, vs. Henry A. Root, Joseph A. Coram *et al.*, Defendants. Amendment to amended complaint. Filed Jul 7, 1902. Samuel M. Roberts, Clerk. By Edward W. Ralph, Deputy Clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram et al., Defendants.

AMENDMENTS TO PLAINTIFF'S AMENDED COMPLAINT.

Comes now the plaintiff in the above-entitled action and by leave of court first granted, amends, and files this his amendment to his amended complaint heretofore filed in this action, by adding thereto the following:

1. Insert in said amended complaint, immediately following line 20 on page page 12 thereof, the following:

That when said compromise contract was made as aforesaid, the said contest of the validity of said alleged will was pending and the same was being prosecuted by said Robert G. Ingersoll for and on behalf of said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar and Joseph A. Coram, in opposition to the admission of said will to probate, and that by reason and in consideration of said prosecution of said contest, and the force, effect and stress thereof, the said heirs, legal representatives, successors and administrator of said John A. Davis, deceased, proponent of said will, were constrained to yield consent, and did yield consent, to the terms of said compromise agreement granting the portions of said estate to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and M. Louise Dunbar, as in this complaint alleged, whereby, and by reason of said prosecution of said contest, said will was defeated and in effect annulled, in so far as it could affect the rights, interests or claims of said persons for whom said Robert G. Ingersoll performed said services, in and to said estate, as heirs at law of said Andrew J. Davis, deceased; and that besides prosecuting said contest as in this complaint alleged, the said Robert G. Ingersoll also counselled, advised

and aided in the making and effectuating said compromise agreement granting and securing to said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and M. Louise Dunbar the shares, parts, parcels and portions of said estate of Andrew J. Davis, deceased, by them acquired as in this complaint alleged.

2. And plaintiff further amends his amended complaint heretofore filed in this action by adding thereto a paragraph as follows:

XXXVI. Plaintiff further alleges that on the third day of December, A. D., 1901, upon the petition of said Henry A. Root, Ellen S. Cornue, and Henry A. Root as administrator with the will annexed of Sarah Maria Cummings, deceased, and Joseph A. Coram as assignee and grantee of said Elizabeth S. Ladd and her said husband, and Mary L. Dunbar, the above-entitled court duly made and caused to be entered of record an order or decree directing the administrator of the estate of Andrew J. Davis, deceased, to distribute to said petitioners 250 1100 of one hundred thousand dollars and one hundred shares of the capital stock of the First National Bank of Butte, Montana, of the property belonging to said estate, in the possession of said administrator thereof, which money and bank stock last above mentioned is of the value of at least one hundred and twenty-five thousand dollars; that said 250 1100 thereof is of the value of $28,408; and that (215 1-2 1100) two hundred fifteen and one-half eleven hundredths of said hundred thousand dollars and bank stock to which said petitioners for distribution last above mentioned are entitled to have and receive through said trustees, Charles H. Palmer and Andrew J. Davis, Jr., amounts in value to the sum of $24,188.55; that said sums to which said petitioners for distribution last above mentioned are entitled out of said money and bank stock last above mentioned aggregates $52,896.55, and that on the payment thereof to said Henry A. Root for himself and as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased, and Ellen S. Cornue, and Joseph A. Coram, as assignee and grantee of Elizabeth S. Ladd and her said husband and Mary L. Dunbar, the same, together with the said other sums of money heretofore distributed to said persons for whom said Robert G. Ingersoll performed said services, as in plain-

tiff's amended complaint alleged, will amount to and they will have had and received from said estate of Andrew J. Davis, deceased, sums aggregating $467,687.46; that there are other moneys, bonds and personal property belonging to said estate of Andrew J. Davis, deceased, in possession of the administrator thereof, of the value of fully one-half million dollars, subject to be hereafter distributed to the persons mentioned in the said decree of this court, a copy of which is annexed to plaintiff's amended complaint marked "Exhibit C", or to their legal representatives, heirs or assigns, of which half million dollars last mentioned the said persons for whom said Robert G. Ingersoll performed said services, as alleged in plaintiff's amended complaint herein, are entitled to (465 1-2/1100) four hundred sixty-five and a half eleven-hundredths, that is to say, over $210,000 thereof, besides a like interest in all the mining property and other real estate belonging to said estate of Andrew J. Davis, deceased, the value of which real estate plaintiff is informed and believes, and on his information and belief alleges, exceeds a million dollars, which real estate has been heretofore distributed and delivered to said persons mentioned in Exhibit C to plaintiff's amended complaint herein.

E. N. HARWOOD *and*
JOHN LINDSAY,
Attorneys for Plaintiff.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

John S. Harris, being first duly sworn, according to law, deposes and says: I am the duly appointed, qualified and acting administrator, in the State of Montana, of the estate of Robert G. Ingersoll, deceased, and that as such administrator I am plaintiff in the above-entitled action; that I have read and know the contents of the above and foregoing amendments, and that said pleading is true to the knowledge of this deponent, excepting the matters therein stated on information and belief, and that as to those matters I believe the same to be true.

JOHN S. HARRIS.

Subscribed and sworn to before me this twentieth day of November, A. D. 1902.

E. N. HARWOOD,
Notary Public within and for the County of Silver Bow, State of Montana.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root et al., Defendants.

NOTICE.

To Messrs. Charles R. Leonard and Clayberg & Gunn and Forbis & Mattison, Attorneys for defendants in the above-entitled action:

You are hereby notified that on November 26, 1902, or as soon thereafter as counsel can be heard, plaintiff in the above-entitled action will apply to the above-entitled court in Department 1, thereof for leave to amend his amended complaint in said action by filing certain amendments thereto, a copy of which is herewith served upon you, hereto annexed.

E. N. HARWOOD *and*
JOHN LINDSAY,
Attorneys for Plaintiff.

We hereby acknowledge service of a copy of the foregoing notice on us this twentieth day of November, A. D. 1902, with copy of said proposed amendments hereto attached.

CLAYBERG & GUNN,
CHAS. R. LEONARD,
Attorneys for Defendant.
FORBIS & MATTISON,
Attorneys for J. H. LEYSON,
Administrator.

(*Indorsed:*)

State of Montana, County of Silver Bow. In the District Court of the Second Judicial District. John S. Harris as administrator of estate of Robert G. Ingersoll, Plaintiff, *vs.* Henry A. Root, Joseph A. Coram, *et al.*, Defendants. Amendments to Plaintiff's amended complaint. Filed Dec. 10, 1902. Samuel M. Roberts, Clerk. By H. M. Heimerdinger, Deputy Clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

Case No.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue; Joshua G. Cornue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, Trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., Trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as Receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; —— Coram, wife of said Joseph A. Coram; —— Stern, wife of said Winfield S. Stern; and W. M. Bickford, Defendants.

ANSWER TO PLAINTIFF'S AMENDED COMPLAINT.

Now come the defendants Henry A. Root and Rosine B. Root, Joseph A. Coram and Margaret Coram, Ellen S. Cornue and Joshua G. Cornue, Henry A. Root, trustee, Henry A. Root as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, trustee; John

B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern and W. M. Bickford, defendants in the above-entitled cause, and for answer to the plaintiff's amended complaint on file herein say:

1. Admit the allegations of paragraph 1 of said amended complaint.

2. Admit the allegations of paragraph 2 of said amended complaint, except the allegation that Andrew J. Davis left a large estate consisting of real and personal property of great value, to wit, of the value of five millions of dollars or more, and deny that said Andrew J. Davis left an estate of five millions of dollars or more, but allege the truth to be that the estate was not of the value of over two millions of dollars.

3. Admit the allegations of fact stated in paragraph 3 of said amended complaint.

4. Admit the allegations of fact stated in paragraph 4 of said amended complaint.

5. Admit that Elizabeth S. Ladd, Ellen S. Cornue and Maria Louise Dunbar were each and all of them interested to the extent of their respective claims or shares in and to said estate as next of kin of said decedent Andrew J. Davis, deceased, in the successful prosecution of said objections to and contests of the validity of said alleged will, and in opposition to the admission thereof to probate and by said court until the probate thereof was defeated as alleged in paragraph 5 of said complaint.

Admit that Elizabeth S. Ladd, Ellen S. Cornue, Sarah Maria Cummings and Mary Louise Dunbar executed the paper, a copy of which is attached to plaintiff's amended complaint as Exhibit A, as alleged in paragraph five of said amended complaint, but deny that

said paragraph five of said amended complaint states truly the contents of said instrument, and these defendants respectfully refer to the copy of said instrument attached to the said amended complaint for the contents thereof.

6. Admits that the defendant Joseph A. Coram has acquired all the remaining interests and shares of Mary Louise Dunbar and Elizabeth S. Ladd in the estate of Andrew J. Davis, deceased, but deny that he now holds or owns the same or any part thereof.

7. Admit that prior to August 17, 1891, while said contests were pending, the defendants Henry A. Root and Joseph A. Coram engaged and employed the said Robert G. Ingersoll to act as attorney for and in behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Mary Louise Dunbar and Joseph A. Coram in the prosecution of said contests; admit that the said Robert G. Ingersoll accepted said employment and in pursuance and fulfillment thereof rendered services as counsel to and in behalf of said parties in the prosecution of said contests; allege that prior to the seventeenth day of August, 1891, the said employment of said Ingersoll was by a verbal agreement and that on or about the said seventeenth day of August, 1891, the said Root and Coram signed the written instrument attached to said amended complaint and marked "Exhibit B"; deny that the consideration for said contract is properly or truly set forth in said complaint, and deny that the terms of said contract are properly alleged or set forth in said amended complaint save as to said Exhibit B; but allege that said Exhibit B attached to said amended complaint states truly all the terms and conditions of said employment of said Ingersoll by said Root and Coram.

8. Deny that said Robert G. Ingersoll fully performed or rendered the services for which it was promised or agreed he should be paid the sum of one hundred thousand dollars as compensation therefor; admits that the contest of Henry A. Root was tried by this court sitting with a jury in the year 1891, and that Robert G. Ingersoll attended and took part in said trial and rendered services in the prosecution of said objections and contests for the parties as alleged in paragraph 8 of said amended complaint; admits that the

jury disagreed upon the questions at issue in said contest, and failed to find a verdict and return as the result of said trial.

9. Admit that while said contests were pending said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd and Charles H. Ladd, her husband, Mary Louise Dunbar, Ellen S. Cornue and Joshua G. Cornue, her husband, entered into and made a compromise contract in writing, dated April 28, 1893, with the heirs, successors in interest and legal representatives of John A. Davis, deceased, whereby the said heirs, successors in interest and legal representatives of John A. Davis, deceased, in consideration of the compromise and settlement of said contests and litigation then pending and for the purpose of having the said contests settled, and in contemplation of the final admission of said will to probate, granted, assigned, set over and conveyed to said Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd and Ellen S. Cornue two and a half elevenths of all and singular the property of Andrew J. Davis, deceased, and conveyed and set over to Charles H. Palmer and Andrew J. Davis, as joint trustees, another one eleventh of the property of the said estate in trust for the use and benefit of Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar and Ellen S. Cornue, on condition of the final admission of the said will to probate, after all contests and litigation in respect thereto had been determined or settled; admit that all of the residue and remainder of said estate and all those certain parts and portions thereof not assigned and conveyed aforesaid were conveyed to Charles H. Palmer and Andrew J. Davis, Jr., in trust, for the use and benefit of and to be divided equally between the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue and Maria Louise Dunbar, and the heirs, successors in interest and legal representatives of John A. Davis, deceased; admit that John A. Davis had departed this life intestate before the execution of said contract, and that John E. Davis had been, by order of the court, duly appointed administrator of his estate, had duly qualified as such, and letters of administration had been issued to him, and that he was acting as the legal representative and administrator of the estate of John A.

Davis, deceased; admit that this court thereafter, by order duly made, approved, ratified and confirmed the action of John E. Davis as such legal representative and administrator in entering into, making and delivering said contract; admit that Charles H. Palmer and Andrew J. Davis, Jr., accepted of the trusts created and vested in them jointly, and that they are still acting as general trustees under said contract.

10. Admit the contests of Henry A. Root and Sarah Maria Cummings were, on or about the eighteenth day of March, A. D. 1895, withdrawn and dismissed, and that said will was admitted to probate.

11. Admit that thereafter other contests of the validity of said will, accompanied by petitions to revoke the probate thereof, were instituted and prosecuted in behalf of Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth Smith; admit that said last-mentioned contests and petitions were pending and prosecuted until about August 24, 1897; admit that these contests and petitions for revocation were also all compromised and settled by certain compromise contracts and grants and conveyance of portions of said estate of said Andrew J. Davis, deceased, to the said last above mentioned contestants and petitioners which were made in the year 1897, as alleged in paragraph nine of said amended complaint; and admit that said contests and petitions to revoke the probate of said will were withdrawn and dismissed.

12. Admit that by the terms of said compromise contracts, grants and assignments, taken and given, there was granted, assigned and secured and conveyed to Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd, and Charles H. Ladd, her husband, and Ellen S. Cornue and Joshua G. Cornue, her husband, 250 1000ths of all and singular the property of the estate of Andrew J. Davis, deceased, and that there was granted, assigned and secured to Charles H. Palmer and Andrew J. Davis, trustees, 151 1000ths of the said estate of Andrew J. Davis, deceased.

13. Admit that the annuities by the terms of the will given to Thomas Jefferson Davis, Pet Davis and Mrs. Bergett were on or about the date alleged in said amended complaint ascertained and fixed by decree of the court and settled and paid.

14. Admit that on or about August 24, 1897, the court duly made a decree confirming the admission of said will to probate, and that Exhibit C attached to said amended complaint is a true and correct copy thereof.

15. Deny that by virtue or as a result of the prosecution of said contests of or objections to the validity of said will, instituted or prosecuted in the above entitled court in the names or in behalf of said Henry A. Root and Sarah Maria Cummings, or in behalf of Elizabeth S. Ladd, Ellen S. Cornue and Mary Louise Dunbar, or any of them, or of the services in their behalf so rendered by Robert G. Ingersoll in the prosecution of said objections or contests, or in behalf of any of them, the said compromise contracts mentioned in said amended complaint or the decree last above mentioned were procured or made, or are now or ever were effectual in defeating the said will in so far as it cuts off the rights of the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, or Maria Louise Dunbar, or either of them, in or to the said estate of Andrew J. Davis, deceased, or in any other way or manner or at all, or in securing or getting for them respectively each, all, or any rights, interests, parts, parcels or shares of in or to the said estate, that they, or either of them, were entitled to as next of kin or heirs at law of Andrew J. Davis, deceased, and allege the truth to be that each and all of said contracts and compromises were negotiated by the said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd and Mary Louise Dunbar by and through their attorneys, other than Robert G. Ingersoll, and that said Robert G. Ingersoll performed no services in said settlement or in the procuring of said contracts; allege that by virtue of said Exhibit B, attached to said amended complaint, the only services for which the said parties employed the said Robert G. Ingersoll were services to be performed in connection with the said contests against the probate of said will, and further allege that by the terms of said contract, Exhibit B, the fee agreed to be paid to the said Robert G. Ingersoll was conditioned upon the said will being defeated; allege that said Robert G. Ingersoll did not perform any services of any kind, character or description for any of the parties to this suit other than those which

were performed in assisting in and endeavoring to enforce the contests of Henry A. Root and Sarah Maria Cummings to the said alleged will, and in which the said Robert G. Ingersoll totally and wholly failed, and said will was finally probated; deny that by virtue of said contract with the said Robert G. Ingersoll, or by virtue of any other contract or at all, or by virtue of the facts alleged in said amended complaint, or any other facts, or at all, the said Robert G. Ingersoll became entitled to the sum of one hundred thousand dollars, or his expenses or disbursements, as a compensation for his services rendered for and in behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, Mary Louise Dunbar or Joseph A. Coram, or either of them, in the prosecution of said objections to or contests of the validity of said will, or in any other sum or amount, or at all; deny that Robert G. Ingersoll, or his representatives or assigns, ever were or are now entitled in law or in equity to a lien on the interests in said estate acquired by Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, Mary Louise Dunbar, or Joseph A. Coram, or either of them, or at all, or upon any interests of either or all of said parties as security for the payment of said services to said Ingersoll or otherwise or at all.

Admit that the said Robert G. Ingersoll has been paid the sum of five thousand dollars, but that such payment was made in the manner hereinafter alleged; deny that there is now owing or due for or on account of the said services or any services, or wholly unpaid, the sum of ninety-five thousand dollars, or any other sum or amount at all.

16. Admit that Robert G. Ingersoll died as alleged in paragraph 16 of said amended complaint, and that his widow, Eva A. Ingersoll, was duly appointed administratrix of his estate in the State of New York as alleged in paragraph 16 of said amended complaint; admit that plaintiff, John S. Harris, had been appointed administrator of the estate of said Robert G. Ingersoll in the State of Montana, and that he has qualified as such administrator and now is acting as such as alleged in paragraph 16 of said amended complaint.

17. Deny that by virtue of the law or facts in said amended complaint stated, or otherwise or at all, the said Robert G. Ingersoll

acquired or held, or that his estate, or plaintiff as his legal representative or administrator of his estate or otherwise or at all, now has, holds, or is entitled to the enforcement of a lien upon said or any shares, lots or parcels of the funds or other property of the said estate so assigned or allotted to Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cormie, either directly or for their own use or benefit, to Charles H. Palmer or Andrew J. Davis, as trustee or either of them or at all, or upon all or any interest therein acquired by Joseph A. Coram, to secure the payment of said or any amount owing or now due as the compensation for his services rendered by Robert G. Ingersoll as attorney or counsellor-at-law in the prosecution of said objections or contests, or at all, or for or in behalf of them or either of them, as their or either of their cause of action to acquire, secure or get the respective shares of said estate to which said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cormie or Mary Louise Dunbar, or either of them, were entitled to as next of kin or heirs of said Andrew J. Davis, deceased, or otherwise or at all; deny that any lien rests upon or adheres to their or either of their respective shares, or any shares, or in or to the funds or property of said estate, real or personal, so granted or assigned to them by said compromise contracts, or allotted to them by said or any decree pursuant to said or any compromise contract or contracts, or upon said or any shares or proportions of said shares, as alleged in paragraph 17 of said amended complaint, or otherwise or at all.

18. Admit that John H. Leyson had been duly appointed, has qualified and is now acting as administrator with the will annexed of the said estate of Andrew J. Davis, deceased; admit that said John H. Leyson as such administrator has in his custody and control, subject to the orders of the court, certain funds and other property belonging to said estate of Andrew J. Davis, deceased.

19. Admit that there are certain lots, pieces or parcels of real estate situate in the County of Silver Bow, State of Montana, which were a part and parcel of said estate of Andrew J. Davis, deceased, when said objections to and contests of the validity of the said will were prosecuted by the said Robert G. Ingersoll, and at the same

time said compromise contracts were entered into, and at the same time said proceedings and decree, a copy of which is annexed to said amended complaint as Exhibit C, were entered into, procured and made; deny that any lien exists in favor of Robert G. Ingersoll, or in favor of the plaintiff as his legal representative, or as administrator, to secure payment for any services of Robert G. Ingersoll as attorney or counsellor-at-law in behalf of Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, Mary Louise Dunbar or Joseph A. Coram, or either of them, in the prosecution of said objections to or contests of the validity of said alleged will, or otherwise or at all; allege that all and singular the real estate mentioned and described in said amended complaint has by order and decree of this court, and by the consent of all the parties interested therein, been distributed and turned over to the parties who were entitled thereto by order of this court made and entered on the eighth day of February, 1898; deny that John H. Leyson is now in possession of said real estate as receiver, by order of this court or otherwise, to manage, take care of or preserve the same or any part thereof for the persons mentioned in said compromise contracts or decrees, or their successors in interest according to their respective interests therein, or otherwise or at all; allege that John H. Leyson was appointed receiver simply of the rents, issues and profits of said real estate pending a certain suit heretofore brought in this court by Ellen S. Cornue for the partition of said property.

20. Admit the allegations of paragraph 20 of said amended complaint.

21. Allege that the defendant Winfield S. Stern now holds the legal title to all and singular the interests of Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar and Joseph A. Coram, and all of them, in and to the real estate mentioned and set forth in said amended complaint; deny that the conveyance and transfer by the said parties to the said Winfield S. Stern is a pretended assignment or grant, and deny that it was made without consideration; deny that the interest or claim of the said defendant Winfield S. Stern in or to the said real estate or any part thereof is subsequent or subject to said lien

existing in favor of said Robert G. Ingersoll, deceased, in his lifetime or of his estate or legal representatives, upon said real estate or any part thereof; allege that Robert G. Ingersoll in his lifetime did not acquire any lien upon the said real estate or any part thereof; allege that the said Robert G. Ingersoll in his lifetime took no steps to acquire any lien upon said real estate or any part thereof; deny that the estate of Robert G. Ingersoll or his successors, heirs, representatives or assigns, or the said Robert G. Ingersoll personally during his lifetime, ever took any steps of any nature, kind or description to obtain a lien upon any of said real estate or other property of the estate of Andrew J. Davis, deceased, to which the defendants Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar or Joseph A. Coram, or either of them, are entitled, or which has come or will come to them or either of them by virtue of any decrees of this court or by virtue of any contracts of compromise, or by virtue of any assignments, grants or conveyances or otherwise or at all.

22. Admit that defendants John B. Clayberg and N. W. McConnell, as copartners under the firm name of McConnell & Clayberg, have a lien upon said shares and interests in and to said property of the estate of Andrew J. Davis, deceased, acquired, or to be acquired, by said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar and Joseph A. Coram, and each and all of them. Admit that said lien has not been adjudicated by any court in any suit or action in which the said Robert G. Ingersoll, or his legal representatives or administrator, have been coupled and made a party, or at all; admit that the defendant E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana, is now the owner of said claim of McConnell and Clayberg; deny that said lien or interest is subject to any claim or lien in favor of said Robert G. Ingersoll or of his estate or legal representatives or at all.

23. Admit that the defendants E. W. Toole and William Wallace, Jr., as copartners under the firm name of Toole & Wallace, have an interest in and lien upon said shares and interests in and to the property of the estate of Andrew J. Davis, deceased, which has been distributed or which will be distributed to the said Henry A.

Root, Ellen S. Cornue, Elizabeth S. Ladd, Sarah Maria Cummings, Mary Louise Dunbar and Joseph A. Coram, and each and all of them: but deny that said lien or interest is subject to any claim or lien in favor of Robert G. Ingersoll or his estate or legal representatives, or at all.

24. Admit the death of Frank E. Corbett and the appointment of Adelaide T. Corbett as the executrix of his estate, as alleged in paragraph 24 of said amended complaint.

Admit that Adelaide T. Corbett, as such administratrix, has an interest in and a lien upon the shares in said property of the estate of Andrew J. Davis, deceased, which has been or will be distributed to Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar, and Joseph A. Coram, and each and all of them: deny that said interest or lien is subject to or any claim or lien existing in favor of said Robert G. Ingersoll or his estate, or his legal representatives, as alleged in paragraph 24 of said amended complaint, or otherwise or at all.

25. Admit that the defendant George W. Stapleton has an interest in and lien upon the shares and interest of the property of said estate of Andrew J. Davis, deceased, which has been or will be distributed to Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar and Joseph A. Coram, and each and all of them, but deny that said lien or interest is subject to said or any claim or lien existing in favor of Robert G. Ingersoll, or his heirs or his estate or legal representatives, or otherwise or at all.

26. These defendants have not sufficient knowledge or information upon which to found a belief as to the truth of the allegations in paragraph 33 of said amended complaint, and therefore deny the same.

27. Deny each and every allegation of said amended complaint not hereinbefore specifically admitted or denied.

II.

And these answering defendants, for their further and separate answer to said amended complaint, allege:

1. That the cause of action alleged in said amended complaint is

barred by the provisions of Sections 512, 514 and 543 of the Code of Civil Procedure of the State of Montana.

2. That the cause of action set forth in said amended complaint is barred by the provisions of Section 518 of the Code of Civil Procedure of the State of Montana, and Section 513 of said Code as amended.

III.

And these answering defendants, for their further and separate answer to said amended complaint, allege:

1. That, during the lifetime of said Robert G. Ingersoll the said Robert G. Ingersoll and Henry A. Root and Joseph A. Coram, upon a valuable consideration paid to the said Robert G. Ingersoll by the said Henry A. Root and Joseph A. Coram, the receipt of which was confessed and acknowledged by said Robert R. Ingersoll, cancelled, revoked, set aside and held for naught the contract of August 17, 1891, which said contract so revoked, rescinded and set aside is the same contract as that attached to plaintiff's amended complaint and marked "Exhibit B".

2. And these answering defendants further allege that since said revocation and cancellation said contract has not had any further existence, force or effect, and could not be made the basis of this or any other suit.

Wherefore these defendants pray the judgment of this court that the said plaintiff take nothing by his said suit, but that said suit be dismissed and that these defendants and each and all thereof be discharged with their costs in that behalf.

CLAYBERG & GUNN,
CHAS. R. LEONARD,
Attorneys for Defendants.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Henry A. Root, being first duly sworn, says: That he is one of the defendants named in the above-entitled action, and one of the defendants who answered the amended complaint in said action by this answer; that he has heard read said answer and that he knows the contents thereof, and that the same is true of his own knowledge,

except as to the matters therein stated on information and belief, and that as to those he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this thirty-first day of May, A. D. 1902.

W. J. JAMESON,

[NOTARIAL SEAL] *Notary Public in and for the County of Silver Bow, State of Montana.*

Service of the above answer accepted with copy this thirty-first day of May, 1902.

E. N. HARWOOD,

Attorney for Plaintiff.

[*Endorsed.*]

Case No. 9346. In Second Judicial District Court, Silver Bow County, State of Montana. John S. Harris, Adm'r, Estate of Robert G. Ingersoll, deceased, plaintiff *vs.* Henry A. Root *et al.*, defendants. Answer to plaintiff's amended complaint. Filed May 31, 1902. Samuel M. Roberts, Clerk, by H. M. Heimerdinger, Deputy Clerk. Clayberg & Gunn, Chas. R. Leonard, Attorneys for Defendants.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue; Joshua G. Cornue; M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., Trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as Receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as Executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; Coram, wife of said Joseph A. Coram; —— Stern, wife of said Winfield S. Stern; and W. M. Bickford, Defendants.

Now come the above-named defendants, except John H. Leyson, as administrator of the will annexed of the estate of Andrew J. Davis, deceased, Gideon Wells, Trustee, and —— Stern, sued as the wife of Winfield Stern, by Charles R. Leonard and Gunn & Clayberg, their attorneys, and for answer to the amendments filed by plaintiff to the said amended complaint say:

First. They admit that Gideon Wells has departed this life, but

as to whether or not a successor of his as such trustee has been named, appointed, or authorized to act as joint trustee, as alleged in said amendment to the amended complaint, these defendants have not sufficient knowledge or information to form a belief thereon, and therefore deny the same.

Second. Admit that heretofore, on or about August 26, 1897, there was distributed, pursuant to the order of this court, from the moneys belonging to the said estate of Andrew J. Davis, deceased, the sum of six hundred seventy thousand dollars ($670,000).

These defendants admit that such distribution was made to the same parties, or their successors in interest, and in the same amounts as set forth in the order of this court, a copy of which is attached to plaintiff's amended complaint and marked "Exhibit C", but these defendants deny that said distribution was in accordance with, or by virtue of, said decree of the court above mentioned, but made by the court upon the hearing of petitions for such distribution, in which were the names of the parties interested in said estate, and who were entitled to distribution of portions of said estate, and the amounts that each of said persons were entitled to, and that the court, in ordering said distribution, found, upon a hearing of said petitions, that the persons therein named were entitled to distribution of said estate in the amounts as set forth in said petitions.

As to the allegation that Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue and Elizabeth S. Ladd and Mary Louise Dunbar, or their assignee, Joseph A. Coram, received the sum of one hundred fifty-two thousand two hundred seventy-two dollars and seventy-three cents ($152,272.73), and the allegation that out of and from the same distribution there was also distributed and paid to Charles H. Palmer and Andrew J. Davis, Jr., trustees, the sum of two hundred sixty-two thousand five hundred eighteen dollars and eighteen cents ($262,518.18), in trust under the trust created, for the purposes mentioned in plaintiff's amended complaint, in this action, for the use and benefit of said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue and Elizabeth S. Ladd and Mary Louise Dunbar, to the extent of one half (1/2) of the sum last above mentioned; and as to the allegation "which sums heretofore

distributed on the estate of Andrew J. Davis, deceased, to and for the use and benefit of the said Henry A. Root and his associates in the contest of said will, as aforesaid, aggregate two hundred eighty-three thousand five hundred thirty-one dollars and eighty-two cents ($283,531.82)", these defendants say they have no knowledge or information upon which to form a belief, and therefore deny the same: but these defendants admit that Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue and Elizabeth S. Ladd and Mary L. Dunbar, or their assignee, Joseph A. Coram, received two hundred fifty eleven hundredths (250/1100) of the amount distributed by said order, and to Charles H. Palmer and Andrew J. Davis, Jr., trustees, four hundred thirty-one eleven hundredths (431/1100) of the entire amount distributed.

CHARLES R. LEONARD,
CLAYBERG & GUNN,
Attorneys for Answering Defendants.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Henry A. Root, being duly sworn, says: That he is one of the answering defendants in the above answer: that he has heard read the same, and knows the contents thereof, and the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this ninth day of July, A. D. 1902.

CHAS. R. LEONARD,
Notary Public in and for Silver Bow County, State of Montana.

Service of above accepted this tenth day of July, 1902

E. N. HARWOOD,
JOHN LINDSAY,
Attorneys for Plaintiffs.

[*Endorsed:*]

In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. John S. Harris, Admr., plaintiff, vs. Henry A. Root, *et al.*, defendants. Answer to Amendments. Filed July 10, 1902. Samuel M. Roberts, Clerk. By Edward W. Ralph, Deputy Clerk. Clayberg & Gunn, Chas. R. Leonard, Attys. for Defendants.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as Administrator of the Estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles M. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue; Joshua G. Cornue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, Trustees; Henry A. Root, as Administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., Trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; ——Coram, wife of said Joseph A. Coram; ——Stern, wife of said Winfield S. Stern; and W. M. Bickford, Defendants.

DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDMENTS FILED THE DAY OF NOVEMBER, A. D., 1902.

Now come each and all of the above-named defendants, except Gideon Wells, trustee, John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, and Stern, wife of Winifred S. Stern, and for answer to the plaintiff's amendments to his

amended complaint filed herein on the day of November, A. D. 1902, say:

1. They admit that when said compromise contract was made as alleged in said amended complaint, the said contest of the validity of the said alleged will was pending and the same was being prosecuted by said Robert G. Ingersoll, for and on behalf of said defendants named in said amendments in opposition to the admission of said will to probate, but deny that by reason or in consideration of said prosecution of said contest, or force, effect or stress thereof, the said heirs or legal representatives, successors or administrator of John A. Davis, deceased, proponent of said will, or either of them, were constrained to yield consent or did yield consent to the terms of said compromise agreement granting the portions of said estate to Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue or M. Louise Dunbar, as in said amended complaint alleged, or otherwise or at all; deny that by reason of the said prosecution of said contests said will was defeated or in effect annulled in so far as it could affect the rights, interests or claims of said persons for whom said Robert G. Ingersoll performed said services, in or to said estate or any part thereof as heirs at law of said Andrew J. Davis, deceased, or otherwise or at all; deny that Robert G. Ingersoll counselled, advised or aided in the making or effectuating said compromise agreement granting or securing to said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd or M. Louise Dunbar the shares, parts, proceeds or portions of said estate of Andrew J. Davis, deceased, by them or either of them claimed as in said amended complaint alleged.

2. As to the allegations in paragraph XXXVI. of said amendments, these defendants say, that they have no knowledge or information sufficient to warrant a belief as to the truth of the same, and therefore deny the same, except that they admit that said real estate has been heretofore distributed and delivered to said persons mentioned in "Exhibit C" attached to said amended complaint, and except that they admit that an order of distribution was made by this court on the third day of December, 1901; but allege that such order was made upon the petition of other heirs as well as by Henry

A. Root and others, as alleged in said amendment, and further allege that said order was appealed from, and that said appeal is now pending.

CLAYBERG & GUNN,
CHAS. R. LEONARD,
Attorneys for answering defendants.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Henry A. Root, being first duly sworn, says: That he is one of the defendants in the above-entitled action who make the foregoing answer to the amendments to plaintiff's amended complaint, filed on the day of November, A. D. 1902: that he has read said answer and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this tenth day of December, A. D. 1902.

CHAS. R. LEONARD,
Notary Public, Silver Bow County, State of Montana.

[*Endorsed.*]

No. 9346. In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.
John S. Harris, Admr., Plaintiff, *vs.* Henry A. Root *et al.*, defendants. Answer to Plaintiff's Amendments to Amended Complaint filed November A. D. 1902. Filed December 10, 1902. Samuel M. Roberts, Clerk. By H. M. Heimerdinger, Deputy Clerk. Chas. R. Leonard and Clayberg & Gunn, Helena, Montana, Attys., for answering defendants.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

Case No.

John S. Harris as administrator of the Estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue; Joshua G. Cornue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, Trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., Trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as Receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; —— Coram, wife of said Joseph A. Coram; —— Stern, wife of said Winfield S. Stern, and W. M. Bickford, Defendants.

ANSWER.

Now come the defendants Mary Louise Dunbar, Elizabeth S. Ladd and Charles H. Ladd, and for their separate answer to said amended complaint on file herein say:

I.

That in the year 1898 they sold and conveyed all their and each of their right, title, claim and demand in and to any and all pro-

perty of the estate of Andrew J. Davis, deceased, which they or either of them had become or would become entitled to by virtue of any decree of this court or by virtue of any contract, compromise or agreement, to Joseph A. Coram for a valuable consideration. And that these answering defendants therefore further allege that at the time of the commencement of this suit and at this time they have no interest in the controversy stated in said amended complaint, and therefore these answering defendants pray that plaintiff take nothing as against them by his said complaint, and that the said amended complaint be dismissed as to these defendants at their costs.

CLAYBERG & GUNN,
CHAS. R. LEONARD,
Attorneys for Defendants.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

Charles R. Leonard, being duly sworn, on oath deposes and says: That he is one of the attorneys for the above named defendants, Mary Louise Dunbar, Elizabeth S. Ladd and Charles H. Ladd; that he has heard read and knows the contents of the above and foregoing separate answer of said defendants named; that the facts therein stated are true according to his best knowledge, information and belief; that said Mary Louise Dunbar, Elizabeth S. Ladd and Charles H. Ladd, defendants in the above entitled cause, are absent from this said County of Silver Bow, where affiant resides, hence this verification.

CHAS. R. LEONARD.

Subscribed and sworn to before me this thirty-first day of May, A. D. 1902.

W. J. JAMESON,
NOTARIAL SEAL. *Notary Public in and for the County of Silver Bow, State of Montana.*

Service of above answer accepted with copy this thirty-first day of May, 1902.

E. N. HARWOOD,
Attorney for Plaintiff.

(Endorsed:)

Case No. 9346. In the second Judicial District Court, Silver Bow County, State of Montana. John S. Harris as administrator of the estate of Robert G.

Ingersoll, deceased, plaintiff, *v.* Henry A. Root *et al.* Separate answer of M. L. Dunbar, E. S. Ladd and Charles H. Ladd to amended complaint. Filed May 31, 1902. Samuel M. Roberts, Clerk. By H. M. Heimerdinger, Deputy Clerk. Clayberg & Gunn, Chas. R. Leonard, Attorneys for defendants.

SECOND JUDICIAL DISTRICT COURT, STATE OF MONTANA, SILVER BOW COUNTY.

John S. Harris, as Administrator of the Estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cormue, otherwise known as Ellen S. Cormue, Joshua G. Cormue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar, Henry A. Root and Gideon Wells trustees, Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased, Charles H. Palmer and Andrew J. Davis, Jr., trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased, John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton, Winfield S. Stern, Rosine B. Root, wife of said Henry A. Root, —— Coram, wife of said Joseph A. Coram, —— Stern, wife of said Winfield S. Stern, and W. M. Bickford, Defendants.

ANSWER OF JOHN H. LEYSON, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ANDREW J. DAVIS, DECEASED, TO PLAINTIFF'S AMENDED COMPLAINT HEREIN.

Now comes John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased, and files this his separate answer to plaintiff's amended complaint herein on file:

1. Admits all of paragraphs one, two, three and four of said amended complaint.

2. That as to the material allegations set forth in paragraph five of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

3. That as to the material allegations set forth in paragraph six of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

4. That as to the material allegations set forth in paragaaph seven of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

5. That as to the material allegations set forth in paragraph eight of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

6. Admits the material allegations set forth in paragraph nine of said amended complaint.

7. Admits the material allegations set forth in paragraph ten of said amended complaint.

8. Admits the material allegations set forth in paragraph eleven of said amended complaint.

9. That as to the material allegations set forth in paragraph twelve of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

10. That as to the material allegations set forth in paragraph thirteen of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

11. Admits the material allegations set forth in paragraph fourteen of said amended complaint.

12. That as to the material allegations set forth in paragraph fifteen of said amended complaint, this answering administrator has

not sufficient knowledge or information to form a belief, and therefore denies the same.

13. That as to the material allegations set forth in paragraph sixteen of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same, except as to such matters set forth in said paragraph sixteen which appear of record in said court, of which record this answering administrator takes due notice.

14. That as to the material allegations set forth in paragraph sixteen and one-half of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

15. That as to the material allegations set forth in paragraph seventeen of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

16. Admits the material allegations set forth in the first subdivision of paragraph eighteen of said amended complaint, but as to the remaining portion of said paragraph eighteen, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same, except as to matters therein set forth appearing of record in said court, and as to such matters this answering administrator takes due notice.

17. That as to the material allegations set forth in paragraph nineteen of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, except as to such matters as therein appear of record in said court, of which this answering administrator takes due notice, and therefore this administrator does not at this time admit or deny the material allegations set forth in paragraph nineteen of said amended complaint.

18. That as to the material allegations set forth in paragraph twenty of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, except as to matters as therein appear of record in said court, of which this answering administrator takes due notice, and therefore this admin-

istrator at this time neither admits nor denies the allegations set forth in paragraph twenty.

19. That as to the material allegations set forth in paragraph twenty-one of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

20. Admits, on information and belief, the allegations set forth in paragraph twenty-two of said amended complaint.

21. Admits, on information and belief, the material allegations contained in paragraph twenty-three of said amended complaint.

22. Admits, on information and belief, the material allegations set forth in paragraph twenty-four of said amended complaint.

23. Admits, on information and belief, the material allegations set forth in paragraph twenty-five of said amended complaint.

24. Admits, on information and belief, the material allegations set forth in paragraph twenty-six of said amended complaint.

25. That as to the material allegations set forth in paragraph twenty-seven of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

26. That as to the material allegations set forth in paragraph twenty-eight of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

27. That as to the material allegations set forth in paragraph twenty-nine of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief, and therefore denies the same.

28. That as to the material allegations set forth in paragraph thirty of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief and therefore denies the same.

29. That as to the material allegations set forth in paragraph thirty-one of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief and therefore denies the same.

30. That as to the material allegations set forth in paragraph thirty-two of said amended complaint, this answering administrator has not sufficient knowledge or information to form a belief and therefore denies the same.

31. Admits, on information and belief, the material allegations set forth in paragraph thirty-three of said amended complaint.

32. This administrator having fully answered asks that the court, in rendering judgment in the above entitled action, protect the interests of this answering administrator, and the estate of Andrew J. Davis, deceased, as may to the court seem fit and proper.

FORBIS & MATTISON,
Attorneys for Defendant JOHN H. LEYSON,
Administrator with the will annexed of the
estate of ANDREW J. DAVIS, *deceased.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

John H. Leyson, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting administrator with the will annexed of the estate of Andrew J. Davis, deceased, and as such administrator makes the foregoing answer: that he has read the same and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

JOHN H. LEYSON.

Subscribed and sworn to before me this thirty-first day of May, 1902.

J. A. POORE,
Notary Public in and for Silver Bow County,
State of Montana.

Service of the foregoing answer by copy accepted this thirty-first day of May, 1902.

E. N. HARWOOD,
Attorney for Plaintiff.

[*Indorsed.*]

No. 3346. John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff, v. Henry A. Root *et al.*, Defendants. Separate Answer of John H. Leyson, as administrator with the will annexed of the estate of

Andrew J. Davis, deceased. Filed May 31, 1902. Samuel M. Roberts, Clerk. By Eugene Roberts, Deputy Clerk. Forbis & Mattison, Attorneys for defendant John H. Leyson, Admr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff.

v.

Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue, Joshua G. Cornue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, Trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., Trustees; John H. Leyson, as administrator with the will annexed of the Estate of Andrew J. Davis, deceased; John B. Clayberg and N. W. McConnell individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as Receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as Executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern; Rosine B. Root, wife of said Henry A. Root; ——Coram, wife of said Joseph A. Coram; ——Stern, wife of said Winfield S. Stern; and W. M. Bickford, Defendants.

REPLY.

Comes now John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, plaintiff in the above entitled action, and for his reply to the answer of defendants Henry A. Root and Rosine B. Root, Joseph A. Coram and Margaret Coram, Ellen S.

Cornue and Joshua G. Cornue; Henry A. Root, trustee; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, trustees; John B. Clayberg and N. W. McConnell, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. Toole and William Wallace, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. Toole and T. C. Bach, individually and as former copartners in the firm name of Toole & Bach; E. T. Wilson, as receiver of the Merchants National Bank of Helena, Montana; Adelaide Corbett, as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. Stapleton; Winfield S. Stern and W. M. Bickford, filed and served in said action, says:

I.

1. That plaintiff denies the affirmative allegation of said answer, that the cause of action alleged in plaintiff's amended complaint is barred by the provisions of Section 512, or of Section 514, or of Section 543, or by either or all of said sections of the Code of Civil Procedure of the State of Montana.

2. That plaintiff denies the affirmative allegation of said answer, that the cause of action set forth in plaintiff's amended complaint is barred by the provisions of Section 518 or Section 543 of the Code of Civil Procedure of the State of Montana; and the plaintiff denies that said cause of action is barred by any provision or provisions of any or either section of said code.

II.

Plaintiff further denies that ever at any time said Robert G. Ingersoll and Henry A. Root and Joseph A. Coram or either of them, upon a valuable or any consideration whatever, paid to said Robert G. Ingersoll by said Henry A. Root and Joseph A. Coram or either of them, or of which receipt was acknowledged or confessed by said Robert G. Ingersoll, cancelled, or revoked, or set aside, or held for naught, the said contract mentioned in plaintiff's amended complaint in this action, evidenced by the writing of which is annexed to said amended complaint marked "Exhibit B". And plaintiff further denies that said Robert G. Ingersoll ever at any

time, for a valuable or any consideration whatever paid to him by said Henry A. Root and Joseph A. Coram or either of them, or confessed or acknowledged by said Robert G. Ingersoll, or in any manner or for any consideration whatever, the said Robert G. Ingersoll agreed with the said Root and Coram or either of them to cancel or revoke or set aside or hold for naught the said contract mentioned in plaintiff's amended complaint evidenced by the writing of which a copy is annexed to said amended complaint marked "Exhibit B": and plaintiff denies that said Robert G. Ingersoll for any consideration whatever paid to him by any person whomsoever, or at all, agreed with said Root and Coram or either of them, or any other person, that said contract was, or should be, cancelled or revoked or set aside or held for naught: and plaintiff avers that said contract has all the while since the same was entered into been in force and was fully performed by and on the part of said Robert G. Ingersoll as alleged in plaintiff's amended complaint in this action: and plaintiff denies that at any time since the making of the said contract the same has ceased to be in force or effect, and plaintiff denies that said contract could not, since the procurement of the result upon which the payment thereby contracted and promised to said Robert G. Ingersoll depended and was contingent, be made the basis of this or any other proper action.

III.

Plaintiff denies each and every affirmative allegation of defence, or in contradiction of the averments of plaintiff's amended complaint set forth in defendant's said answer.

And plaintiff demands relief as in his amended complaint demanded.

E. N. Harwood,
John Lindsay,
Attorneys for Plaintiff.

State of Montana,
County of Silver Bow, ss.

John S. Harris, being first duly sworn according to law, deposes and says: I am the duly appointed, qualified and acting administrator, in the State of Montana, of the estate of Robert G. Ingersoll,

deceased, and that as such administrator I am plaintiff in the above-entitled action; that I have read and know the contents of the above and foregoing reply, and that said pleading is true to the knowledge of this deponent, excepting as to matters therein stated on information and belief, and that as to those matters he believes the same to be true.

JOHN S. HARRIS.

Subscribed and sworn to before me this seventh day of July, A. D. 1902.

JOHN E. CORETTE,

[NOTARIAL SEAL] *Notary Public within and for the County of Silver Bow, State of Montana.*

Service of copy of foregoing reply, on us, this July 7, 1902, is hereby acknowledged.

CLAYBERG & GUNN *and*
CHARLES R. LEONARD,
Attorneys for HENRY A. ROOT
and other answering defendants
mentioned in the foregoing reply.

[*Endorsed:*]

No. 9346. State of Montana, County of Silver Bow. In the District Court of the Second Judicial District. John S. Harris, Admr. of the estate of Robert G. Ingersoll, deceased, Plaintiff, *vs.* Henry A. Root, Joseph A. Coram *et al.*, Defendants. Reply to answer of defendants Root, Coram, *et al.*, filed Jul. 7, 1902. Samuel M. Roberts, Clerk. By Edward W. Ralph, Deputy Clerk. E. N. Harwood, John Lindsay, Attys for plaintiff.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

J. S. Harris, Administrator, Plaintiff,

vs.

Henry A. Root et al., Defendants.

DEPARTMENT ONE.

Cause No. 9346.

This day, the parties hereto being present in court as on Wednesday, December 10, 1902, and the jury being present and answering to their names, the further trial herein is by the court resumed now,

the opening statement on behalf of plaintiff is resumed, and being concluded the introduction of testimony on behalf of plaintiff is commenced.

Come now defendants and object to the introduction of any and all testimony on behalf of plaintiff upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. After argument of counsel, the motion to exclude testimony is by the court sustained, to which ruling of the court plaintiff by counsel duly excepts and is by the court granted thirty days' additional time to prepare and serve bill of exceptions herein, and upon motion of counsel for defendants the complaint herein is by the court ordered dismissed and the motion to discharge receiver herein is by the court reserved for further consideration. Whereupon the jury herein is discharged from further attendance of this cause and this term of court.

E. W. HARNEY, *Judge*.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the foregoing is a full, true and correct copy of Journal entry showing Order of Court deemed excepted to by counsel for plaintiff in above entitled action, made and entered upon the minutes of the said District Court, in Journal U, page 176, on the eleventh day of December, A. D. 1902.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this twelfth day of December, A. D. 1902.

SAMUEL M. ROBERTS, *Clerk*,

[COURT SEAL] *by* EDWARD W. RALPH, *Deputy*.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, Plaintiff.

v.

Henry A. Root, et al., Defendants.

This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the court and sustained,—

Now, therefore, in consideration of the premises aforesaid and the law,

It is ordered, adjudged and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $12.50.

Done in open court this twelfth day of December, 1902.

E. W. HARNEY, *Judge*.

[*Endorsed:*]

No. 2346. In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

John S. Harris, Admr., Plaintiff, vs. Henry A. Root *et al.*, Defendants. Judgment. Recorded Book "M", page 370. Filed Dec. 12, 1902. Samuel M. Roberts, Clerk. By H. M. Heimerdinger, Deputy Clerk. Paid $5.00.

IN THE SUPREME COURT OF THE STATE OF MONTANA.

MARCH TERM, A. D. 1903.

THE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF MONTANA,

To the Honorable Judge of the District Court of the Second Judicial District, in and for the County of Silver Bow, GREETING:

Whereas, in the District Court, in a cause between John S. Harris, Admr., plaintiff and appellant, and Henry A. Root *et al.*, defendants and respondents, wherein the judgment of the said District

Court, entered in said cause on the twelfth day of December, A. D. 1902, was in favor of the said defendants and respondents and against the said plaintiff and appellant, as by the inspection of the transcript of record of said court in said cause which was brought into the Supreme Court of said State by virtue of an appeal agreement to the statutes of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

And whereas, in the term of March, in the year of our Lord one thousand nine hundred and three, said cause came on to be heard before said Supreme Court and was argued by counsel.

Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the court below, entered in this cause on the twelfth day of December, A. D. 1902, and the orders made and entered on the twelfth day of December, A. D. 1902, thirteenth day of December, 1902, and the twenty-seventh day of December, 1902, be and the same are hereby affirmed at the cost of appellant.

Costs in this court are as follows:

Appearance fee of respondent . . .	$5 00
Fee for remittitur	1 80
	$6 80

said judgment to be carried into execution according to the terms thereof.

May 11th, A. D., 1903.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as, according to right and justice and the laws of the State of Montana, ought to be had, said appeal notwithstanding.

Witness, the Honorable Theo. Brantly, Chief Justice of the Supreme Court of the State of Montana, this twenty-eighth day of May, A. D. 1903.

[COURT SEAL]

HENRY G. RICKERTS,
Clerk of the Supreme Court of the State of Montana.

[*Endorsed:*]

9346. In the District Court. John S. Harris, Admr., vs. Henry A. Root *et al.* Remittitur. Recorded Book 1, page 37. Filed Jun 23, 1903. Samuel M. Roberts, Clerk. By W. S. Waugh, Deputy Clerk.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that I have compared the foregoing and annexed transcript, consisting of typewritten pages numbered 1 to ___ inclusive, exclusive of this, with the original files, papers, orders and documents, filed and entered of record in my said office, in that certain cause numbered No. 9316 and entitled John S. Harris, administrator of the estate of Robert G. Ingersoll, deceased, *v.* Henry A. Root *et al.*, and that the same contains only full, true and correct copies of the amended complaint, amendments to amended complaint, answer to plaintiff's amended complaint, answer to amendments of amended complaint, defendants' answer to plaintiff's amendments, answer of Dunbar, Ladd and Ladd, answer of Levson, administrator, to amended complaint, reply, order dismissing plaintiff's complaint made and entered in minutes of the court, judgment and the remittitur from the Supreme Court of the State of Montana, in the said last above mentioned cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this fourteenth day of July, A. D. 1903.

SAMUEL M. ROBERTS, *Clerk*,

SEAL. *by* W. N. WATCH, *Chief Deputy*.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, William Clancy, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a clerk and a seal, do hereby certify that Samuel M. Roberts, whose genuine original signature is subscribed to the annexed certificate and attestation, is and was, at the time of making the same, the clerk of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, qualified, sworn and acting as such clerk; that full faith and credit are due to his official acts, and that he is the legal keeper of all the records and

the seal of said court; that said certificate and attestation is in due form of law; and that the seal affixed thereto is the genuine seal of said court.

Witness my hand at Butte, Montana, this fourteenth day of July, A. D. 1903.

WILLIAM CLANCY,
Judge of said Court.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a clerk and a seal, do hereby certify that the Honorable William Clancy, whose name is subscribed to the annexed and foregoing certificate, is, and was at the time of making the same, judge of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such judge, to all whose acts as such full faith and credit are due, and that the signature of said judge to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Butte, Montana, this fourteenth day of July, A. D. 1903.

SAMUEL M. ROBERTS,
[SEAL.] *Clerk of said Court.*

DEFENDANTS' EXHIBIT No. 6.

[Put in Evidence, page 1504.

No. 1925. STATE OF MONTANA.

IN THE SUPREME COURT, MARCH TERM, 1903.

JOHN S. HARRIS, as administrator of the Estate of Robert G. Ingersoll, Deceased, Plaintiff and Appellant,

v.

HENRY A. ROOT, JOSEPH A. CORAM, ELIZABETH S. LADD, CHARLES H. LADD, ELLEN CORNLE, otherwise known as Ellen S. Cornue; JOSHUA G. CORNLE, M. LOUISE DUNBAR, otherwise known as Mary Louise Dunbar; HENRY A. ROOT and GIDEON WELLS, Trustees; HENRY A. ROOT as administrator with the will annexed of the Estate of Sarah Maria Cummings, deceased; CHARLES H. PALMER and ANDREW J. DAVIS, Jr., Trustees; JOHN H. LEYSON as administrator with the will annexed of the estate of Andrew J. Davis, deceased; JOHN B. CLAYBERG and N. W. McCONNELL, individually and as former copartners in the firm name of McConnell & Clayberg; E. W. TOOLE and WILLIAM WALLACE, Jr., individually and as former copartners in the firm name of Toole & Wallace; J. K. TOOLE and T. C. BACH, individually and as former copartners in the firm name of Toole & Bach; E. T. WILSON as Receiver of the Merchants National Bank of Helena, Montana; ADELAIDE CORBETT as executrix of the last will and testament of Frank E. Corbett, deceased; G. W. STAPLETON; WINFIELD S. STERN; ROSINE B. ROOT, wife of said Henry A. Root; —— CORAM, wife of said Joseph A. Coram; —— STERN, wife of said Winfield S. Stern; and W. M. BICKFORD, Defendants and Respondents.

Submitted April 27, 1903.

Decided May 11, 1903.

Filed May 11, 1903. HENRY G. RICKERTS, *Clerk*.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE OPINION.

In this action the plaintiff seeks to recover a judgment against the defendants Root and Coram for $95,000, a balance alleged to be

due for legal services rendered as attorney to the said defendants by Robert G. Ingersoll, plaintiff's intestate, with interest thereon from August 21, 1897. The right of recovery is based upon the following written agreement entered into between the parties:

"BUTTE CITY, MONT., August 17, 1891.

R. G. Ingersoll, Esq., Butte City, Montana.

Sir.—We agree that for your services in the contest of Maria Cummings and Henry A. Root, against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry Root.

HENRY A. ROOT,
J. A. CORAM."

The claim is made that while the services were rendered for Root and Maria Cummings, it was intended by the parties that they should also inure to the benefit of the defendants Elizabeth S. Ladd, Marie Louise Dunbar and Ellen S. Cornue, who, in case the will should be defeated, should share in the distribution of the estate.

It appears from the allegations of the complaint that previous to the institution of the contest and in order to provide means to prosecute the contest, the defendants Cummings, Ladd, Dunbar and Cornue assigned to the defendants Root and Wells one-third of the interests claimed by them in the estate in trust, to reimburse Root for the outlay necessary to procure counsel and to pay other expenses. It is further alleged that the defendant Coram acquired by assignment some interest in these shares and also in the share of Root, the extent of which does not distinctly appear. Wells and the defendants other than those named are made parties in order that the amount received by Cummings, Ladd, Dunbar, Cornue and Root, and the balance due them upon final distribution, may be ascertained and the judgment recovered be declared a lien thereon in the hands

of Leyson, the administrator, with the will annexed, to secure the payment of the judgment. Andrew J. Davis died in 1890, and his estate has since that time been and is now in the course of administration by the District Court of Silver Bow County. An account of the proceedings therein will be found by reference to the opinions of this court, published under the title *In re* Davis Estate, 27 Mont. 70 Pac. 721, and 27 Mont. ——, 71 Pac. 757. The complaint herein sets them out with particularity, but they need not be repeated here. The allegations necessary to an understanding of this controversy are in substance the following: That the first contest of the probate of the will was instituted by Root and Cummings in the year 1890; that these contestants were aided and assisted by their co-defendants Ladd, Dunbar and Cornue; that in order to prosecute the contest successfully the services of Robert G. Ingersoll, an attorney-at-law of Dobbs Ferry, New York, were secured by the said Coram and Root; that the contest was tried in 1891, but without result because the jury disagreed; that pending the trial the contract was entered into by Root and Coram, the latter becoming a party to it, because he had theretofore become entitled by assignment to certain interests in the shares of the contestants and their associates; that thereafter, on April 28, 1893, while the contest was still pending and undetermined, the contestants with their associates compromised the controversy with the proponent of the will by an agreement under the terms of which the contest was to be dismissed and the will admitted to probate; that the compromise was carried into effect by procuring a decree to be entered by the court in March, 1895, under the provisions of which the contest was dismissed, the will was admitted to probate, and Root, Cummings, Ladd, Dunbar and Cornue were declared entitled to certain distributive shares in the estate; that thereafter other contests were instituted by other next of kin of the deceased, which were settled by a compromise similar to that of April 28, 1893, to which all persons claiming an interest in the estate were parties and in pursuance of which a decree was entered by the court on August 24, 1897, dismissing the contests and finally settling and determining all controversies between the proponent and the rival claimants and

declaring the shares to which each was entitled; that the sa
decree became the basis of the distribution of the estate, and th
the contestants Root and Cummings became thereunder entitled
greater interests than they would have received had the will bee
finally defeated; "that by virtue and as a result of the prosecutio
of said objections and contests of the validity of said writing
propounded for admission to probate as the last will and testamen
of said Andrew J. Davis, deceased", the said compromise contra
and decree were procured and became effectual to defeat the wi
and to secure to the contestants and their associates all their right
as next of kin of A. J. Davis, deceased; that the plaintiff's intestat
by procuring the contract and decree fully discharged his obliga
tions under his contract and kept and performed all the condition
thereof to be by him kept and performed; that thereby ther
became due and he was entitled to have paid to him the full sum o
$100,000 and his expenses as stipulated therein; but that no par
thereof has been paid, except the sum of $5000, wherefore judgmen
is demanded for that amount with interest from the date of th
decree.

Upon the issues made by the answers of the defendants the caus
came on for trial in the District Court sitting with a jury on Decem
ber 11, 1902. Evidence was offered by plaintiff in support of his
allegations. This was objected to by the defendants Coram and
Root, and the objections sustained by the court on the ground that
the complaint did not state a cause of action against them. The
plaintiff having failed to amend, the jury was discharged and judg
ment ordered entered for the defendants. From the judgment the
plaintiff has appealed. He has also appealed from an order made
after judgment, vacating an order made prior to the trial by which
a receiver was appointed to receipt to the administrator of the Davis
estate for the shares of Root and his associates and to preserve them
pending a termination of this action; and also from an order sub
sequently made refusing to set aside the order just mentioned and
to retain the receiver pending the appeal from the judgment.

Mr. Chief Justice Brantly delivered the Opinion of the Court.

1. The action of the court in sustaining the defendants' objec-

tion to the evidence presents for decision the question whether the allegations in the complaint, which we have stated in substance, warrant recovery by the plaintiff. The complaint declares upon the contract, and unless it appears therefrom that the plaintiff's intestate fully performed the contract on his part, or facts and circumstances are alleged justifying a failure in any particular, a recovery cannot be had. The contract is clear and explicit in its terms and its construction involves no difficulty. To its language alone, therefore, must we look in order to find the intention of the parties. (Civil Code, §2203). Taking it by its four corners and giving to its words their ordinary and popular sense (Civil Code, §2209), we find that Root and Coram undertook on their part to pay the expenses of Mr. Ingersoll in any event, provided, of course, he performed the services stipulated for. Root was to pay the full amount of $100,000 in addition to expense money in case the will should be defeated and he and his clients should get their shares. Coram was bound by the same undertaking, except that the amount he was to be personally liable for was in no event to exceed the amount received by his clients, including Root,—that is, if they did not get anything, he was not to pay anything beyond expenses. It is therefore clear that as to him the intention was that he should not be bound except upon the happening of two contingencies, to wit: that the will be defeated, and his clients actually get their shares; in other words, the contest was to result in success and the funds out of which only payment could be exacted were to be secured from the estate of Andrew J. Davis. The duty to pay devolved upon him only upon the happening of these contingencies. There was included also the duty to devote the funds secured to that purpose. If he should not secure them he was not compelled to pay from his own means. The obligation of Root was exactly the same, except that if the funds secured from the estate should not be sufficient he became personally liable for any balance. The explanation why the contract was so made is manifest. The will had been offered to probate and a contest had been instituted by Root and Cummings which, if successful, would inure to the benefit of their associates. If it should prove a failure, they would get nothing, because under

the terms of the will the proponent would get the whole estate except the amount required to pay two or three small legacies. Coram was not interested in the estate. He was willing, however, to become a party to the contract, provided he could share in the result of a successful contest and not be held in case of failure. Mr. Ingersoll was willing to contribute to the enterprise his experience and ability upon a contingency provided his share was made proportionately larger; and he was willing to embody in the contract the provision that neither Root nor Coram should be liable except upon a complete success of the enterprise through a contest, and the actual receipt by the contestants and their associates of the shares to which they would thus become entitled. A judgment sustaining the contest would not be sufficient. The shares must be received.

Counsel for the defendants contended in the court below, and contend here, that this is the only construction of which the contract is susceptible, and that as the complaint itself shows that the contestants and their associates succeeded by means of a compromise of the litigation in negotiating which Mr. Ingersoll took part, instead of by means of a contest which Mr. Ingersoll did not conduct to successful termination, the contract for the contingent fee was abandoned by the parties, and that a recovery against the defendants, if any may be had at all, must be upon a *quantum meruit* for services other than those provided for by the contract. Counsel for plaintiff contends, however, that the compromise of the litigation by which the contestants obtained certain shares was *pro tanto* a defeat of the will; that under the decree the defendants have received and will receive amounts largely in excess of the sum due the estate of Mr. Ingersoll; and that in any event the procurement of a final decree settling the contest and ascertaining the shares to which the contestants are entitled, though such decree was brought about by a compromise, was a complete discharge by Mr. Ingersoll of his obligations under the contract, and that his estate is entitled to recover on the contract.

We agree with the contention of the defendants. An attorney, as such, has no authority to compromise a controversy of his client, no matter what may be the difficulties involved, nor however advan-

tageous the result may be to the client. A general retainer in a case does not imply such authority, and if a compromise of the controversy be made, it must be made under special authority delegated for that purpose. Otherwise, and in the absence of a ratification by the client, the compromise agreement, as well as any judgment entered in pursuance of it, is void at the option of the client. (Walker *v.* Parker, 7 Cranch, 136; Preston *v.* Hill, 50 Cal. 43; 3 Am. & Eng. Enc. Law, 358; Jubilee Placer Mng. Co. *v.* Hessfield, 20 Mont., page 234.) Nor is this rule, which is sustained by the current of authority, changed or modified in any respect by Section 398 of the Code of Civil Procedure. (Preston *v.* Hill, *supra*.) Mr. Ingersoll could not, therefore, under the contract assume the authority to make any compromise of the contest. His duty required him to prosecute it, and he could not be held entitled to recover under his contract short of a successful result of the controversy, followed by actual distribution to his clients. Additional authority was therefore necessary to this end, and when this was conferred by his clients and accepted by him, there was a mutual abandonment of the contract; for the negotiations were not included among his duties under the contract, and when the compromise was consummated, the contract could not be performed. This impossibility of performance was the result of the subsequent mutual arrangement between him and his clients under and by virtue of which the compromise was made. The services stipulated for under the contract was therefore never performed and the contingent fee to be paid for them could not be recovered. The contract was entire, and nothing short of entire performance would authorize a recovery upon it. Nor would the case have been different had the compromise been effected without the aid or consent of Mr. Ingersoll; for where the stipulation is for a contingent fee, no matter whether the rendering of the service is prevented by the client, or by circumstances over which he has no control, the measure of recovery by the attorney is the value of the services actually rendered, and not the amount of the stipulated fee. These views, we think, are correct upon principle, and are sustained by the weight of authority. (Tenney *v.* Berger, 93 N. Y. 524; French *v.* Cunningham, 19 N. E. Rep. (Ind.) 797; Western Union

Tel. Co. *v.* Symmes, 73 Md. 9; Palsley *v.* Anderson, 7 W. Va. 202; Agnew *v.* Walden (Ala.), 4 So. Rep. 672; Pemberton *v.* Lockett, 21 How. 257; 3 Am. & Eng. Enc. Law, 427, 431, and notes.) The allegations of the complaint fall very far short of showing an entire performance of the contract. The action of the court, therefore, was correct in sustaining the objections to the introduction of evidence under the complaint, and in directing judgment upon the plaintiff's failure to amend.

2. The first order made after entry of judgment, though in form an order vacating the appointment of a receiver, was equivalent to an order discharging the receiver, and was properly made. The court had entered a final judgment. It had lost jurisdiction of the case "except for the purpose of entertaining a motion for a new trial or such other proceedings as might properly and lawfully be had looking to a revision or correction of its action, or to enforce the decree as rendered. It had no authority, inherently or by statute, or by any rule of this court, to retain jurisdiction for any purpose pending the appeal". (Finlen *v.* Heinze, 27 Mont. , 69 Pac. 829.) It was therefore the duty of the court to discharge the receiver who, after entry of judgment, had no other functions to perform. It necessarily follows that the court was also right in refusing to set aside the order just mentioned and to retain the receiver pending appeal from the judgment.

The judgment and orders are affirmed.

Affirmed.

THEO. BRANTLY,
Chief Justice.

We concur:

GEO. R. MILBURN,
Associate Justice.

WM. L. HOLLOWAY,
Associate Justice.

STATE OF MONTANA,
COUNTY OF LEWIS & CLARKE, ss.

I, Henry G. Rickerts, do hereby certify that I am the duly elected, qualified and acting clerk of the Supreme Court of the

State of Montana, and as such have in my custody and control the records of said court.

I hereby further certify that the foregoing and attached is a full, true, complete and compared copy of the opinion and decision of said court in Case No. 1925, entitled John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, plaintiff and appellant, *v.* Henry A. Root, Joseph A. Coram, Elizabeth S. Ladd, Charles H. Ladd, Ellen Cornue, otherwise known as Ellen S. Cornue, Joshua G. Cornue, M. Louise Dunbar, otherwise known as Mary Louise Dunbar; Henry A. Root and Gideon Wells, trustees; Henry A. Root, as administrator with the will annexed of the estate of Sarah Maria Cummings, deceased; Charles H. Palmer and Andrew J. Davis, Jr., trustees; John H. Leyson, as administrator with the will annexed of the estate of Andrew J. Davis, deceased, Winfield S. Stern, Rosine B. Root, wife of said Henry A. Root, Coram, wife of said Joseph A. Coram, wife of said Winfield S. Stern, *et als.*, defendants and respondents, in which case an appeal was taken to said Supreme Court from the District Court of Silver Bow County, Montana, on the fourth day of February, 1903, from a judgment of said District Court rendered and entered on the twelfth day of December, 1902.

In witness whereof, I have hereunto set my hand and seal of said court at Helena, Montana, this twenty-first day of July, A. D. 1903.

HENRY G. RICKERTS,

[SEAL] *Clerk of the Supreme Court of the State of Montana.*

STATE OF MONTANA,

COUNTY OF LEWIS & CLARKE, ss.

I, Theodore Brantly, do hereby certify that I am now the duly elected, qualified and acting Chief Justice of the Supreme Court of the State of Montana; that Henry G. Rickerts, whose signature is attached to the foregoing certificate, is, and was at the time of signing said certificate, the duly elected, qualified and acting clerk of said court, and that said signature is the genuine signature of the said Henry G. Rickerts; that the above and foregoing attestation by said clerk is in due form according to the laws of the State of

Montana, and that the record consisting of the said opinion and decision as authenticated hereby is by the law and usage of the courts of this State entitled to full faith and credit.

Witness my hand at Helena, Montana, this twenty-first day of July, A. D. 1903.

THEO. BRANTLY,
Chief Justice of the Supreme Court of Montana.

STATE OF MONTANA,
COUNTY OF LEWIS & CLARKE, ss.

I, Henry G. Rickerts, Clerk of the Supreme Court of the State of Montana, do hereby certify that the Hon. Theodore Brantly is, and was at the time of the signing by him of the foregoing certificate, the duly elected, qualified and acting Chief Justice of the Supreme Court of said State, and that the signature to the foregoing certificate is the signature of the said chief justice.

In witness whereof, I have hereunto set my hand and the seal of said court at Helena, Montana, this twenty-first day of July, A. D. 1903.

HENRY G. RICKERTS,
[SEAL] *Clerk of the Supreme Court, State of Montana.*

DEFENDANTS' EXHIBIT No. 7.

[Put in Evidence, page 1505.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT IN AND FOR THE COUNTY OF SILVER BOW AND STATE OF MONTANA.

In the Matter of the Estate of ANDREW J. DAVIS, Deceased.

And now comes Henry A. Root, contestant and plaintiff in the matter of the application of John A. Davis for Letters of Administration, upon his petition therefor, with the pretended last will and testament of said decedent annexed, and files this his contest and opposition to the probate thereof upon the following grounds, to wit:

First. Said pretended will is fraudulent and void, was never signed by and is not the will of said decedent.

Second. The said pretended will has never been duly or at all executed or signed by said decedent, or attested by any of the subscribing witnesses thereto, nor have any such or any witnesses subscribed or attested said will, and that all such pretended signatures, attestations and will is forged, fraudulent and void.

Third. That said petitioner, John A. Davis, heretofore filed his petition and application for Letters of Administration upon said estate, and this plaintiff and contestant duly filed his contest and opposition thereto, which is now pending in the Supreme Court of the State, and which involves the competency of said John A. Davis to act as such administrator, with or without any will annexed, and which said question is yet pending and undetermined.

Fourth. Said pretended, fraudulent and void will, if ever signed by said decedent, was obtained by duress, menace, fraud and undue influence, and is not the will of said decedent.

Fifth. Said pretended will has been revoked, cancelled and annulled by said decedent since its pretended execution, is not his last will and testament, and has been rendered void and ineffectual on account of the acts and things done by said decedent in pursuance of Sections 153, 154, 155, 156 and 167, Chapter 15, second sub-division of the Probate Practice Act, Compiled Statutes of Montana.

This plaintiff and contestant further shows unto this Honorable Court that he verily believes the said decedent died intestate, and as evidence in part upon which he founds such belief refers to the records and proceedings had on the part of the said John A. Davis in the matter of his petition for Letters of Administration upon said estate, filed in this court on the twenty-eighth day of March, A. D. 1890, and now pending on appeal in the Supreme Court of said State. That since said proceedings were had, as plaintiff and contestant is informed and believes, the said John A. Davis has sold one undivided half of his interest in said estate to his brother, Erwin Davis, who ever since has been and now is the owner of said half interest thereof.

That at the time of death of said decedent there was, and now is, the following heirs, entitled to share in the distribution of said estate, and who reside *respectively* in the places herein set forth:

Erwin Davis, who resides in New York City, State of New York, John A. Davis, who claims to reside in the city of Butte, State of Montana, Calvin P. Davis, who resides at Samona, Cal., being brothers of the said decedent: Diana Davis, of Somers, Conn., Harriett Wood, of Springfield, Mass., Elizabeth Bowdoin, likewise of Springfield, Mass., being sisters of the said decedent now living: Henry A. Root, your contestant and plaintiff, of Helena, Mont., Henry A. Davis, Munson, Mass., all nephews of the said decedent: Ellen S. Cornue, Croton Falls, N. Y., Mary L. Dunbar, London, England, Elizabeth S. Ladd, Springfield, Mass., Maria Cummings, Ware, Mass., Harriet R. Sheffield, New Rochelle, N. Y., Elizabeth Dunbar Smith, San Francisco, Cal., all nieces of the said decedent, and Harriet E. Davis, of Munson, Mass., widow of Asa Davis, a deceased brother of said decedent: all of which said heirs are over the age of majority.

That the said Erwin Davis and the said John A. Davis, petitioner, conspiring and confederating together to fraudulently obtain and acquire all the estate of said decedent and deprive the other said heirs of their just share therein, have presented the said pretended will for probate, well knowing that the same is fraudulent, inoperative and void.

This contestant and plaintiff further shows unto this Honorable Court, that in order to establish the facts and issues herein presented and set forth, a large amount of testimony will be required to be taken in the States of Iowa, New York, Massachusetts, Connecticut, Montana and elsewhere, and which will, in the belief of contestant and plaintiff, in due time be had and produced.

Wherefore, he prays that this his contest and opposition to the probate of said pretended will be entertained and heard: that upon the trial the same be rejected and declared null, void and of no effect: and that the proceedings had for letters of administration upon the estate of said intestate, and now pending, be carried out in accordance with the statutes in such case made and provided, and

that such other or further order be made in the premises as may be requisite and proper.

(Signed) HENRY A. ROOT,
Contestant and Plaintiff.
McCONNELL & CLAYBERG, *and*
TOOLE & WALLACE,
Attorneys for Contestant.

Filed Aug. 9, 1890.
WILL L. CLARK, *Clerk.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the foregoing is a full, true and correct copy of contest and opposition of Henry A. Root to probate of will of Andrew J. Davis, deceased, as shown by the records and files in my office, in the matter of the estate of Andrew J. Davis, deceased.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, the sixth day of August, A. D. 1903.

SAMUEL M. ROBERTS, *Clerk.*
[SEAL] *By* EDWARD W. RALPH, *Deputy Clerk.*

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, William Clancy, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the attestation of Samuel M. Roberts, Clerk of the said District Court, to the foregoing copy of contest and opposition of Henry A. Root to probate of will of Andrew J. Davis, deceased, is in due form.

And I do further certify that the said Samuel M. Roberts was, at the time of making said certification, clerk of said District Court, and Edward W. Ralph the deputy clerk of said District Court, and

that the seal affixed to said certification is the seal of the said District Court.

In testimony whereof, I have hereunto set my hand this eighth day of August, A. D. 1903.

WILLIAM CLANCY, *Judge*.

DEFENDANTS' EXHIBIT No. 8.

[Put in Evidence, page 1505.]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF SILVER BOW AND STATE OF MONTANA.

In the matter of the Estate of ANDREW J. DAVIS, Deceased.

Now comes Maria Cummings and in the matter of the application of John A. Davis for letters of administration and probate of the will of said decedent, and appears to contest said will and files these her grounds of opposition to the probate of the same, in writing, and to that end shows unto this Honorable Court:

I.

That this contestant and plaintiff verily believes, and therefore states, that said decedent died intestate in the said County of Silver Bow and State of Montana, and left the following heirs who are and were entitled to share in the distribution of his estate, to wit:

Erwin Davis, who resides in New York City, State of New York; John A. Davis, who claims to reside in the City of Butte, State of Montana, Calvin P. Davis, who resides at Sonoma, Cal., being brothers of the said decedent; Diana Davis, of Somers, Conn., Harriett Wood, Springfield, Mass., Elizabeth Bowdoin, likewise of Springfield, Mass., being sisters of the said decedent now living; Henry A. Root, who resides in Helena City, Montana, Henry A. Davis, Munson, Mass., all nephews of the said decedent; Ellen S. Cornue, Croton Falls, N. Y., Mary L. Dunbar, London, England, Elizabeth S. Ladd, Springfield, Mass., Maria Cummings, contestant and plaintiff, who resides at Ware, Mass., Harriett R. Sheffield, New Rochelle, N. Y., Elizabeth A. Smith, Alameda Co., Cala., all nieces

of the said decedent, and Harriett E. Davis, of Munson, Mass., widow of Asa Davis, a deceased brother of said decedent, all of which heirs are over the age of majority, on account whereof this contestant and plaintiff became and is entitled to contest said will and file her grounds of opposition to the probate thereof in accordance with the statute in such case provided.

II.

And this contestant and plaintiff further shows unto this Honorable Court that the said pretended will so sought to be probated is fraudulent and void and is not the will of said decedent, for that the same was never signed by the said decedent, nor was the same ever signed by the pretended witnesses appearing thereby to have attested the same, in the presence of said decedent or each other or otherwise, or elsewhere, and that all of said signatures are forged, fraudulent and spurious, on account whereof said will is not the will of said decedent and is not entitled to be and should not be probated as requested by said petitioner, and that the perpetrators of such fraud and forgery are at the present time unknown to this contestant and plaintiff.

III.

And this contestant and plaintiff further shows unto this Honorable Court that said pretended will so sought to be probated by said petitioner is not the last will or testament of said deceased, and is inoperative and void, for that the same, if ever executed, has been revoked, in that about eight years ago, the exact date of which is unknown to this contestant and plaintiff, the said decedent, at the City of Helena, in the County of Lewis and Clarke, made, signed and executed a will subsequent to said pretended will, the provisions of which were in all respects wholly inconsistent with the terms of such pretended will and contained a clause therein expressly revoking all former wills. The said latter or subsequent will was duly and properly signed by said decedent, and attested by two competent witnesses at his request in the presence of said decedent and in the presence of each other, who signed the same at the end of said will and to which said witnesses said decedent declared the same to be his last will and testament, and which said will complied in all

respects with the statute in such case provided. That said will remained in existence and securely deposited for the space of about two years, and was at the end of such time by him destroyed without any intention of reviving any former wills by him made, all of which this contestant and plaintiff will be able to verify upon the trial of the issues raised by this her contest of said will and opposition to the probate thereof.

IV.

And this contestant and plaintiff, in relation to the application of the said John A. Davis, petitioner, for letters of administration upon the estate of said decedent, contests said application, for the reason that said petitioner is incompetent to serve as such administrator and incompetent to execute the duties of the trust imposed in such cases, on account of drunkenness, improvidence, want of understanding, and want of integrity.

Wherefore, she prays that this her contest and opposition to the probate of said pretended will be entertained and heard: that upon the trial the same be rejected and declared null, void and of no effect: and that the proceedings had for letters of administration upon the estate of said intestate, and now pending, be carried out in accordance with the statutes in such case made and provided, and that such other or further order be made in the premises as may be requisite and proper.

MARIA CUMMINGS,
Contestant and Plaintiff.
CLAYBERG & MCCONNELL,
TOOLE & WALLACE,
Attorneys for Contestant and Plaintiff.

[*Endorsed:*]

285. 24 Second Dist Mont In the Matter of the Estate of Andrew J. Davis deceased. Contest and Opposition to probate of will Maria Cummings. Filed September 11th 1896 Will. L. Clark Clerk.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the foregoing is a full, true and

correct copy of contest and opposition to probate of will filed by Maria Cummings in my office, in the matter of the estate of Andrew J. Davis, deceased, on the eleventh day of September, 1890, and which is now on file in said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this sixth day of August, A. D. 1903.

SAMUEL M. ROBERTS, *Clerk*,
[SEAL] *by* EDWARD W. RALPH, *Deputy Clerk*.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, William Clancy, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the attestation of Samuel M. Roberts, Clerk of the said District Court, to the foregoing copy of contest and opposition to probate of will filed by Maria Cummings is in due form.

And I do further certify that the said Samuel M. Roberts was at the time of making said certification clerk of said District Court, and Edward W. Ralph the deputy clerk of said District Court, and that the seal affixed to said certification is the seal of the said District Court.

In testimony whereof, I have hereunto set my hand this eighth day of August, A. D. 1903.

WILLIAM CLANCY, *Judge*.

DEFENDANTS' EXHIBIT No. 9.

[Put in Evidence, page 1508.]

COMMONWEATH OF MASSACHUSETTS.

SUFFOLK, ss. REGISTRY OF PROBA

I, Elijah George, Register of the Probate Court for said Cou of Suffolk, having by law the custody of the seal and all the recor books, documents, and papers of or appertaining to said Court, he by certify the papers hereto annexed to be true copies of pap appertaining to said Court, and on file and of record in the Off of said Court, to wit:—the copy of the will and certificate of p bate thereof in Montana of Andrew J. Davis, late of Butte, Montan deceased:—the decree of the District Court of the Second Judic District of the State of Montana in and for the County of Silv Bow relating to certain stipulations and agreements of the parti in interest:—the petition, citation and decree relating to the allo ance by said Probate Court for the County of Suffolk of said will: the claim of appeal of Erwin Davis from said decree of allowan and the decree of the Supreme Judicial Court affirming the decr of this Court allowing said will.

In witness whereof, I have hereunto set my hand and the seal said Court, this twenty-eighth day of July in the year of our Lo one thousand nine hundred and four.

[SEAL.] ELIJAH GEORGE, *Regist*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COU

I, John W. McKim, Esquire, Judge of the Probate Court withi and for the County of Suffolk, hereby certify that Elijah George Esquire, whose signature is affixed to the annexed certificates an attestation, is the Register and Certifying Officer of said Court and has, by law, the custody of the seal, and all the Records, books documents and papers of, or appertaining to said Court, and tha said certificates and attestation are in due form and entitled to ful faith and credit.

In Witness Whereof, I have hereunto set my hand, this twenty-

eighth day of July in the year of our Lord one thousand nine hundred and four.

JOHN W. McKIM
Judge of Probate Court.

[SEAL]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. REGISTRY OF PROBATE.

I, Elijah George, Esquire, Register of the Probate Court within and for the County of Suffolk, hereby certify that John W. McKim, Esquire, whose signature is affixed to the annexed Certificate, is the senior presiding Judge of said Court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, this twenty-eighth day of July in the year of our Lord one thousand nine hundred and four.

[SEAL] ELIJAH GEORGE *Register.*

SECOND JUDICIAL DISTRICT COURT, STATE OF MONTANA,
SILVER BOW COUNTY.
No. (285)

In the Matter of the Estate of Andrew J. Davis, Deceased.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

The last will of Andrew J. Davis, deceased, a copy of which is hereto annexed, having been proved and recorded in the Second Judicial District Court of Montana, within and for Silver Bow County, and the executors named in said will being dead,

John H. Leyson, of Butte, Silver Bow County, Montana, is hereby appointed administrator with the will annexed.

Witness, H. A. Niedenhoten, Clerk of said Court, with the Seal thereof affixed, this, the twenty-third day of April, A. D. 1895.

By Order of the Court:

H. A. NIEDENHOTEN
Clerk of said Court.

[COURT SEAL]

Know all men by these presence that I, A J Davis, of the coun
of Van Buren & State of Iowa, being in good health & of sound
Desposing mind & memory do make & publish this my last will
testament & as to my worldly estate & all the property real person
and mixed of which I shall die seized & possessed or to which I sh
be entitled at the time of my decease.

I devise, bequeath and dispose thereof in the manner following
to wit.

My will is that I guive & bequeath to Thomas Jefferson Davis
Pet Davis & her mother Miss Bergett, all three of Van Buren Co
Iowa, a life maintainance.

That is to say they shal have the necessaries of life out of m
estate during their natural life. This amount of annuity to be s
apart by my executors hereinafter named & the judgement of m
executors as to the amount necessary to set apart for the support o
the above named persons shal be final

I guive devise & bequeath to my beloved brother, John A. Davi
reversion or remainder of my property wherther real personal o
mixed to have and to hold the same forever together with all th
profits & income thereof to the said John A. Davis, his heirs admin
trator or assigns to his & their use & benefit forever

And lastly I do nominate and appoint James Davis & Job Davi
of Davis County, & State of Iowa to be the executors of this my
last will and testament.

In testimony whereof I, the said A. J. Davis have to this my last
will & testament contained on one sheat of paper, I have suscribed
my name & affixed my seal this the twentieth day of July, in the
year of our Lord one thousand eight hundred & sixty six (1866)

A. J. Davis

Signed, sealed published and delivered by the said A. J. Davis
as & for his last will and testament in the presence of us who at his
request and in his presence & in the presence of each other have
subscribed our names as witnesses thereto.

Witnessed

J. C. Sconce
James Davis
Job Davis

SECOND JUDICIAL DISTRICT COURT, STATE OF MONTANA,
SILVER BOW COUNTY.
(No. 285.)

In the Matter of the Estate of Andrew J. Davis, deceased.

STATE OF MONTANA
COUNTY OF SILVER BOW, ss.

I do solemnly swear that I will support the Constitution of the United States of America and the Constitution of the State of Montana: that I will perform, according to law, the duties of administrator of the estate of Andrew J. Davis, deceased, with the will annexed.

J. H. LEYSON.

Subscribed and sworn to before me this twentieth day of April, A. D. 1895.

D'GAY STIVERS.
[NOTARIAL SEAL] *Notary Public, Silver Bow County, State of Montana.*

Filed April 23 1895.

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, hereby certify and attest that the foregoing is a full, true and correct copy of the Letters of Administration with the Will Annexed, issued to John H. Leyson, in the matter of the Estate of Andrew J. Davis, deceased, on the Twenty-third day of April, 1895, and the Oath of said John H. Leyson thereto attached, and that said Letters of Administration are still in force.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Court at Butte City, Silver Bow County, Montana, this Third day of September, 1897.

Attest:

CLINTON C. CLARK
Clerk of the District Court of the Second Judi-
SEAL] *cial District of the State of Montana, in and for the County of Silver Bow.*

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, John Lindsay, Judge of the District Court of the Second Jud
cial District of the State of Montana, in and for the County
Silver Bow, hereby certify that Clinton C. Clark is the Clerk
said Court, and that the foregoing certificate and attestation is
due form.

Witness my hand at Butte City, Silver Bow County, State
Montana, this third day of September, 1897.

JOHN LINDSAY, *Judg*

[*Endorsed:*]

No. 285. In the District Court of the Second Judicial District of the State
Montana in and for the County of Silver Bow. In the matter of the esta
of Andrew J. Davis, Deceased. Certified Copy Letters of Administration wi
the Will Annexed.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT O
THE STATE OF MONTANA IN AND FOR THE
COUNTY OF SILVER BOW.

In the Matter of the Estate of Andrew J. Davis Deceased.

Upon the contest of Henry A. Root and Maria Cummings agains
the probate of the proposed will of the said deceased, wherei
John E. Davis is proponent, and said Henry A. Root, et al.
contestants. And the contest of Harriet Sheffield and Henry
A. Davis against the probate of said will, and wherein John E
Davis, administrator of said John A. Davis, deceased, ha
been substituted for said deceased.

The petition of John A. Davis, deceased, heretofore filed, pray
ing for the admission to probate of a certain document, filed in thi
court, purporting to be the last will and testament of Andrew J
Davis, deceased, and that letters testamentary be issued to said
petitioner, this day, regularly coming on to be heard, and it appear
ing to the Court that John E. Davis has been duly appointed ad
ministrator of the estate of said petitioner, John A. Davis, deceased,
and that letters of administration have been duly issued to him, and
that he is duly qualified and acting as such, and that the said John
E. Davis, administrator as aforesaid, has been duly substituted for

and in place of the said John A. Davis, deceased, and said petition having, by leave of court, been amended accordingly, and it appearing that the contests of the said Henry A. Root and Maria Cummings, and of Harriet R. Sheffield and Henry A. Davis, have been compromised and settled, and the said contests this day dismissed and withdrawn in open Court, in pursuance of stipulations and agreements, and it appearing that there is no further contest or opposition to the probate of the said alleged will, and due proof having been made to the satisfaction of this Court that due notice had been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served as required by the previous order of this Court: and it further appearing to this Court that notice has been given according to law, to all parties interested, and after examining John C. Sconce and Mary A. Downey, produced on behalf of said petitioner, whose testimony has been reduced to writing and filed herein, from which it appears that said document is the last will and testament of said Andrew J. Davis, deceased: that it was executed in all particulars as required by law, and that said testator at the time of the execution of the same was of sound and disposing mind, and not under restraint and not acting under duress, menace, fraud or undue influence: that said Andrew J. Davis, deceased, died on the 11th day of March, A. D. 1890, being a resident of the City of Butte, County of Silver Bow, State of Montana, at the time of his death, and leaving both real and personal estate in said County and State and elsewhere.

That said estate and effects, for and in respect of which the probate of said will is applied for, as aforesaid, does not exceed the value of Three Millions dollars:

And all the parties hereto appearing in open Court by their respective attorneys, and in pursuance of the stipulations and agreements and consent in open Court, and upon the proofs aforesaid,

It is ordered that the said document heretofore filed, purporting to be the last will and testament of the said Andrew J. Davis,

deceased, be admitted to probate, as the said last will and testament of the said deceased.

And it appearing by the said agreements and stipulations of the parties and by consent duly entered in open Court that Harriet R. Sheffield, now of Northport, Suffolk County, State of New York, and Henry A. Davis, of the town of Monson, State of Massachusetts, are the sole heirs at law of Asa Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive each one fiftieth (1/50) in kind of said estate upon the distribution or distributions of said estate.

And it further appearing by said agreements and stipulations of the parties and by consent duly had in open Court that Andrew J. Davis and John E. Davis, of the City of Butte and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the City of Chicago and State of Illinois, are the sole heirs at law of John A. Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive upon final distribution of said estate nineteen forty-fourths (19/44) of the remainder of said estate after deducting one twenty-fifth (1/25) thereof hereinbefore provided for Harriet R. Sheffield and Henry A. Davis, subject however, to the bequests of said will, no part of which bequests are to be borne by said one-twenty-fifth (1/25) of said estate belonging to said Sheffield and Davis.

And it further appearing by said agreements and stipulations of the parties, and by consent duly had in open Court that Henry A. Root, of the City of Helena, State of Montana, and Ellen S. Cornue, of the town of Croton Falls and State of New York, are the children and sole heirs of Anna C. Root, deceased, a sister of said Andrew J. Davis, and that Sarah Maria Cummings, widow, of the town of Ware and State of Massachusetts, is a sister of said Andrew J. Davis, deceased, and Mary Louise Dunbar, an unmarried woman, of the City of Springfield and State of Massachusetts, is a niece of the said Andrew J. Davis, deceased, and Elizabeth S. Ladd, of the City of Springfield and State of Massachusetts, is a child and heir of Sophronia Firmin, deceased who is also a sister of said Andrew

J. Davis, deceased, and Charles H. Ladd, her husband, and Joshua G. Cornue, husband of the said Ellen S. Cornue, and are entitled to have and receive twenty-five forty-fourths (25/44) of the remainder of said estate, after the one twenty-fifth (1/25) thereof above provided for said Harriet R. Sheffield and Henry A. Davis, subject to said bequests made in said will.

Now, Therefore, it is ordered, adjudged and decreed in pursuance thereof, that the said Harriet R. Sheffield, of the town of Northport, County of Suffolk and State of New York, and Henry A. Davis of the town of Monson, State of Massachusetts, sole heirs at law of Asa Davis, deceased, brother of Andrew J. Davis, deceased, have and receive each one-fiftieth (1/50) of said estate in kind, on the distribution or distributions thereof. And that the said Andrew J. Davis and John E. Davis, of the City of Butte, State of Montana, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the City of Chicago, State of Illinois, have and receive nineteen forty-fourths (19/44) of the remainder of said estate, after providing for the one twenty-fifth (1/25) of said estate for Harriet R. Sheffield and Henry A. Davis as above, and subject to the bequests made in said will, and that said Henry A. Root of the City of Helena, State of Montana, Sarah Maria Cummings, of the town of Ware, State of Massachusetts, Mary Louise Dunbar, of the City of Springfield, State of Massachusetts, Elizabeth S. Ladd of the City of Springfield, State of Massachusetts, Charles H. Ladd, husband of the said Elizabeth S. Ladd, of the City of Springfield, State of Massachusetts, Ellen S. Cornue, and Joshua G. Cornue, her husband of the town of Croton Falls, State of New York, have and receive twenty-five forty-fourths (25/44) of the remainder of said estate in kind, after providing for the one-twenty-fifth (1/25) thereof for the said Harriet R. Sheffield and Henry A. Davis, as above, subject to the bequests of said will.

And the said stipulations and agreements of the parties in interest and to be affected by this cause and proceeding, is, by consent in open Court, adopted and made the basis of this order and decree, according to the terms and provisions of said stipulations and agreements.

Done in Open Court this 27th day of March 1895.

JOHN J. McHATTON, *Judge.*

Filed Mar. 27 1895 at 10:25 A.M.

H. A. NIEDENHOFEN, *Clerk.*
by C. V. HENDERSON, *Deputy.*

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Hereby Certify and Attest That the foregoing is a full, true and correct copy of the Order Admitting Will to Probate, etc., made and entered in the above entitled Court in the matter of the Estate of Andrew J. Davis, deceased, on the 27th day of March, 1895.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Court at Butte City, Silver Bow County, State of Montana, this Eighth day of September, 1897.

Attest:

CLINTON C. CLARK,
Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

[SEAL.]

THE STATE OF MONTANA
COUNTY OF SILVER BOW ss.

I, John Lindsay, Judge of the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow, Hereby Certify that Clinton C. Clark is Clerk of said Court and that the foregoing certificate and attestation is in due form.

Witness my hand at Butte City, Silver Bow County, State of Montana, this Eighth day of September, 1897.

JOHN LINDSAY, *Judge.*

[*Endorsed:*]

8478. Andrew J. Davis. Exemplified Copy of Will. Filed Oct. 8, 1897. I appear for Erwin Davis. Richard W. Hale. Oct. 13, 1897.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents John H. Leyson, of Butte in the County of Silver Bow, and State of Montana, that the last will and testament of Andrew J. Davis, late of Butte, in the County of Silver Bow, and State of Montana, deceased, testate, has been duly proved and allowed by the Supreme Judicial District Court in and for the said County of Silver Bow, according to the laws of said State of Montana, a copy of which will, and of the Probate thereof, duly authenticated, are herewith produced: that said testator at the time of his decease, had estate in said County of Suffolk, on which said will may operate: that the same ought to be allowed in this State as the last will and testament of said deceased: that the executors therein named are dead: that your petitioner has been duly appointed administrator with the will annexed of the estate of said Andrew J. Davis by said Supreme Judicial District Court of Montana and therefore prays, that the copy of said will may be filed and recorded in the Registry of Probate in said County of Suffolk, pursuant to the statute in that case made and provided: and that letters of administration with the will annexed may be granted thereon to him, and certifies that the statements made in the foregoing petition are true to the best of his knowledge and belief.

Dated this eighth day of October A. D. 1897.

JOHN H. LEYSON.

SUFFOLK, ss.

Subscribed and sworn to this 8th day of October A. D. 1897.

Before me,

HORACE G. ALLEN,

Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

To the heirs-at-law, next of kin and all other persons interested in the estate of Andrew J. Davis, late of Butte, in the County of Silver Bow, and State of Montana, deceased.

Whereas, a petition has been presented to said Court, by John H. Leyson, of said Butte, with certain papers purporting to be

copies of the last will and testament of said deceased, and of the probate thereof in said State of Montana, duly authenticated, representing that at the time of his death, said deceased had estate in said County of Suffolk, on which said will may operate, and praying that the copy of said will may be filed and recorded in the Registry of Probate of said County of Suffolk, and letters of administration with the will annexed thereon granted to him.

You are hereby cited to appear at a Probate Court, to be held at Boston, in said County of Suffolk, on the eleventh day of November A. D. 1897, at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And said petitioner is hereby directed to give public notice thereof, by publishing this citation once in each week, for three successive weeks, in the Boston Daily Advertiser, a newspaper published in Boston, the first publication to be thirty days, at least, before said Court.

Witness, John W. McKim, Judge of said Court, this eighth day of October in the year one thousand eight hundred and ninety.

ELIJAH GEORGE, *Register.*

I have served the foregoing citation as therein ordered on behalf of John H. Leyson.

HORACE G. ALLEN.

SUFFOLK, ss. Boston, Nov. 10, A. D. 1897. Then personally appeared Horace G. Allen on behalf of John H. Leyson and made oath that the above return by him subscribed is true.

Before me,

RICHARD W. HALE,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

At a Probate Court holden at Boston, in and for said County of Suffolk, on the ninth day of December in the year of our Lord one thousand eight hundred and ninety seven on the petition of John H. Leyson of Butte, in the County of Silver Bow and State of

Montana, praying that a copy of the last will and testament of Andrew J. Davis, late of Butte, in the State of Montana, deceased, testate, may be filed and recorded in the Registry of Probate of this County: and letters of administration with the will annexed issued to him the executors therein named having deceased: a copy of said will, and of the probate thereof, duly authenticated, having been produced therewith, and public notice having been given, according to law and the order of Court: and it appearing that there is estate of said deceased in said County of Suffolk, on which said will may operate: and that the original will has been proved and allowed in the State of Montana according to the laws of said State, and it ought to be allowed in this Commonwealth as the last will and testament of said deceased: it is therefore ordered that the copy of said will be filed and recorded in the Registry of Probate of said County of Suffolk, pursuant to the statute in that case made and provided: and that letters of administration with the will annexed be granted to said petitioner, he first giving bond with sufficient sureties for the faithful discharge of said trust.

ROBERT GRANT,
Judge of the Probate Court.

[*Endorsed:*]

No. 84785. Andrew J. Davis Allowance of Foreign Will and Letters. Petition Citation Decree. Filed Oct. 8 1897. Returnable Nov. 11 1897. Allowed Dec. 9 1897. Recorded Vol. Page For Petitioner: H. G. Allen For Respondent: R. M. Morse C. E. Hellier For Erwin Davis Respondent objecting Richard W. Hale.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk.

Respectfully represents Erwin Davis of the City, County and State of New York, that he is one of the next of kin of Andrew Jackson Davis, late of Butte in the County of Silver Bow and State of Montana, deceased, leaving estate in said County of Suffolk: that he is also, by the assignment from the sole legatee of said Andrew Jackson Davis, the owner of one-half share in said estate, and is the attorney irrevocable duly authorized to represent the other one half of said estate, and is interested in said estate of said

deceased: that he is aggrieved by the decree of the Probate Court held at Boston in said County of Suffolk on the ninth day of December, A. D. 1897, whereby said Court allowed a certain paper presented to said Court as a copy of the Will of said Andrew Jackson Davis, and appointed John H. Leyson of said Butte to be Administrator with the will annexed:

And he hereby gives notice that he claims an appeal from said Decree to the Supreme Judicial Court.

Dated this seventh day of January, A. D. 1898.

ERWIN DAVIS
by his Atty. RICHARD W. HALE

(Filed January 7, 1898.)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. IN EQUITY & PROBATE.

SUPREME JUDICIAL COURT.

No. 6132. John H. Leyson, Petitioner, Appellee *v.* Erwin Davis, respondent, appellant.

DECREE.

This case came on to be heard and was argued by counsel and thereupon, on consideration thereof, it is ordered, adjudged and decreed that said appeal be dismissed: that the decree of the Probate Court admitting to Probate the will of Andrew J. Davis late of Butte, Montana, and appointing John H. Leyson of said Butte administrator with said will annexed, be and the same hereby is affirmed: that said cause be remitted to the Probate Court for further proceedings not inconsistent herewith.

By the Court,

March 9, 1898. JOHN NOBLE, *Clerk.*

A true copy. Attest: C. H. COOPER *Asst. Clerk.*

[SEAL.]

[*Endorsed:*]

No. 84,785 Andrew J. Davis Decree of Supreme Judicial Court. Filed Mar 9, 1898.

6132 Decree. It is agreed that the within decree may be entered all appeal from it is waived. Sgd. H. G. Allen, Solicitor for John H. Leyson. E. M. Saltonstall, Richard W. Hale, Solicitors for Erwin Davis.

DEFENDANTS' EXHIBIT No. 10.

[Put in Evidence, page 1509.]

EVA A. INGERSOLL as administratrix of the Estate of Robert G. Ingersoll deceased, Plaintiff,

v.

HENRY A. ROOT, GIDEON WELLS, JOSEPH A. CORAM, ELIZABETH S. LADD, ELLEN CORNUE, M. LOUISE DUNBAR; and HERBERT P. CUMMINGS as Executor and HENRY A. ROOT as administrator with the will annexed of the estate of Sarah Maria Cummings deceased; and CHARLES H. PALMER, and ANDREW J. DAVIS, Jr., trustees; and JOHN H. LEYSON as administrator with the will annexed of the estate of Andrew J. Davis deceased, Defendants.

COMPLAINT.

Plaintiff complains of said defendants and for cause of action alleges:

I. That plaintiff is the duly appointed, qualified and acting administratrix of the estate of Robert G. Ingersoll deceased, late of the village of Dobbs Ferry in the County of Westchester, State of New York.

II. That on or about March 11, 1890, Andrew J. Davis then citizen and resident of the City of Butte, County of Silver Bow, State of Montana, died at said place, leaving a large estate of the value of five million dollars or more, consisting of real and personal property, and leaving him surviving next and nearest of kin to him the said Andrew J. Davis deceased, among others, said defendants Henry A. Root and Ellen Cornue children and heirs of Anna C. Root a deceased sister of said Andrew J. Davis; said M. Louise Dunbar a daughter and heir of Roxana Dunbar a deceased sister of said Andrew J. Davis; said Elizabeth S. Ladd child and heir of Sophronia Firman a deceased sister of said Andrew J. Davis; and said Sarah Maria Cummings a sister of said Andrew J. Davis; and that by reason of their nearest kinship as aforesaid to him the said Andrew J. Davis deceased, in the event he died intestate, the said Henry A. Root, Ellen Cornue, M. Louise Dunbar, Elizabeth S. Ladd

and Sarah Maria Cummings, claimed to be, and were entitled to su
ceed to certain shares of said estate of said Andrew J. Davi
deceased, to wit, to three and one-half-elevenths, or three hundre
and fifty-eleven hundredths, thereof.

III. That thereafter on or about the day of July A. D. 189
John A. Davis a surviving brother of said Andrew J. Davis deceased
propounded for admission to probate in and by the above entitle
court having jurisdiction of said estate and the administration, set
tlement and distribution thereof, a certain writing purporting to b
the last will and testament of him the said Andrew J. Davi
deceased, by the terms of which writing all and singular the said
estate, except a life maintenance thereby given to Thomas Jefferson
Davis, Pet Davis and their mother Mrs. Bergett, was devised and
bequeathed to said John A. Davis, and that by the terms and effec
of said writing, if established and admitted to probate as the las
will and testament of said Andrew J. Davis deceased, without pro
vision having been made by said John A. Davis the principal lega
tee and devisee of said estate under said will, or his successors in
interest, granting to said Henry A. Root, Ellen Cornue, M. Louise
Dunbar, Elizabeth S. Ladd and Sarah Maria Cummings, shares or
portions of said estate, their claims as such heirs of said Andrew J.
Davis deceased, would have been cut off and neither of them would
have received any part of said estate as such next of kin and heirs
of said decedent; and thereupon said John A. Davis, and his heirs,
successors and legal representatives, prosecuted in said court for a
long period of time proceedings to establish and cause to be admitted
to probate in and by said court, the said writing as the last will and
testament of said Andrew J. Davis deceased.

IV. That on or about the day of August A. D. 1890, as their
cause of action for the purpose of opposing and defeating the
admission to probate of said alleged will, and thereby securing and
obtaining the said shares of in and to said estate claimed by said
Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen
Cornue and M. Louise Dunbar, as such heirs and next of kin to
said decedent, as an intestate, the said Henry A. Root and Sarah
Maria Cummings caused to be instituted in the above entitled court,

in their names respectively, objections to and contests of the validity of, the said writing as the alleged last will and testament of said decedent, which objections and contests were pending and prosecuted in said court from the time of the institution thereof as aforesaid until finally disposed of as hereinafter alleged.

V. That said Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, as well as said Henry A. Root and Sarah Maria Cummings, named as said contestants, were each and all of them interested to the extent of their respective claims of shares in and to said estate, as next of kin of said decedent, in the successful prosecution of said objections to, and contests of the validity of said alleged will, in opposition to the admission thereof to probate in and by said court until the probate thereof were defeated, or the payment, distribution and delivery of said shares in and to said estate claimed by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, were duly provided for and secured by proper and lawful compromise agreement and grant to them by said John A. Davis the principal legatee and devisee under said will or his heirs and legal representatives, granting and conveying to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, the said shares and interests claimed by them in and to said estate; and that in order to aid in the prosecution of said objections and contests and in procuring counsel to prosecute the same, and for that purpose, and in consideration of the employment of counsel by said Henry A. Root, to prosecute said objections and contests, and the prosecution thereof, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, on or about the twenty fifth day of September A. D. 1890, by a certain instrument of writing, of that date, duly assigned, transferred, conveyed and set over, to said Henry A. Root and Gideon Wells, in trust, an entire one third part of the interests of each of them the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, respectively, in and to said estate, to which they were, or should become, entitled, out of the avails of which to aid in paying for services and expenses of attorneys and counselors at law, employed and ren-

dered, and to be rendered, in the prosecution of said objections to, and contests of the validity of, said alleged will and in opposing the admission thereof to probate.

That by the terms, tenor and effect of said writing last above mentioned, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, severally constituted, appointed and empowered the said Henry A. Root and Gideon Wells, by irrevocable commission, to represent them the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, in the prosecution of said objections to, and contests of the validity of said alleged will in opposition to the admission thereof to probate, and to demand, sue for, collect, compound, receive and receipt for, their and each of their shares and interests of in and to said estate.

That in and by the terms, tenor and effect of said instrument of writing last above mentioned, the said Henry A. Root on his part undertook, promised and agreed in consideration of said assignment to procure and employ counsel to prosecute said objections and contests in opposition to the admission of said alleged will to probate, and as between him and the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, the said Henry A. Root, promised and agreed to pay the compensation of counsel for services rendered in that behalf.

That a copy of said instrument of writing last above mentioned is hereto annexed marked "exhibit A" and hereby referred to and made a part hereof to the same effect as if set forth at large herein.

VI. That during the times herein mentioned the said defendant Joseph A. Coram acquired and had and still has owns and holds, some interest in and to the shares of in and to said estate claimed by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, or some of them, the extent of which plaintiff is at the time of beginning this action unable to state, which rights and interests of said Joseph A. Coram, were dependent upon the prosecution of said objections to, and contests of the validity of, said alleged last will and testament of said Andrew J. Davis deceased, in opposition to the probate thereof until the

probate thereof, were defeated, or the payment distribution and delivery of the said shares in and to said estate claimed by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, were duly provided for and secured by proper and lawful compromise agreement and grant made to them by said John A. Davis, the principal legatee and devisee under said will or his heirs and legal representatives, granting to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, the said shares and interests claimed by them in and to said estate.

VII. That prior to August 17, 1891, while said objections to, and contests of the validity of, said alleged last will and testament of said decedent were pending in the above entitled court, said defendants Henry A. Root and Joseph A. Coram engaged and employed the said Robert G. Ingersoll, late of Dobbs Ferry in the State of New York, an attorney and counselor at law, to act as attorney and counselor for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections and contests in opposition to the admission of said alleged will to probate; that said Robert G. Ingersoll accepted said employment and in pursuance and fulfillment thereof rendered valuable services and counsel to and in behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections and contests; and that on or about August 17, 1891, during said employment and the rendition of said services, and in consideration of such services rendered and to be rendered by said Robert G. Ingersoll as attorney and counsel for said contestants and the said persons interested with them as aforesaid, in the prosecution of said objections and contests, the said defendants Henry A. Root and Joseph A. Coram made and entered into an agreement and contract with the said Robert G. Ingersoll, evidenced by a writing signed by said Root and Coram and by them delivered to said Robert G. Ingersoll, whereby the said Root and Coram promised and agreed to and with the said Robert G. Ingersoll, to the effect that in the event said

alleged will were defeated as to the said Henry A. Root, Sara Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louis Dunbar, and they succeeded in securing and obtaining the sai respective shares by them claimed of in and to said estate to whic they were entitled as next of kin to said Andrew J. Davis deceas as an intestate, then said Robert G. Ingersoll should have and b paid by said Henry A. Root and Joseph A. Coram, one hundre thousand dollars as compensation for said services rendered and t be rendered by said Robert G. Ingersoll in the prosecution of sai objections to and contests of the validity of, said alleged will, i opposition to the admission thereof to probate, and further prom ised and agreed that in any event the expenses and disbursement of said Robert G. Ingersoll in and about said prosecution should b paid: the said agreement being conditioned as to the said Joseph A. Coram to the effect that in case the said parties interested in th prosecution of said objections to, and contests of the validity of said alleged will, to wit, the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar represented by said Henry A. Root in carrying on said prosecu tions, were unsuccessful and failed of obtaining the said shares i said estate by them claimed as said next of kin and heirs of said Andrew J. Davis deceased, then there should be no personal obliga tion of the part of said Joseph A. Coram to pay for said services s rendered and to be rendered by said Robert G. Ingersoll, and that said Coram should not in any event be liable or obligated for the payment of said compensation so agreed and promised to be paid to said Robert G. Ingersoll, beyond or in excess of the funds and other property obtained from said estate by the said Henry A. Root, Elizabeth S. Ladd, Sarah Maria Cummings, Ellen Cornue and M. Louise Dunbar, or to which they became entitled.

That the said writing last above mentioned was signed by said Joseph A. Coram by the use of the initial letter "J" for and as representing his first or christian name "Joseph". That a copy of said writing last above mentioned is hereto annexed marked "Exhibit B," and the same is hereby referred to and made a part hereof to the same effect as if set out at large herein.

VIII. That said Robert G. Ingersoll fully performed and rendered the said services for which it was promised and agreed as aforesaid he should be paid said sum of one hundred thousand dollars as compensation therefor.

That said contest of the validity of said alleged will instituted in said court in the name of said Henry A. Root in opposition to the admission of said alleged will to probate, was tried in and by said court sitting with a jury, in the year 1891, which trial was of long duration, occupying about six weeks, at which trial the said Robert G. Ingersoll attended and rendered great and valuable services in the prosecution of said objections to and contest of the validity of said writing so propounded for admission to probate as the last will and testament of said decedent, in opposition thereof to probate, for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, each and all of whom were interested in the prosecution of said objections and contest as aforesaid; that the jury empaneled and sitting in said trial, to whom was submitted by said court, the question of fact as to the due execution and validity of said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis deceased, disagreed upon said question and failed to find or return a verdict, as the result of said trial.

IX. That thereafter while said objections to, and contests of the validity of, said alleged will were pending in said court, said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd and her husband Charles H. Ladd joining therein with her, M. Louise Dunbar, and Ellen Cornue and her husband joining therein with her, denominated as the parties of the second part therein, entered into and made a compromise contract in writing, dated April 28, 1893, with the heirs, successors in interest and legal representatives of said John A. Davis the principal legatee and devisee under said will, he then being deceased, whose said heirs successors in interest and legal representatives were denominated the parties of the first part, in and to said contract; whereby, and by the terms conditions tenor and effect of said contract, the said parties of the first part thereto as heirs, successors and legal representatives of said John A. Davis,

in consideration of the compromise and settlement of said contests and litigation then pending in said court between the said parties of the first, and parties of the second, part, to said contract, in regard to the validity of said alleged will as the title to said estate, and for the purpose of compromising and settling said contention and litigation, and in contemplation thereof and of the final admission of said alleged will to probate in and by said court as an expedient method of effectuating said compromise and settlement, and conditioned upon that event, granted, assigned, set over and conveyed directly to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, M. Louise Dunbar and Ellen Cornue, two and one half-elevenths (2 & 1-2/11) of the property of said estate of Andrew J. Davis deceased in kind, and also granted, assigned and conveyed to said Charles H. Palmer and Andrew J. Davis, Jr., as joint trustees, another one-eleventh (1/11) of the property of said estate in kind and also the sum of five hundred thousand dollars of the funds of said estate or the proceeds of the property thereof, in trust for the use and benefit of the said parties of the second part to said compromise contract, to wit, for the use and benefit of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar each and all of which interests so assigned and conveyed as last aforesaid, were according to the terms and conditions of said compromise contract, to be apportioned, distributed, paid and delivered to them the said parties of the second part to said compromise contract, out of the property of said estate or the proceeds thereof, on the final admission of said will to probate and the settlement and distribution of said estate; and that all of the residue and remainder of said estate, over and above those certain parts and portions thereof assigned and conveyed as aforesaid, and two-elevenths (2/11) thereof reserved to the said parties of the first part to said compromise contract, was by the terms, provisions, conditions and effect thereof, also granted, assigned, conveyed and set over, by said parties of the first part, to said trustees, Charles H. Palmer and Andrew J. Davis, Jr., in trust for the use and benefit of, and to be divided equally between the said parties of the first part and parties of the second part to said compromise con-

tract, according to the terms, conditions, provisions and effect thereof.

That said compromise contract, agreements, stipulations, and grants therein made and provided, were conditioned and made dependent upon, and in consideration of, the dismissal of said contests aforementioned, of the validity of said alleged will, interposed and prosecuted in said court on behalf of said parties of the second part to said compromise contract, in opposition to the admission of said will to probate, at such time as said parties to said compromise contract should deem the dismissal thereof advisable, and also upon the final admission of said will to probate, if so finally established and admitted to probate as the last will and testament of said Andrew J. Davis deceased, after all contests thereto and petitions to revoke the probate thereof, if any such petitions to revoke the probate thereof should be interposed and prosecuted, were finally disposed of and determined.

That said Charles H. Palmer and Andrew J. Davis, Jr., accepted said trust created and vested in them jointly by the terms and provisions of said compromise agreement and ever since have been and still are joint trustees under said contract, and decree of said court hereinbelow mentioned.

That pursuant to the said agreement set forth in said compromise contract, said objections to, and contests of the validity of, said alleged will so instituted in the names of said Henry A. Root and Sarah Maria Cummings and prosecuted on their behalf and on behalf of said Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar as aforesaid, were on or about the day of March A. D. 1895, withdrawn and dismissed and said will was thereupon on or about that date duly proved and admitted to probate in and by said above entitled court by decree thereof duly made and entered of record.

X. That thereafter other objections to, and contests of the validity of, said alleged will accompanied by petitions to revoke the probate thereof, were instituted and prosecuted in the above entitled court by and on behalf of other persons than those hereinabove named, claiming to be heirs of said Andrew J. Davis deceased,

which last mentioned objections, contests and petitions, to revoke the probate of said will were pending until on or about August 21, 1897, when the same were also compromised and settled by grants of portions of said estate to said last above mentioned contestants and petitioners to revoke the probate of said will, duly executed and delivered by each and all of said parties to said compromise contract mentioned in paragraph numbered IX of this complaint, also joined in by said trustees Charles H. Palmer and Andrew J. Davis, Jr., and that in consideration of said grants last mentioned, the said contests and petitions to revoke the probate of said will instituted as last aforesaid, were withdrawn and dismissed.

That the said annuities by the terms of said will given to said Pet Davis, Thomas Jefferson Davis and Mrs. Bergett, were on or about or prior to the date last above stated, fixed, determined and settled, at an expense to said estate not exceeding seventy five thousand dollars.

XI. That finally on or about August 24, 1897, upon proper showing and proceedings, the above entitled court duly made and caused to be entered in its records, its decree confirming the admission of said will to probate, and duly providing, designating and ordering in and by said decree, in accordance with the terms, conditions, grants and stipulations, of said compromise contracts aforementioned, the several portions, parts and parcels, of the funds and other property of said estate of Andrew J. Davis deceased, which shall on the distribution thereof, be distributed and delivered to the several persons mentioned and provided for in said compromise contracts and that by the terms, provisions, orders and effect of said decree last mentioned, it was and is ordered adjudged and decreed that said Henry A. Root, Sarah Maria Cummings, M. Louise Dunbar therein mentioned as Mary L. Dunbar, Elizabeth S. Ladd and her husband, Charles H. Ladd, Ellen Cornue and her husband, Joshua G. Cornue, shall have and that there shall be distributed and delivered to them, directly, two hundred and fifty-eleven hundredths (250-1100) of all and singular the funds and other property of said estate both real and personal on the distribution thereof, and that four hundred and thirty-one-eleven-hundredths (431-1100) of the funds

and other property of said estate both real and personal, shall on the distribution of said estate be distributed, paid and delivered to said trustees Charles H. Palmer and Andrew J. Davis, Jr., in trust for the use and benefit of said parties of the first part and the parties of the second part to said compromise agreement of date April 28, 1893, mentioned in paragraph numbered IX of this complaint, according to the terms, conditions and stipulations thereof.

That of the said four hundred and thirty-one-eleven hundredths (431/1100) of the property of said estate, so granted, decreed, ordered and required to be distributed, paid and delivered to said Charles H. Palmer and Andrew J. Davis Jr., as said trustees in trust for the uses aforesaid, the said Henry A. Root, Sarah Maria Cummings or her heirs and legal representatives, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, are entitled to fully one-half.

That a copy of said decree last above mentioned is hereto annexed marked "exhibit C," and hereby referred to and made a part hereof to the same effect as if set forth at large herein.

XII. That by virtue and as a result of the prosecution of said objections to, and contests of the validity of, said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis deceased, instituted and prosecuted in the above entitled court in the names and on behalf of said Henry A. Root and Sarah Maria Cummings and on behalf of said Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, as next of kin and heirs of said Andrew J. Davis deceased, as aforesaid, and of the services on their behalf so rendered by said Robert G. Ingersoll in the prosecution of said objections and contests, the said compromise contract mentioned in paragraph numbered IX hereof, and decree last above mentioned, were procured, made and are now effectual in defeating said alleged will in so far as it could affect the rights of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, in and to said estate as next of kin and heirs of said Andrew J. Davis deceased, and in securing and getting for them respectively each and all rights, interests, parts, portions and shares of in and to said estate to which they were entitled as next of kin and heirs of said Andrew

J. Davis deceased: whereby and by virtue of the facts aforesaid, the said Robert G. Ingersoll became entitled to the payment of said sum of one hundred thousand dollars, besides his expenses and disbursements in and about the premises, as compensation for said services by him rendered as aforesaid for and on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections to, and contests of, the validity of, said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis deceased.

That said compensation to which said Robert G. Ingersoll so became entitled for said services so rendered by him as aforesaid has not been paid, nor has any part thereof been paid except the sum of five thousand dollars heretofore paid on account thereof; that there is now owing and due for and on account of said services, and wholly unpaid, the sum of ninety-five thousand dollars ($95,000.00), although payment thereof has heretofore been demanded by plaintiff from said Henry A. Root and Joseph A. Coram, but they have neglected and refused to pay the said balance so owing and due for said services, and have also failed, neglected and refused to make proper and effectual provision for the payment thereof out of the said funds and proceeds of said shares, lot and parcels of the property of said estate so granted and decreed to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly, and for their use and benefit, to said trustees Charles H. Palmer and Andrew J. Davis, Jr., as aforesaid, and out of the interest therein now owned and held by said Joseph A. Coram.

XIII. That lately in the year 1899, at Dobbs Ferry in the County of Westchester, State of New York, said Robert G. Ingersoll departed this life intestate; and thereafter on the twenty-first day of August in said year A. D. 1899, this plaintiff, widow of him the said Robert G. Ingersoll, was duly appointed administratrix of his estate, by the Surrogate of said County last above mentioned, and letters of administration were thereupon duly issued out of, and attested by the seal of, the Surrogate's court in and for said County last above mentioned, and delivered to plaintiff, duly nominating

and appointing her administratrix of the estate of said Robert G. Ingersoll, deceased, and authorizing plaintiff as such administratrix, and legal representative of said Robert G. Ingersoll, among other things, to ask, demand, sue for, recover and receipt for all debts and demands owing to said decedent Robert G. Ingersoll at the time of his decease. That plaintiff duly qualified as such administratrix and ever since the date last aforesaid has been and now is the duly qualified and acting administratrix of the estate of, and legal representative of, said Robert G. Ingersoll deceased.

XIV. That as between themselves (aside from said assignment and transfer of a third part of certain of said shares to said Henry A. Root and Gideon Wells as mentioned in paragraph numbered V. hereof, the said Henry A. Root, Elizabeth S. Ladd, Ellen Cornue, Sarah Maria Cummings, and M. Louise Dunbar, are entitled to take said shares, portions and parcels, of the property of said estate of Andrew J. Davis deceased, so granted, allotted and decreed to them, and for their use and benefit to said trustees Charles H. Palmer and Andrew J. Davis, Jr., in the following proportions, respectively, to wit: said Henry A. Root is entitled to one-seventh (1 7) thereof; the said Sarah Maria Cummings or her heirs or legal representatives are entitled to two-sevenths (2 7) thereof; the said Ellen Cornue is entitled to one-seventh (1 7) thereof; said Elizabeth S. Ladd is entitled to two-sevenths (2 7) thereof; and the said M. Louise Dunbar is entitled to one-seventh (1 7) thereof.

That the one-third part of the said shares of said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, of in and to said estate, by them assigned, transferred, set over and conveyed by said assignment mentioned in paragraph numbered V of this complaint, to the said Henry A. Root and Gideon Wells, for the purpose of securing and aiding in paying the compensation of, counsel to prosecute said objections and contests, are proportions of their said shares respectively as follows: Sarah Maria Cummings, assigned two-twenty-firsts (2 21) of her said share; Elizabeth S. Ladd assigned two-twenty-firsts (2 21) of her said share; Ellen Cornue assigned one-twenty-first (1 21) of her said share; and M. Louise Dunbar assigned one twenty-first (1 21) of her said share; each and

all of which portions last above recited are subject to the lien in favor of said Robert G. Ingersoll and plaintiff as his administratrix and legal representative, as security for payment of said compensation for said services rendered by him for and on behalf of said Henry A. Root, Sarah Maria Cummings, Ellen Cornue, Elizabeth S. Ladd and M. Louise Dunbar, in the prosecution of said objections to, and contests of the validity of, said alleged will.

XV. That by virtue of the law and the facts aforesaid, the said Robert G. Ingersoll, and plaintiff as his legal representative as administratrix of his estate, claim, and have had and held, and are entitled to the enforcement of a lien upon the said shares, lots and parcels, of the funds and other property of said estate, so allotted and decreed to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, both directly, and for their use and benefit, to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees as aforesaid, and upon all interest therein acquired by said Joseph A. Coram, to secure payment of said amount owing and now due as compensation for said services so rendered by said Robert G. Ingersoll as attorney and counselor at law in the prosecution of said objections to, and contests of the validity of, said alleged will, for and on behalf of them as their cause of action, to acquire, secure and get the respective shares of said estate to which the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, were entitled as next of kin and heirs of said Andrew J. Davis deceased; which lien rests upon and adheres to their respective shares in and to the funds and property of said estate so allotted granted and decreed to them, as follows:

Upon all and singular the share and interest so acquired by said Henry A. Root, of in and to, the funds and other property, of said estate of Andrew J. Davis deceased, both real and personal, directly, or through said grant and decree to Charles H. Palmer and Andrew J. Davis, Jr., as trustees for his use and benefit as aforesaid; and upon one-third part of all and singular the said shares and interests of in and to the property of said estate, both real and personal, so acquired by said Sarah Maria Cummings,

Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, and each of them, directly, and for their use and benefit, by said grant and decree to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, as aforesaid, being the same one-third part of said shares of said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, by them assigned to said Henry A. Root and Gideon Wells, in trust to aid in procuring and paying for services of counsel engaged in the prosecution of said objections to and contests of the validity of, said alleged will, as aforesaid; and upon all and singular the right, title and interest of said Joseph A. Coram, in and to said shares of in and to the funds and other property of said estate of Andrew J. Davis deceased, so acquired by said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly, and granted and decreed for their use and benefit, to said Charles H. Palmer and Andrew J. Davis, Jr., trustees as aforesaid.

XVI. That said John H. Leyson, named as defendant herein, is the administrator with the will annexed of said estate of Andrew J. Davis deceased, appointed by order of the above entitled court duly made and entered of record, and commissioned by proper letters of administration, duly issued to him, out of and attested by the seal of said court, and is duly qualified and acting as such administrator with the will annexed of said estate of Andrew J. Davis deceased.

That said John H. Leyson as such administrator with the will annexed of said estate of Andrew J. Davis deceased, has in his custody and control, and is entitled to the custody and control, subject to the orders of the above entitled court, of a large amount of funds and other personal property belonging to said estate, of which a large portion as aforesaid has been granted and decreed to said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar, directly, and for their use and benefit, to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, as aforesaid, and that said Joseph A. Coram claims to be and is entitled to certain portions of the said shares and interests so granted, allotted and decreed to said Henry A. Root, Sarah Maria

Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunb
or some of them, the extent of which plaintiff is at present una
to state.

That in the course of the administration, and settlement of s
estate, said funds and personal property will be subject to distri
tion by order of the above entitled court, to the persons appear
to be entitled thereto, according to the terms of said decree
August 24, 1897, a copy of which is hereto annexed mark
"Exhibit C," or to such persons as may establish a right there
and that a large portion of said funds and other personal prope
belonging to said estate, now in the custody of said John H. Ley
as such administrator with the will annexed and other funds belo
ing to said estate now in the state of Massachusetts, will be subj
to distribution to the account of said shares so granted, allotted
decreed as aforesaid, to the said Henry A. Root, Sarah Maria Cu
mings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar.

XVII. That besides said funds and other personal prope
belonging to said estate in the custody of said John H. Leyson
administrator with the will annexed of said estate, subject to
orders of this court, and said funds belonging to said estate in
state of Massachusetts, there are certain lots, pieces and parcels
real estate, situate in the County of Silver Bow, State of Monta
which were a part and parcel of said estate of Andrew J. Da
deceased, when said objections to, and contests of the validity
said alleged will were prosecuted by said Robert G. Ingersoll,
the cause of action of, and on behalf of, said Henry A. Root, Sar
Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Lou
Dunbar, and said compromise contract mentioned in paragra
numbered IX hereof, and said proceedings and decree, a copy
which is hereto annexed marked "Exhibit C," were had procure
made and entered, as aforesaid, in and to which real estate,
virtue of said contests, proceedings, grants and decree, the sa
Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ell
Cornue and M. Louise Dunbar, acquired, directly and through sa
grant and decree to said Charles H. Palmer and Andrew J. Davi

Jr., as trustees, the same shares and interests as aforesaid, to which shares and interests in said real estate, the said lien in favor of said Robert G. Ingersoll, and plaintiff as his legal representative as administratrix of his estate, attached as aforesaid, to secure payment for said services of said Robert G. Ingersoll rendered as attorney and counselor at law on behalf of said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram, in the prosecution of said objections to, and contests of the validity of said alleged will; which real estate is more particularly described as follows:

That certain quartz lode mining claim located, recorded and known as the "Baltic" lode mining claim, the same being lot numbered 63, survey numbered 567, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Blue Jay" quartz lode mining claim, being lot numbered 96, survey numbered 610, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Broker" quartz lode mining claim, being lot numbered 240, survey numbered 955, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Charlotta" quartz lode mining claim, being lot numbered 80, survey numbered 594, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Centerville" quartz lode mining claim, being lot numbered 271, survey numbered 1082, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Gem" quartz lode mining claim, being lot numbered 38A, survey numbered 91, in township 3 north of range 8 west; and the "Gem" mill site, being lot numbered 38B, in township 3 north of range 7 west;

That certain quartz lode mining claim located, recorded and known as the "Great Republic" quartz lode mining claim, being lot numbered 69, survey numbered 678, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and known as the "Pawnbroker" quartz lode mining claim, being lot numbered 79, survey numbered 593, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and know
as the "New Era" quartz lode mining claim, being lot number
223, survey numbered 974, in township 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and know
as the "Mount Moriah" quartz lode mining claim, being lot nu
bered 94A, and lot numbered 94B, survey numbered 622, in tow
ship 3 north of range 8 west;

That certain quartz lode mining claim located, recorded and know
as the "Hibernia" quartz lode mining claim, being lot number
488, survey numbered 1864, in township 3 north of range 8 wes

That certain quartz lode mining claim located, recorded and know
as the "Last Chance" quartz lode mining claim, being lot number
285, survey numbered 1115, in township 3 north of range 8 west

Also those certain town or city lots, numbered eighteen (18
nineteen (19), twenty (20), twenty-one (21), twenty-two (22
twenty-three (23), twenty-four (24), twenty-five (25), twenty-s
(26), and twenty-seven (27) in block numbered thirteen (13);

And lots numbered five (5), six (6), and seven (7), in Bloc
numbered forty-six (46); all in the original townsite of Butte,
shown by the original survey and plan thereof filed and of recor
in the office of the County Clerk and Recorder of Deer Lodg
County, and of record in the office of the County Clerk and R
corder of Silver Bow County, in the State of Montana;

Also lot numbered six (6) in Block numbered one (1); and lo
numbered nine (9), ten (10), eleven (11), twelve (12), thirteen (13
fourteen (14), and fifteen (15) in Block numbered four (4), an
lots numbered three (3), four (4), five (5), six (6), seven (7)
and eight (8), in Block numbered seven (7), all situate in what i
known as Davis and Barnard's Addition to the City of Butte, i
said County of Silver Bow, as the same appear by the original pla
and survey of said Addition filed and of record in the office of th
County Clerk and Recorder of said County of Silver Bow;

Also that certain tract of land, situate and described as follows
the north-west quarter of the north-east quarter, and the north ea
quarter of the north-west quarter, and lot numbered one (1), all i
section numbered thirty (30), in township three (3) north of rang

seven (7) west, together with all water and water rights thereto belonging and used in connection therewith or appurtenant thereto:

Also each and all right, easements, hereditaments and appurtenances belonging or appertaining to each and every of the said pieces and parcels of real property above described.

That said John Leyson is now in possession of said real estate, by order of the above entitled court to manage, take care of and preserve the same, for said persons mentioned in said decree, copy of which is hereto annexed marked "exhibit C," according to their respective interests therein.

XVIII. That said Sarah Maria Cummings, on the day of April A. D. 1901, departed this life, testate, a resident of the County of Hampshire in the Commonwealth of Massachusetts, and that since said date letters testamentary have been issued out of and attested by the seal of the probate court in and for said County of Hampshire, having jurisdiction of her estate, to said Herbert P. Cummings, named as executor of the last will and testament of said Sarah Maria Cummings deceased; and the said Herbert P. Cummings has duly qualified and is now acting as executor of the estate of said Sarah Maria Cummings deceased; and that said Henry A. Root has also been appointed by this court first above entitled, as administrator with the will annexed of said estate of Sarah Maria Cummings deceased, situate in the State of Montana, and letters of administration with the will annexed, have heretofore been duly issued to said Henry A. Root as such administrator with the will annexed of said estate of Sarah Maria Cummings deceased, situate in the State of Montana, and the said Henry A. Root has qualified and is acting as such.

Wherefore plaintiff as administratrix and legal representative of said Robert G. Ingersoll deceased, prays and demands relief herein as follows:

1. For judgment against said Henry A. Root for the recovery of said sum of ninety-five thousand dollars, due as aforesaid as compensation for said services so rendered by said Robert G. Ingersoll, in the prosecution of said objections to, and contests of the validity of, said alleged last will and testament of said Andrew J. Davis

deceased, on behalf of said Henry A. Root, Sarah Maria Cumming
Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Jose
A. Coram, to the end of getting and securing the said shares of sa
Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ell
Cornue, and M. Louise Dunbar, in and to said estate, as next
kin to said Andrew J. Davis deceased, together with interest on sa
sum of ninety five thousand dollars from August 24, 1897, at t
rates allowed by the laws of this State, and costs of this actio
and that said debt and judgment be adjudged and decreed by th
Court to be a lien upon and adhering to, all and singular the sa
share and interest so acquired by said Henry A. Root, of, in a
to the funds and other property of said estate of Andrew J. Da
deceased, both real and personal, directly, and for his use and be
efit through said grant and decree to said Charles H. Palmer a
Andrew J. Davis, Jr., as said trustees; and upon one third part
all and singular the said shares and interest of in and to the proper
of said estate, both real and personal, so acquired by said Sar
Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Lou
Dunbar, and each of them, directly, and for their use and bene
by said grant and decree to said Charles H. Palmer and Andrew
Davis, Jr., as said trustees; and also upon all and singular th
interest of said Joseph A. Coram in and to the said shares of, i
and to the funds and other property of said estate of Andrew
Davis deceased, so acquired by said Henry A. Root, Sarah Mar
Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Du
bar, directly, or for their use and benefit through said grant an
decree to said Charles H. Palmer and Andrew J. Davis, Jr., as sa
trustees; and that a sufficient portion of said rights, interests an
shares of said Henry A. Root, Sarah Maria Cummings, Elizabet
S. Ladd, Ellen Cornue, M. Louise Dunbar and Joseph A. Coram
of, in and to the funds and property of said estate, last above men
tioned and the proceeds thereof in the custody of said John H
Leyson as administrator with the will annexed of said estate o
Andrew J. Davis deceased, be sequestered by proper orders of thi
Honorable Court, and that the moneys hereafter distributed to th
credit of said shares and interests last above mentioned, by th

orders of this court, in the future distribution of the property of said estate, be ordered and required by order of this court to be first applied to the payment of said judgment, interest and costs of this suit, in favor of plaintiff, and that the personal property hereafter ordered distributed to the credit of said shares be by this court ordered sold by said John H. Leyson or a Receiver and the proceeds thereof applied to the payment of said judgment, interest and costs in favor of plaintiff, and that in case the moneys and personal property hereafter ordered to be distributed to the credit of said shares be insufficient to pay in full said judgment, interest and costs, in favor of plaintiff, then that said shares last above mentioned of, in and to said real estate herein above described or sufficient thereof, be by this court ordered sold and the proceeds derived from the sale thereof, applied to the payment of whatever may remain unpaid of said judgment in favor of plaintiff, together with interest thereon, and costs of this action.

2. That this court ascertain by proper proceedings herein, the interest of said Joseph A. Coram, in and to the said shares of Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Comme and M. Louise Dunbar, in and to the property of said estate of Andrew J. Davis deceased, and that each and all of the said interests of said Joseph A. Coram, and the proceeds thereof, be by proper provisions of said judgment, decree and orders of this court herein to be made, subjected and applied to the payment of the said claim of plaintiff in this action set forth.

3. That said John H. Leyson as administrator with the will annexed of said estate of Andrew J. Davis deceased, be required by the orders of this Honorable Court, to reserve and retain in his custody, all moneys and other property belonging to said estate hereafter ordered distributed to said Henry A. Root, and also one-third part of all moneys and other property of said estate hereafter ordered distributed to said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Comme, and M. Louise Dunbar, and each of them or their, or either of their, successors in interest or legal representatives, and also each and all parts of the moneys or other property of said estate to which the said Joseph A. Coram is entitled out of said shares of

said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar or either of them; and that said John H. Leyson be required by proper orders of this court to apply all moneys by him so retained out of said shares as last above mentioned, to the payment of said claim of plaintiff set forth is this action, and that in case said moneys are insufficient to pay the same together with interest and costs of this action, that all and singular the said other property of said estate so retained in the custody of said John H. Leyson pursuant to the decree and orders of this court herein, be sold and the proceeds thereof applied in payment of the balance owing on said claim of plaintiff herein set forth.

4. That said Charles H. Palmer and Andrew J. Davis, Jr., as said trustees mentioned in said decree of this court, a copy of which is hereto annexed marked "exhibit C", and made a part hereof, be required by proper orders of this court, to keep and reserve in their possession and under their control, all moneys and other property, real and personal, now in their custody or which may hereafter come into the custody or control of them or either of them as such trustees pursuant to said decree, a copy of which is hereto annexed marked "Exhibit C," in trust for the use and benefit of said Henry A. Root, and one-third part of each and all moneys and other property which has heretofore or which may hereafter come into the custody or control of said trustees last above mentioned or either of them pursuant to said decree last mentioned, in trust for the use and benefit of said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, and that the same and the proceeds thereof, or so much thereof as may be necessary, be, by the orders of this Honorable Court in this action required to be applied, or to be sold and the proceeds thereof applied, to the payment of any balance which may remain unpaid, of the said claim and demand of plaintiff set forth in this action, with the interest thereon and costs of this action.

5. That a Receiver be appointed to take possession of all or any part of said funds or other property to which said lien in favor of plaintiff attaches as aforesaid, and that such Receiver be, by proper orders of this court empowered to take, and be put into possession

thereof, subject to the orders of this court, if at any time it appears necessary to appoint such Receiver to preserve and protect said funds or other property from being lost or removed, and to make the same available, and apply the same to the payment of said demand in favor of plaintiff herein above set forth.

6. And plaintiff demands all such further and other relief herein, to which she may in law or in equity be entitled, to the end of the full and complete protection, security and enforcement of payment of said claim and demand herein set forth.

E. N. HARWOOD *and*
JOHN LINDSAY
Attorneys for plaintiff.

Exhibit A.

Know all men by these presents, that whereas Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Corrine and M. Louise Dunbar claim to be interested in the estate of Andrew J. Davis, late of Butte, Montana, about which controversies have arisen; and whereas Henry A. Root, also a party claiming to be interested in said estate, has rendered services and expended moneys in the matter of the administration thereof; and whereas there is offered for probate a will purporting to be the will of said Andrew J. Davis, in opposing the allowance of which all the said parties are interested; and whereas said Henry A. Root has undertaken to procure evidence, counsel and such other things as are necessary for opposing said will and obtaining for the parties above named their respective rights and shares of said estate, as against all parties other than the brothers and sisters and nephews and nieces of said Andrew J. Davis;

Now therefore in consideration as aforesaid, we the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Corrine, and M. Louise Dunbar hereby severally sell, assign, transfer and set over to Henry A. Root and Gideon Wells one-third part of each of our interests in said estate, in trust, out of the avails thereof to reimburse said Henry A. Root for all sums by him heretofore or hereafter expended, and liabilities incurred by him on account of the settlement of said estate and opposing the probate of said will, as well as all sums which he may hereafter incur on account thereof, the entire

residue of said one-third to be paid to said Root as compensation for his own time and service in that behalf used and employed. It being understood and agreed that this assignment shall be in full for all such claims and demands and that no further liability shall exist against the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar on account thereof. And the said Root shall not be authorized in any way to hold or render either of the above-named personally liable or responsible for any of said matters or things.

And the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue and M. Louise Dunbar severally agree that they will not take any sales, transfer or settlement of their several and respective interests in said estate, or either of them, without the assent thereto of said Henry A. Root and Gideon Wells.

And the said Root on his part agrees to procure counsel, pay their charges and do all things necessary properly to secure the interests of the parties above-named in said estate, as heirs-at-law and next of kin of said Davis and agrees that he will not sell, transfer, or in any way dispose of his interest in said estate without the consent of the said Wells thereto.

And we the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar do hereby severally constitute and appoint the said Henry A. Root and Gideon Wells our attorneys in fact, irrevocable, for us and each of us, and in our and in each of our names, place and stead, jointly to demand, sue for, collect, receive, compound, receipt for and full acquittance give for our and each of our interests in said estate.

In witness whereof we the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar and Henry A. Root have set our hands and seals to this and one other instrument of like tenor, this twenty-fifth day of September in the year one thousand eight hundred and ninety.

SARAH MARIA CUMMINGS [SEAL]
ELIZABETH S. LADD [SEAL]
M. LOUISE DUNBAR [SEAL]
ELLEN CORNUE [SEAL]
HENRY A. ROOT [SEAL]

Exhibit B.

BUTTE CITY, MONT., August 17, 1891.

R. G. Ingersoll, Esq., Butte City, Montana.

Sir: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

HENRY A. ROOT
J. A. CORAM.

Exhibit C.

In the Matter of the Estate of Andrew J. Davis, Deceased: Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root *et al.* contestants; and the contest of Harriet Shefield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it Remembered that on the 24th day of August, 1897, the petition in the above entitled proceedings coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements therein referred to, and that an order of the Court has been heretofore made on the 24th day of August, 1897, confirming the

acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to, and that all of the said parties so interested in said contests now pending are represented by attorneys present in Court.

It is Ordered that the contests heretofore instituted in this Court by Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, be and the same are hereby dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed, each party to pay his or her own costs.

And it Appearing from said petition that the order and decree of this Court heretofore made on the 27th day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this Court confirming the making, executing and delivering the same, It is Ordered, Adjudged and Decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of said Andrew J. Davis, deceased, with the will annexed, keep, retain and hold in his possession and under his control as such administrator all funds, property and effects necessary and proper to carry out said compromise agreements said order and the provisions thereof.

And it is Hereby Ordered Adjudged and Decreed in pursuance of said petition, said compromise agreement and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis, deceased, and so held retained and controlled by said administrator, and to be distributed by him, be, and the same are hereby established and declared to be as follows, to-wit: That is to say:—Subject to the bequests in said will of said Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis, and Miss Bergett, and the expense of administration and outstanding debts of said estate. The parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:

Two hundred eleven-hundredths (200/1100) thereof in kind to

John E. Davis, as administrator of the estate of John A. Davis, deceased; two hundred and fifty eleven-hundredths (250/1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty-four eleven-hundredths (44/1100) thereof in kind to Harriet R. Shetfield and Henry A. Davis; fifty eleven-hundredths (50/1100) thereof in kind to Calvin P. Davis; fifty eleven-hundredths (50/1100) thereof in kind to Harriet Wood; twenty-five eleven-hundredths (25/1100) thereof in kind to Elizabeth A. Smith; fifty eleven-hundredths (50/1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed in and by the compromise agreement dated April 23, 1895, are entitled to have and receive as such trustees and for the purposes of such trust four hundred and thirty-one eleven hundredths (431/1100) of said estate in kind.

It Being Further Ordered, however, that no portion of the real estate owned by said Andrew J. Davis, and situated in the State of Iowa, shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be effected by this cause and proceeding are, by consent in open court adopted and made the basis of this order and decree according to the terms and provisions of said contracts and agreements.

Done in Open Court this 24th day of August, A. D. 1897.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

E. N. Harwood being first duly sworn according to law, deposes and says: That he is attorney for plaintiff in the above entitled action; that he has read and knows the contents of the foregoing complaint; that the facts and matters stated in the foregoing com-

plaint are true to the best knowledge information and belief of affiant; that the reason why this verification is made by affiant as plaintiff's attorney, is, that the said plaintiff Eva A. Ingersoll, is now at the time of making this verification, absent from the County of Silver Bow, State of Montana, where affiant resides and where this action is commenced.

E. N. HARWOOD.

Sworn to and subscribed before me this 25th day of July A. D. 1901.

CHAS. F. CLEMONS
[SEAL] *Notary Public within and for the said County of Silver Bow, State of Montana.*

[*Endorsed:*]
No. 9346 Complaint Copy.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, Plaintiff,

v.

Henry A. Root, Gideon Wells, Joseph A. Coram, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar; and Herbert P. Cummings as Executor and Henry A. Root as administrator with the will annexed of the estate of Sarah Maria Cummings deceased; and Charles H. Palmer and Andrew J. Davis, Jr., trustees; and John H. Leyson as administrator with the will annexed of the estate of Andrew J. Davis deceased, Defendants.

The State of Montana sends Greeting to the above named Defendants:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service;

and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness my hand and the seal of said Court this 25th day of July, A. D. 1901.

SAMUEL M. ROBERTS, *Clerk*.

[COURT SEAL] *by* JAMES F. WILKINS, *Deputy Clerk*.

[*Endorsed*:]

No. 2346. In the District Court of the Second Judicial District of the State of Montana, Silver Bow County. Eva A. Ingersoll, administratrix, Plaintiff, vs. Henry A. Root *et al.*, Defendants. E. N. Harwood and John Lindsay, Attorneys for Plaintiff. Clerk's Fees $5 paid.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

At a regular term of the District Court of the Second Judicial District of the State of Montana, sitting in and for the County of Silver Bow, held at the Court House, in Butte, the County Seat of the said County of Silver Bow, on the 6th day Dec. A. D. 1901.

Hon. E. W. Harney Judge Presiding.

The following proceedings among other were had to wit:

John S. Harris, Admr., plaintiff versus Henry A. Root et al defendant. Department one. Cause No 2346

This day upon motion for plaintiff and Eva M. Ingersoll, Admix. an order ordering the substitution of John S. Harris Administrator herein as plaintiff for Eva A. Ingersoll administratrix herein of the estate of Robt. G. Ingersoll, deceased, and that he may intervene herein and that the complaint herein be amended by inserting the name of John S. Harris administrator herein and that the name of Eva A. Ingersoll administratrix be stricken from the complaint herein is by the Court signed and ordered filed and entered.

E. W. HARNEY, *Judge*.

STATE OF MONTANA
COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts Clerk of the District Court of the Second Judicial District of the State of Montana in and for the County of

Silver Bow, do hereby certify that the foregoing is a full, true
correct copy of the Journal Entry showing Order of Court Cha
ing title of Action in above entitled cause made and entered upon
minutes of the said District in Journal T Page 46 on the 6th da
Dec A. D 1901.

In Testimony Whereof, I have hereunto set my hand and affi
the seal of said Court this 12th day of Dec. A. D. 1901

SAMUEL M. ROBERTS, *Clerk.*

[COURT SEAL] *by* EDWARD W. RALPH *Deputy C*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF T
STATE OF MONTANA, WITHIN AND FOR THE
COUNTY OF SILVER BOW.

Eva A. Ingersoll as administratrix of the Estate of Robert G. Inge
soll, deceased Plaintiff,

v.

Henry A. Root, Gideon Wells, Joseph A. Coram, Elizabeth S. Lad
Ellen Cornue, M. Louise Dunbar; and Herbert P. Cummin
as executor and Henry A. Root as administrator with the wi
annexed of the estate of Sarah Maria Cummings, deceased; an
Charles H. Palmer and Andrew J. Davis Jr. Trustees; an
John H. Leyson as Administrator with the will annexed of th
Estate of Andrew J. Davis, deceased, Defendants.

ORDER

On motion of counsel for plaintiff in the above entitled actio
and for John S. Harris as administrator of the estate of Robert G
Ingersoll, Dec'd it is by the Court,

Ordered that John S. Harris the duly appointed and acting admin
istrator, in the State of Montana, of the estate of Robert G. Inger
soll deceased, may intervene in, and be and is hereby substituted a
plaintiff in the above entitled action as administrator of the estate o
Robert G. Ingersoll, deceased, in the place instead of Eva A. Inger
soll named as plaintiff therein; and that the complaint in said action
may be and is hereby amended by the insertion of the name of said

John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, plaintiff, in the complaint in said action, in the place instead of said Eva A. Ingersoll as administratrix of said estate plaintiff in said action, whose name as such plaintiff may be stricken from the complaint in said action.

E. W. HARNEY, *Judge*.

Dated December 6th 1901.

[*Endorsed:*]

No. 9346 State of Montana, County of Silver Bow in the District Court of the Second Judicial District Eva A. Ingersoll, Admix. of Estate of Robert G. Ingersoll, deceased, plaintiff, vs. Henry A. Root, *et al.* defendant. Order Re Intervention and substitution of John S. Harris as Admr., of estate of Robert G. Ingersoll, deceased, as plaintiff in above entitled action. Filed Dec 6th 1901 Samuel M. Roberts, Clerk. By. H. M. Heimerdinger Deputy Clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

Eva A. Ingersoll, as administratrix of the Estate of Robert G. Ingersoll deceased, Plaintiff

v.

Henry A. Root, Gideon Wells, Joseph A. Coram, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar, and Herbert P. Cummings, as Executor and Henry A. Root as administrator with the will annexed of the Estate of Sarah Maria Cummings deceased: and Charles H. Palmer, and Andrew J. Davis, Jr., Trustees: and John H. Leyson as administrator with the will annexed of the Estate of Andrew J. Davis deceased, Defendants.

ORDER.

On motion of counsel for plaintiff in the above entitled action and for John S. Harris, as administrator of the estate of Robert G. Ingersoll dec'd, it is by the court,

Ordered that John S. Harris the duly appointed and acting administrator in the State of Montana, of the Estate of Robert G. Ingersoll deceased, may intervene in and be and is hereby substituted as plaintiff in the above entitled action as administrator of the Estate of Robert G. Ingersoll deceased, in the place and stead of Eva A.

Ingersoll, named as plaintiff therein: and that the complaint in said action may be and is hereby amended by the insertion of the name of said John S. Harris as administrator of the Estate of Robert G. Ingersoll deceased, plaintiff, in the complaint in said action, in the place and stead of said Eva A. Ingersoll as administratrix of said estate plaintiff in said action, whose name as such plaintiff may be stricken from the complaint, in said action.

E. W. HARNEY, *Judge.*

Dated December 6th 1901.

[*Endorsed:*]

No. 9546 State of Montana County of Silver Bow In the District Court of the Second Judicial District Eva A. Ingersoll, Admr'x of estate of Robert G. Ingersoll, deceased, Plaintiff, vs. Henry A. Root, *et al* Defendants Intervention of John S. Harris as Admr of the Estate of Robert G. Ingersoll dec'd as plaintiff in above entitled action and substitution in place of above named plff and Amendment of the complaint filed therein by inserting of the name of said John S. Harris as administrator of the estate of Robert S. Ingersoll deceased plaintiff in the above entitled in place of the above named plaintiff, by leave of court, etc. Filed Dec 7 1901 Samuel M. Roberts, Clerk By Edward W. Ralph, Deputy Clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, WITHIN AND FOR THE COUNTY OF SILVER BOW.

Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll deceased, Plaintiff,

v.

Henry A. Root, Gideon Wells, Joseph A. Coram, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar, Herbert P. Cummings, as executor and Henry A. Root as administrator with the will annexed, of the estate of Sarah Louise Cummings, deceased; and Charles H. Palmer and Andrew J. Davis, Jr., Trustees; and John H. Leyson as administrator with the will annexed of the estate of Andrew J. Davis, deceased, Defendants.

AMENDMENT TO COMPLAINT.

Comes now John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, in the state of Montana, and by leave of the above entitled court and pursuant to the order thereof, a copy

of which is hereto annexed, and intervenes in his representative capacity as administrator of said estate of Robert G. Ingersoll, deceased, as plaintiff in the above entitled action and amends the complaint therein, and files this amendment thereof, to make the title of said cause, and paragraph "I" of said complaint read as follows:

John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, plaintiff *vs.* Henry A. Root, Gideon Wells, Joseph A. Coram, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar, and Herbert P. Cummings, as executor and Henry A. Root as administrator with the will annexed of the estate of Sarah Marie Cummings deceased, and Charles H. Palmer and Andrew J. Davis, Jr. Trustees; and John H. Leyson as administrator with the will annexed of the estate of Andrew J. Davis, deceased, Defendants.

COMPLAINT

I. That plaintiff is the duly appointed, qualified and acting administrator in the state of Montana, of the Estate of Robert G. Ingersoll, deceased, late of the village of Dobbs Ferry in the County of Westchester, state of New York.

E. N. HARWOOD *and*
JOHN LINDSAY
Attorneys for Plaintiff.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

John S. Harris being first duly sworn, according to law deposes and says: I am the duly appointed qualified and acting administrator, in the state of Montana, of the Estate of Robert G. Ingersoll, deceased, and as such administrator I am plaintiff in the above entitled action as amended, and by intervention, as set forth in the foregoing amendment to the complaint filed in said cause; that plaintiff has read and knows the contents of the foregoing amendment to said complaint, and that the facts therein stated are true to the knowledge of deponent.

JOHN S. HARRIS

Subscribed and sworn to before me this 6th day of Decem A. D. 1901.

E. N. HARWOOD
[NOTARIAL SEAL] *Notary Public within and for the County of Silver Bow, State of Montana*

I, Samuel M. Roberts, Clerk of the District Court of the Secon Judicial District of the State of Montana, in and for the County Silver Bow, do hereby certify that the foregoing is a full, true an correct copy of the following files and records on file in this office in cause No. 9346 Eva A. Ingersoll, Admix. *vs.* Henry A. Root, al. Complaint amended. Minute Entry of Dec. 6th 1901. Orde Amendment to Complaint. Order.

In testimony whereof, I have hereunto set my hand and the Sea of the said Court, this 7th day of December, A. D. 1904.

SAMUEL M. ROBERTS, *Clerk*.
[SEAL] *by* EUGENE M. ROBERTS, *Deputy Clerk*.

STATE OF MONTANA,
COUNTY OF SILVER BOW, ss.

I, E. W. Harney, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that Samuel M. Roberts, whose genuine original signature is subscribed to the annexed Certificate and Attestation, is and was, at the time of making the same, the Clerk of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Clerk; that full faith and credit are due to his official acts, and that he is the legal keeper of all the Records and the Seal of said Court; that said certificate and Attestation is in due form of law; and that the Seal affixed thereto is the genuine Seal of said Court.

Witness my hand at Butte, Montana, this 6th day of Feb. A. D. 1904.

E. W. HARNEY
Judge of said Court.

STATE OF MONTANA,

COUNTY OF SILVER BOW, ss.

I, Samuel M. Roberts, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, which is a Court of Record, having a Clerk and a Seal, do hereby certify that the Honorable E. W. Harney, whose name is subscribed to the annexed and foregoing certificate, is and was at the time of making the same, Judge of the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly elected, sworn, qualified and acting as such Judge, to all whose acts as such, full faith and credit are due, and that the signature of said Judge to said Certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said District Court, at Butte, Mont., this 6th day of February, A. D. 1901.

SAMUEL M. ROBERTS
Clerk of said Court.

[SEAL.]

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the four volumes, entitled as follows:

Volume I., Record for Complainant (pages 1 to 165);

Volume II., Record for Complainant (pages 1001 to 1291);

Volume III., Record for Defendants (pages 1501 to 1682);

Volume IV., Proceedings in said Circuit Court with References to Volumes I., II., and III. (pages 2001 [1701] to 2058 [1741]);

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings of said Circuit Court in the cause in equity entitled,

No. 1757.

EVA A. INGERSOLL, ADMINISTRATRIX, COMPLAINANT,

v.

JOSEPH A. CORAM ET AL., DEFENDANTS,

in said Circuit Court determined, the Opinion of the Circuit Court of March 22, 1905, the Petition for Appeal, the Assignment of Errors, the Summons and Severance, and the Bond to Party on Appeal, and also the original Citation issued upon the appeal of the defendants, Joseph A. Coram, Henry A. Root and Charles H. Palmer, trustee, in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this thirtieth day of August, A.D. 1905.

[SEAL] ALEX. H. TROWBRIDGE, *Clerk.*

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD.

[FILED IN CIRCUIT COURT OF APPEALS JULY 20, 1905.]

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Friday, September 1, 1905.

FRANCIS C. LOWELL,

U. S. Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,

v.

EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

CLERK'S CERTIFICATE.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the four volumes, entitled in the above cause, namely:

Volume I., Record for Complainant, — Pleadings, Court Records, Proofs, etc.;

Volume II., Complainant's Exhibits;

Volume III., Record for Defendants;

Volume IV., Transcript of Record of Circuit Court and Proceedings in Circuit Court of Appeals;

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of November, A.D. 1906.

[SEAL.] JOHN G. STETSON, *Clerk*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1904.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,

v.

EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

TRANSCRIPT OF RECORD OF CIRCUIT COURT.

[FILED IN CIRCUIT COURT OF APPEALS AUGUST 30, 1905.]

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the last Tuesday of February, being the twenty-eighth day of February, in the year of our Lord one thousand nine hundred and five.

Before

THE HONORABLE WILLIAM L. PUTNAM,
Circuit Judge.

No. 1737, EQUITY.

EVA A. INGERSOLL, ADMINISTRATRIX, COMPLAINANT,

v.

JOSEPH A. CORAM ET AL., DEFENDANTS.

The bill of complaint in this cause was filed in the clerk's office on the fifteenth day of June, A.D. 1903, and was duly entered at the February Term of this Court, A.D. 1903, and is in the words and figures following: —

BILL OF COMPLAINT.

[FILED JUNE 15, 1903.]

[MEMORANDUM. The Bill of Complaint, as printed in this Transcript of Record, commencing on page 1, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

At the same term the following Order of Court for Service on Absent Defendants was entered: —

ORDER OF COURT.

AUGUST 7, 1903.

[MEMORANDUM. The Order of Court, as printed in this Transcript of Record, on page 61, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Demurrers were filed:—

DEMURRER OF JOSEPH A. CORAM ET AL.

[FILED AUGUST 11, 1903.]

[MEMORANDUM. The Demurrer of Joseph A. Coram *et al.*, as printed in this Transcript of Record, commencing on page 49, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

DEMURRER OF JOHN H. LEYSON, ADMINISTRATOR.

[FILED SEPTEMBER 28, 1903.]

[MEMORANDUM. The Demurrer of John H. Leyson, Administrator, as printed in this Transcript of Record, commencing on page 55, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

DEMURRER OF ANDREW J. DAVIS, TRUSTEE.

[FILED OCTOBER 2, 1903.]

[MEMORANDUM. The Demurrer of Andrew J. Davis, Trustee, as printed in this Transcript of Record, commencing on page 58, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

This cause was thence continued to the October Term, A.D. 1903, when the same was set down for hearing and fully heard by the Court on the fourth and fifth days of November, A.D. 1903, on the

Demurrers of Joseph A. Coram *et al.*, of John H. Leyson, administrator, and of Andrew J. Davis, trustee, the Honorable William L. Putnam, Circuit Judge, sitting.

At the same term the following Adoption of Demurrer of Joseph A. Coram *et al.* by Charles H. Palmer, Trustee, was filed: —

ADOPTION OF DEMURRER OF JOSEPH A. CORAM ET AL. BY CHARLES H. PALMER, TRUSTEE.

Filed November 5, 1903.

[Memorandum. The Adoption of Demurrer of Joseph A. Coram *et al.* by Charles H. Palmer, Trustee, as printed in this Transcript of Record, on page 65, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk.*]

Also at the same term the following Complainant's Motion to Amend Bill by Joining Administrator of the Estate of Elizabeth S. Ladd was filed by consent: —

COMPLAINANT'S MOTION TO AMEND BILL BY JOINING ADMINISTRATOR OF ESTATE OF ELIZABETH S. LADD.

Filed by consent December 28, 1903.

Memorandum. The Complainant's Motion to Amend Bill by Joining Administrator of the Estate of Elizabeth S. Ladd, as printed in this Transcript of Record, commencing on page 65, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk.*]

On the thirtieth day of December, A.D. 1903, the Opinion of the Court was announced and the following Order thereon entered: —

OPINION OF THE COURT AND ORDER THEREON.

December 30, 1903.

[Memorandum. The Opinion of the Court and Order thereon, as printed in this Transcript of Record, commencing on page 67, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk.*]

Also at the same term the following Amendment to Bill was filed: —

AMENDMENT TO BILL.

Filed January 11, 1904.

[Memorandum. The Amendment to Bill, as printed in this Transcript of Record, commencing on page 91, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk.*]

Also at the same term the following Demurrer of Charles H. Ladd *et al.*, was filed by consent: —

DEMURRER OF CHARLES H. LADD ET. AL.

[FILED BY CONSENT, JANUARY 14, 1904.]

[MEMORANDUM. The Demurrer of Charles H. Ladd *et al.*, as printed in this Transcript of Record, on page 92, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Order of Court was entered: —

ORDER OF COURT.

JANUARY 14, 1904.

[MEMORANDUM. The Order of Court, as printed in this Transcript of Record, on page 93, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Interlocutory Decree was entered: —

INTERLOCUTORY DECREE.

JANUARY 14, 1904.

[MEMORANDUM. The Interlocutory Decree, as printed in this Transcript of Record, commencing on page 93, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

This cause was thence continued to the February Term, A.D. 1904, when the following Answer of Andrew J. Davis, Trustee, was filed: —

ANSWER OF ANDREW J DAVIS, TRUSTEE.

[FILED MARCH 22, 1904.]

[MEMORANDUM. The Answer of Andrew J. Davis, Trustee, as printed in this Transcript of Record, commencing on page 94, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

At the said term the following Motion for Leave to Amend Date in Bill of Complaint was filed: —

MOTION FOR LEAVE TO AMEND DATE IN BILL OF COMPLAINT.

[FILED MARCH 24, 1904.]

[MEMORANDUM. The Motion for Leave to Amend Date in Bill of Complaint, as printed in this Transcript of Record, on page 96, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Stipulation for Amendment of Bill of Complaint was filed: —

STIPULATION FOR AMENDMENT OF BILL OF COMPLAINT.

FILED MARCH 24, 1904.

[MEMORANDUM. The Stipulation for Amendment of Bill of Complaint, as printed in this Transcript of Record, on page 97, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

On the same day, to wit, March 24, 1904, the following Order Allowing Amendment of Bill of Complaint was entered: —

ORDER ALLOWING AMENDMENT OF BILL OF COMPLAINT.

MARCH 24, 1904.

[MEMORANDUM. The Order Allowing Amendment of Bill of Complaint, as printed in this Transcript of Record, on page 98, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Answers were filed: —

ANSWER OF JOSEPH A. CORAM ET AL.

[FILED APRIL 4, 1904.]

[MEMORANDUM. The Answer of Joseph A. Coram *et al.*, as printed in this Transcript of Record, commencing on page 99, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

ANSWER OF JOHN H. LEYSON, ADMINISTRATOR.

[FILED BY CONSENT APRIL 29, 1904.]

[MEMORANDUM. The Answer of John H. Leyson, Administrator, as printed in this Transcript of Record, commencing on page 123, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Replications were filed:

REPLICATION TO ANSWER OF DAVIS ET AL.

(Filed by Consent May 2, 1904.)

[Memorandum. The Replication to Answer of Davis *et al.*, as printed in this Transcript of Record, on page 125, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk.*]

REPLICATION TO ANSWER OF CORAM ET AL.

Filed May 2, 1904.

[Memorandum. The Replication to Answer of Coram *et al.*, as printed in this Transcript of Record, on page 126, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk.*]

This cause was thence continued to the October Term, A.D. 1904, when, publication of the testimony having passed in the clerk's office, the same was set down for hearing and fully heard by the Court, the Honorable William L. Putnam, Circuit Judge, as aforesaid, sitting, on January 31 and February 1, 1905.

This cause was thence continued under advisement to the present February Term, A.D. 1905, when the Opinion of the Court is announced, and the following Final Decree is entered in accordance therewith: —

FINAL DECREE.

May 3, 1905.

Putnam, J. This cause came on to be heard at this term on bill, answers, replications and proofs, and was argued by counsel for the respective parties, and, on due consideration thereof, the court found that each and all the material allegations of the complainant's bill of complaint herein are proved, established, and are true as therein alleged, so that, on the twenty second day of March, nineteen hundred and five, the Court ordered as follows:

"Let the complainant file a draft decree, in accordance with our opinion passed down this day, on or before the fourth day of April next, the respondents to file corrections thereof on or before the eighteenth day of April next, all in accordance with Rule 21."

Thereupon, in accordance with that order, the complainant duly filed a draft decree, but the respondents failed to file any corrections

thereof within the time provided in said order, and refused to file such corrections.

Wherefore, on due consideration of all the foregoing, the court finds, orders, adjudges and decrees that each and all the material allegations as aforesaid are true: that there is due and owing to complainant on that certain contract in writing, made, executed and delivered by defendants Joseph A. Coram and Henry A. Root to and with Robert G. Ingersoll, mentioned in said complainant's bill of complaint, ninety-five thousand dollars, with simple interest thereon from the twenty-sixth day of August, eighteen hundred and ninety-seven, at the rate of six per cent per annum, which interest is now forty-three thousand eight hundred and ten dollars and eighty-three cents, so that the whole of said indebtedness, including principal and interest, now amounts to one hundred and thirty-eight thousand eight hundred and ten dollars and eighty-three cents, and that the whole of said sum of one hundred and thirty-eight thousand eight hundred and ten dollars and eighty-three cents is due to complainant, in her capacity as administratrix of the estate of Robert G. Ingersoll, deceased, as alleged in said bill on said contract, and is wholly unpaid: that said sum of one hundred and thirty-eight thousand eight hundred and ten dollars and eighty-three cents, and also the costs of this action as hereinbelow taxed, bear and shall hereafter bear, interest at the rate of six per cent per annum, simple interest, until fully paid and discharged.

And, It is, on such consideration, further ordered, adjudged and decreed that said defendant Henry A. Root is indebted, obligated and liable personally to complainant, as such administratrix, in and for the payment of said sum of one hundred and thirty-eight thousand eight hundred and ten dollars and eighty three cents, owing and due to the complainant as such administratrix as hereinbefore stated, with interest as aforesaid hereafter accruing, so that said complainant as such administratrix has herein judgment therefor, and shall as such administratrix have execution therefor against said defendant Henry A. Root as may hereafter from time to time be ordered and decreed, for the recovery from him, said Root, of any balance of said sum of one hundred and thirty-eight thousand eight hundred and ten dollars and eighty-three cents and interest hereafter accruing

thereon as aforesaid, which may remain unpaid after due application of the property and proceeds thereof declared herein to be subject to a lien, and to be applied in behalf of said complainant as such administratrix towards the payment of said indebtedness, costs and interest thereon as in this decree provided and decreed in foreclosure of said lien.

That said defendant Joseph A. Coram is personally obligated and liable for the payment of said indebtedness, costs and interests thereon to complainant Eva A. Ingersoll, as administratrix aforesaid, upon said contract herein first above mentioned to the full amount which he has received or may be entitled to receive from the shares of the estate of Andrew J. Davis, deceased, acquired for five of his heirs, namely, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cormie and Henry A. Root, or either of them, under or pursuant to that certain decree or judgment of the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, duly made, rendered and dated the twenty-fourth day of August eighteen hundred and ninety-seven, and entered of record therein, in the matter of the estate of Andrew J. Davis, deceased, upon the contest of Henry A. Root and Sarah Maria Cummings against the probate of the will of said deceased, and other contests of said will, or under or pursuant to the instruments in writing mentioned in said judgment or decree determining said will contests, directly or through said defendants, Charles H. Palmer and Andrew J. Davis, Jr., as trustees, or either of them; and complainant, Eva A. Ingersoll, as administratrix aforesaid, is entitled to judgment and execution against said Joseph A. Coram for recovery of any balance of the aforesaid indebtedness, costs, and interest accruing thereon which may remain unpaid after application of the property and proceeds thereof subject to the lien existing, and by this decree foreclosed, in favor of complainant Eva A. Ingersoll, as administratrix aforesaid, to the payment of said indebtedness, costs and interest, to the extent of the value of the money and other property received by said Joseph A. Coram out of the property acquired from said estate for said five heirs through said decree or instruments of writing therein mentioned, directly or

through said defendants Charles H. Palmer and Andrew J. Davis, Jr., as trustees, as hereinbelow provided and decreed.

That as heirs of Andrew J. Davis, deceased, said Sarah Maria Cummings and Elizabeth S. Ladd were each entitled to one eleventh or one hundred-eleven hundredths, and said Mary Louise Dunbar Ellen S. Cormie and Henry A. Root were each entitled to one twenty-second or fifty-eleven hundredths of the estate of said Andrew J. Davis, deceased, and said five heirs were entitled altogether to three hundred and fifty-eleven hundredths of the estate of said decedent as his heirs; that after the decease of said Andrew J. Davis four of his said heirs hereinabove mentioned, by instrument of writing, duly made and delivered, assigned, transferred and set over one third of each of their interests in the estate of said decedent to said Henry A. Root, to aid in prosecuting contests of an alleged will of said decedent propounded for admission to probate in said District Court of Montana, and thereby said Henry A. Root became and is the owner of one third of the shares or interests of each of said four heirs in the estate of said Andrew J. Davis, deceased, in addition to the interest or share of said Henry A. Root in the property of said estate acquired for said five heirs as hereinbelow mentioned. That said Elizabeth S. Ladd and Mary Louise Dunbar also sold, assigned and transferred all their remaining interests in said estate to said Joseph A. Coram, and he thereby became and is the owner and holder thereof, and entitled to have and receive the same on distribution thereof, and has had and received money heretofore distributed from said estate to said two heirs last above named to the amount of one hundred and seven thousand dollars, and also their interest in certain real property heretofore distributed from said estate of value exceeding a million dollars. That neither said Mary Louise Dunbar, nor Elizabeth S. Ladd nor Charles H. Ladd, her husband, or as administrator of the estate of said Elizabeth S. Ladd, deceased, have any remaining interest in the property of said estate acquired for said five heirs as hereinbelow mentioned, upon which a lien is claimed, exists and is foreclosed by this decree, in favor of complainant Eva A. Ingersoll, as administratrix aforesaid in this action, and, therefore, neither of said three persons last above mentioned, nor their or either of their legal representatives, is a

necessary party to this action. That said Sarah Maria Cummings sold, assigned and transferred all her interest in the property of said estate of Andrew J. Davis, deceased, acquired for said five heirs as hereinbelow mentioned, to said Henry A. Root, except sixty-six and two thirds-eleven hundredths thereof reserved to said Sarah Maria Cummings, and complainant Eva A. Ingersoll, as administratrix aforesaid, does not claim any lien upon, nor is any lien foreclosed by this decree upon, said interest so reserved to said Sarah Maria Cummings in the property of said estate acquired for said five heirs as hereinbelow mentioned, and, therefore, said Sarah Maria Cummings, or her legal representative, Herbert P. Cummings, is not a necessary party to this action. That said Ellen S. Cornue sold, assigned and transferred all her interest in the property of the estate of Andrew J. Davis, deceased, acquired for said five heirs as hereinbelow mentioned, to said Henry A. Root, except thirty-three and two thirds-eleven hundredths thereof reserved to said Ellen S. Cornue, and complainant Eva A. Ingersoll, as administratrix aforesaid, does not claim any lien upon, nor is any lien foreclosed by this decree upon, said interest so reserved to said Ellen S. Cornue in the property of said estate acquired for said five heirs as hereinbelow mentioned, and, therefore, neither said Ellen S. Cornue, nor her husband, Joshua G. Cornue, is a necessary party to this action. That by virtue of said decree or judgment of said District Court of the State of Montana determining said contests of an alleged will of said decedent offered for admission to probate in said court, and the instruments of writing mentioned in said decree or judgment, said five heirs last-above mentioned were awarded, adjudged, decreed, and they and their successors in interest became and are entitled to have and receive two hundred and fifty-eleven hundredths of all the estate and property of said Andrew J. Davis, deceased, in kind directly on distribution thereof, and said five heirs were also awarded by said judgment or decree of said District Court of Montana and instruments of writing therein mentioned, and they and their successors in interest also became and are entitled to have and receive two hundred sixty-five and a half-eleven hundredths of all the estate and property of said decedent, in kind to be distributed to Charles H. Palmer and Andrew J. Davis, Jr., as trustees, in trust for the use

and benefit of said five heirs of Andrew J. Davis, deceased; whereby said five heirs became and they and their successors in interest and legal representatives are entitled to have and receive, and have the use and benefit of, five hundred fifteen and a half-eleven hundredths of all property of the estate of said Andrew J. Davis, deceased, in kind both real and personal on distribution thereof.

That by said assignments of interests in the property of the estate of said Andrew J. Davis, deceased, together with the interest of said Henry A. Root therein acquired through said judgment or decree of said District Court of Montana and instruments of writing therein mentioned, said Joseph A. Coram and Henry A. Root became and are entitled to have and receive, directly and through said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, four hundred fifteen and a half-eleven hundredths parts and parcels of all property of the estate of Andrew J. Davis, deceased, on distribution thereof, and have had and received that proportion of three hundred and seventy-four thousand nine hundred seven dollars and ninety-one cents in money, and the same proportion of real property of value exceeding a million dollars heretofore distributed from said estate to said five heirs and their successors in interest, directly and through said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, pursuant to said decree or judgment of said District Court of Montana duly made and entered in determining said will contests, and the instruments of writing therein mentioned.

That a certain portion of the property, funds and effects of said estate of Andrew J. Davis, deceased, is situate, lying, and being in the State of Massachusetts, in the custody of defendant John H. Leyson, as administrator thereof by appointment duly made by the Probate Court within and for Suffolk County, State of Massachusetts, to wit: three hundred thirty-seven thousand eight hundred and sixty-two dollars lawful current money of the United States of America, and one hundred and seventy bonds issued by the Butte & Boston Consolidated Mining Company, a corporation organized and existing under and by virtue of the laws of the State of New York, for the principal sum of one thousand dollars each, dated the third day of May, eighteen hundred and ninety-seven, numbered consecutively from thirteen hundred and ten to fourteen hundred and

seventy-nine inclusive, and increase of said money and bonds by way of interest accrued and accruing thereon; of which money and bonds and increase thereof said five heirs of Andrew J. Davis, deceased, and their legal representatives and successors in interest, became and are entitled to have and receive five hundred fifteen and a half-eleven hundredths, directly and through said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, under and pursuant to said decree or judgment of said District Court of the State of Montana duly rendered and entered in the determination of said will contests, and the instruments of writing therein mentioned; of which money and bonds last-above described and increase thereof said defendants Joseph A. Coram and Henry A. Root own and are entitled to have and receive four hundred fifteen and a half-eleven hundredths parts and parcels thereof on distribution of said money and bonds by order of the proper court having probate jurisdiction thereof in the administration and distribution of the estate of said Andrew J. Davis, deceased.

That to secure, and as security for, the payment of said indebtedness in the sum of one hundred thirty-eight thousand eight hundred and ten dollars and eighty-three cents and costs of this action, and accruing interest thereon, owing and due complainant, Eva A. Ingersoll, as administratrix aforesaid, as herein found, adjudged and decreed, a valid and subsisting lien exists, rests upon and adheres to said four hundred fifteen and a half eleven hundredths parts and parcels of said three hundred thirty-seven thousand eight hundred and sixty-two dollars lawful current money of the United States of America, and one hundred and seventy bonds issued by the Butte and Boston Consolidated Mining Company, above mentioned and described, and increase of said money and bonds by way of interest accrued or accruing thereon, to which said Joseph A. Coram and Henry A. Root are entitled, now in the custody of said John H. Leyson, as administrator of said estate, situate in the State of Massachusetts, and said lien is hereby declared to attach and adhere to said four hundred fifteen and a half-eleven hundredths parts and parcels of said money and bonds above mentioned and described, and increase thereof wheresoever the same may be taken, and in the custody of whomsoever the same may come, until said lien is fully paid, satisfied and discharged; but said lien and the foreclosure thereof by this

decree is subject to all proper and lawful administration of said funds and effects as part of the estate of Andrew J. Davis, deceased, pursuant to the orders, decrees or judgments of the Probate Court of Suffolk County, Massachusetts, now having probate jurisdiction thereof, or any court which may hereafter have probate jurisdiction of said funds and effects to administer the same as part of the estate of said Andrew J. Davis, deceased, in the due and lawful course of administration thereof.

And thereupon, upon due consideration of the pleadings and proofs, and law applicable to the facts proved, established and found to be true in this cause, It is by the court hereby ordered, adjudged and decreed that complainant, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, have and recover of and from said defendants Joseph A. Coram and Henry A. Root the sum of one hundred and thirty-eight thousand eight hundred and ten dollars and eighty three cents and costs of this action taxed at twenty-five hundred and twenty-three dollars and ninety-two cents lawful money of the United States of America, together with interest on both of said sums at the rate of six per cent per annum from the third day of May, nineteen hundred and five, in so far as the same can be made, paid and satisfied out of and by application to the payment thereof, of said four hundred fifteen and a half eleven hundredths parts and parcels of said three hundred thirty-seven thousand eight hundred and sixty-two dollars lawful money of the United States of America, and one hundred and seventy bonds issued by said Butte & Boston Consolidated Mining Company, a corporation organized and existing under and by virtue of the laws of the State of New York, for the principal sum of one thousand dollars each, dated the third day of May, eighteen hundred and ninety-seven, and numbered consecutively from thirteen hundred and ten to fourteen hundred and seventy-nine, inclusive, and increase of said money and bonds by way of interest accrued and accruing thereon, which may be ordered, adjudged or decreed by the Probate Court of Suffolk County, State of Massachusetts, or by the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, or by any court now having, or which may hereafter have, probate jurisdiction of said money and bonds last above mentioned

and described, to be distributed, paid over or delivered to said Henry A. Root, Sarah Maria Cummings, Herbert P. Cummings, executor of Sarah Maria Cummings, deceased, Ellen S. Cornue, her husband, Joshua G. Cornue, Elizabeth S. Ladd, her husband, Charles H. Ladd, Charles H. Ladd, as administrator of the estate of Elizabeth S. Ladd, deceased, Mary L. Dunbar, Joseph A. Corant, as assignee, grantee or successor in interest of any of said persons, Charles H. Palmer and Andrew J. Davis, Jr., as trustees, or to their or either of their successors, agents, attorneys, trustees, legal representatives or assigns: and It is hereby further ordered, adjudged and decreed that said lien existing upon and adhering to said four hundred fifteen and a half eleven hundredths parts and parcels of said money and bonds last above mentioned and described, be and the same is hereby foreclosed thereon in favor of complainant, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, to secure payment of said sum of one hundred thirty-eight thousand eight hundred and ten dollars and eighty-three cents and costs of this action as herein taxed, and interest accruing thereon as herein provided; and said four hundred fifteen and a half eleven hundredths parts and parcels of said three hundred thirty-seven thousand eight hundred and sixty-two dollars current money of the United States and one hundred and seventy bonds issued by said Butte & Boston Consolidated Mining Company herein above described, now in the custody of said defendant, John H. Leyson as administrator of the estate of Andrew J. Davis, deceased, situate in the State of Massachusetts, is hereby declared, adjudged and decreed to be holden and subject to said lien attached and adhering thereto, and hereby foreclosed thereon, and subject to the terms, demands and provisions of this decree, wheresoever said money and bonds may be taken or removed, whether within or without the State of Massachusetts, and in the custody of whomsoever the same may come, subject only to the proper and lawful probate administration of said money and bonds as part of the estate of Andrew J. Davis, deceased, pursuant to the orders, judgments or decrees of the Probate Court of Suffolk County, in the State of Massachusetts, now having probate jurisdiction thereof, or of any court which may hereafter have probate jurisdiction thereof, to administer the same as

part of the estate of Andrew J. Davis, deceased, in the due and lawful course of administration thereof. And It is hereby further ordered, adjudged and decreed that whenever and as soon as such probate administration of said money and bonds, to wit, said three hundred thirty seven thousand eight hundred and sixty-two dollars lawful current money of the United States of America and one hundred and seventy bonds of the Butte & Boston Consolidated Mining Company herein above mentioned and described, is finished and distribution thereof is ordered by the Probate Court having jurisdiction thereof, the said John H. Leyson, administrator in custody thereof, or his successor or successors in custody thereof, shall set apart and bring into this court and deliver to the clerk thereof, four hundred fifteen and a half-eleven hundredths parts and parcels of such portion of said money and bonds as may be ordered distributed to said Henry A. Root, Sarah Maria Cummings, Herbert P. Cummings, as executor of Sarah Maria Cummings, deceased, Ellen S. Cornue, or her husband, Joshua G. Cornue, Elizabeth S. Ladd, or her husband, Charles H. Ladd, or Charles H. Ladd, as administrator of the estate of Elizabeth S. Ladd, deceased, Mary L. Dunbar, Joseph A. Coram, as assignee, grantee or successor in interst of any of said persons, and to Charles H. Palmer and Andrew J. Davis, Jr., as trustees for said persons, or to their or any of their successors, agents, attorneys, trustees, legal representatives or assigns, to be applied to the satisfaction of said lien thereon hereby foreclosed; and thereupon this court will make proper order for the application of said money, and for the sale and application of the proceeds of said bonds so brought in and delivered pursuant to this decree to the satisfaction of said indebtedness and lien hereby foreclosed thereon.

And It is further ordered, adjudged and decreed that in the event any part of said three hundred thirty-seven thousand eight hundred and sixty-two dollars, lawful money of the United States, and one hundred and seventy bonds of said Butte & Boston Consolidated Mining Company, herein mentioned and described as subject to said lien hereby foreclosed thereon in favor of complainant, Eva A. Ingersoll, as administratrix aforesaid, shall be distributed or delivered to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, or either of them, in trust, for the use and benefit of said Henry A.

Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Ladd, Charles H. Ladd, Mary L. Dunbar, or the legal representative, attorney, agent, trustee, assignee, grantee or successor in interest of any of them, the said Charles H. Palmer and Andrew J. Davis, Jr., as such trustees, shall set apart and bring in and deliver to the clerk of this court, to be applied to the satisfaction of said lien and indebtedness owing and due to complainant, the entire portion of said money and bonds which may be distributed or delivered to said Charles H. Palmer and Andrew J. Davis, Jr., as trustees, to which said Henry A. Root, Elizabeth S. Ladd and Mary L. Dunbar are entitled, and one third of the portion of said money and bonds which may be distributed to said trustees to which said Sarah Maria Cummings and Ellen S. Cornue are entitled by virtue of said decree of said District Court of the State of Montana, hereinabove mentioned, or the instruments of writing mentioned in said decree creating a trust in said Charles H. Palmer and Andrew J. Davis, Jr., in behalf of said persons hereinabove mentioned with others; and the said Charles H. Palmer and Andrew J. Davis, Jr., as trustees as aforesaid, and each of them and their and each of their successors in said trust, are hereby enjoined and required to perform the conditions and requirements of this decree and to withhold from delivering to said five heirs of Andrew J. Davis, deceased, hereinabove named, or to said Joseph A. Coram, or either of them, or their or either of their legal representatives, agents, attorneys or assigns, any part of said four hundred fifteen and a half-eleven hundredths of said three hundred thirty-seven thousand eight hundred sixty-two dollars, lawful current money of the United States of America, and one hundred and seventy bonds of the Butte & Boston Consolidated Mining Company, which may come into the possession of said Charles H. Palmer and Andrew J. Davis, Jr., as such trustees, or either of them, or their or either of their agents, attorneys, legal representatives, successors or assigns, upon which said lien existing in favor of complainant, Eva A. Ingersoll, as administratrix aforesaid, is hereby foreclosed.

And It is hereby further ordered, adjudged and decreed that each and all injunctive and restraining terms and commands of that certain interlocutory injunction order, heretofore duly made and entered

in this cause on the sixth day of September, nineteen hundred and four, be and the same are hereby made final and perpetual; and that said John H. Leyson, as administrator of said estate of Andrew J. Davis, deceased, in custody of said three hundred thirty-seven thousand eight hundred and sixty-two dollars lawful current money of the United States of America, and one hundred and seventy bonds issued by the said Butte & Boston Consolidated Mining Company, and increase thereof, hereinabove mentioned and described, now situate and being in the State of Massachusetts, be and he is hereby enjoined and restrained from removing out of the State of Massachusetts four hundred fifteen and a half-eleven hundredths parts and parcels thereof unless and until the proper court within the State of Massachusetts, having probate jurisdiction of said money and bonds by its final order, judgment or decree, directs said John H. Leyson, as such administrator, to remove said four hundred fifteen and a half-eleventh hundredths of said money and bonds out of the State of Massachusetts; and that said John H. Leyson be and he is hereby further enjoined and restrained from distributing, paying over or delivering to said Henry A. Root, Sarah Maria Cummings, Herbert P. Cummings, as executor of Sarah Maria Cummings, deceased, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Ladd, Charles H. Ladd, individually, or as administrator of the estate of Elizabeth S. Ladd, deceased, Mary Louise Dunbar, Joseph A. Coram, or Charles H. Palmer and Andrew J. Davis, Jr., as trustees, or either of them or their or either of their attorneys, agents, legal representatives, successors or assigns, or to any other person whomsoever without the order of this court, any part of said four hundred fifteen and a half-eleven hundredths parts and parcels of said money and bonds upon which said lien is by this decree foreclosed in favor of complainant, Eva A. Ingersoll, as administratrix aforesaid, at any time or place, or pursuant to the order, judgment or decree of the Probate Court in and for the county of Suffolk, State of Massachusetts, or pursuant to the order of any other court, whether within or without the State of Massachusetts; but when such distribution is ordered or directed by the judgment, order or decree of any court having probate jurisdiction of said money and bonds in the administration and distribution thereof, the said John H. Leyson, as such administrator,

or his successor, or successors in said office shall forthwith bring in and deliver to the clerk of this court four hundred fifteen and a half-eleven hundredths parts and parcels of said money and bonds and increase thereof, upon which said lien is by this decree foreclosed, to be applied to the satisfaction of said indebtedness and lien; and in the event said John H. Leyson resign or be removed from said office of administrator of the estate of Andrew J. Davis, deceased, or from any other cause it shall become necessary or proper for him or his legal representative to transfer or deliver possession of said three hundred thirty-seven thousand eight hundred and sixty-two dollars lawful money of the United States of America, and one hundred and seventy bonds issued by said Butte & Boston Consolidated Mining Company, herein mentioned and described, to a successor or successors in said office of administrator or other custodian, then the said John H. Leyson, or his legal representative, before making such transfer or delivery shall report such proposed action in the premises to this court, and make such delivery or transfer of possession of said money and bonds in the presence of this court, whereupon this court will make such substitution of the successor or successors of said John H. Leyson, as such administrator, or otherwise, who may come into possession of said money and bonds in his place, as party or parties to this action as may be proper; and in the event of the decease of said John H. Leyson, his legal representative who may come into possession, custody or control of said money and bonds shall upon notice of this decree be bound by the terms hereof touching said John H. Leyson and his custody of said money and bonds upon which said lien is hereby foreclosed in favor of complainant, Eva A. Ingersoll, as administratrix aforesaid, and such legal representative of said John H. Leyson, if any there shall be, is hereby enjoined to act accordingly.

And It is hereby further ordered, adjudged and decreed that said defendants Joseph A. Coram, Henry A. Root, and Charles H. Palmer and Andrew J. Davis, Jr., as such trustees, and their and each and all of their attorneys, agents, legal representatives, successors and assigns, be and they are hereby enjoined and restrained absolutely from asking, demanding or receiving from said John H. Leyson, as administrator of said estate of Andrew J. Davis, deceased,

or his successor or successors, either in the State of Massachusetts, or in the State of Montana, or elsewhere, or from any administrator of the estate of Andrew J. Davis, deceased, in the State of Massachusetts or in the State of Montana, or elsewhere, or from any other custodian thereof any part of said four hundred fifteen and a half-eleven hundredths of said money and bonds upon which said lien existing in favor of complainant is by this decree foreclosed, and from taking, carrying away, disposing of or interfering with the same or any part thereof.

And It is hereby further ordered, adjudged and decreed that in case there be any part of said indebtedness and costs of this action or interest accruing thereon owing and due complainant, Eva A. Ingersoll, as administratrix aforesaid, her legal representative, successor or assigns, as hereinabove found, adjudged and decreed, still remaining unpaid after application and payment to, complainant, Eva A. Ingersoll, as administratrix aforesaid, or her legal representative, successor or assigns, said money and the proceeds derived from the sale of said parts and parcels of said bonds upon which said lien is hereby foreclosed, the same may be duly reported and shown to this court, and it will thereupon enter judgment against said defendant Henry A. Root for recovery of and from him the full amount of such deficiency so remaining unpaid and further accruing costs of this action; and for recovery of the same of and from said defendant Joseph A. Coram to an amount not exceeding one hundred and seven thousand dollars; and providing, ordering, adjudging and decreeing that such deficiency, if any there be, remaining unpaid after application of said money, and the proceeds of said parts and parcels of said bonds, upon which said lien is by this decree foreclosed, to the payment of said indebtedness, costs and interest as herein found, adjudged and decreed to be owing and due complainant, Eva A. Ingersoll, as administratrix aforesaid, and further accruing costs of this action, may be recovered jointly or severally from said defendants Henry A. Root and Joseph A. Coram to an amount not exceeding one hundred and seven thousand dollars, and for recovery of any amount of such deficiency due and owing complainant, Eva A. Ingersoll, as administratrix aforesaid, in excess of the sum last above

stated, of and from said defendant Henry A. Root, and that execution issue for recovery thereof accordingly.

It is further ordered, adjudged and decreed, that said defendant Elizabeth S. Ladd and her husband, Charles H. Ladd, and Charles H. Ladd, as administrator of the estate of Elizabeth S. Ladd, deceased, Mary Louise Dunbar, and Herbert P. Cummings, as executor of the last will and testament of Sarah Maria Cummings, deceased, heretofore made parties to this action, be and each and all of them are hereby dismissed therefrom; and that they and each of them may have and recover of and from complainant, Eva A. Ingersoll, as administratrix aforesaid, the costs of this action, if any, by them or either of them laid out and expended prior to the entry of that certain order by this court duly made and entered on the fourteenth day of January, nineteen hundred and four, disposing of demurrers in this cause, taxed at dollars and cents.

It is further provided that this court will hereafter make and enter, upon proper showing, further and supplemental order directing the sale of said parts and parcels of said bonds and the application of said money and the proceeds obtained from the sale of said bonds, upon which said lien is by this decree foreclosed, to the payment of said indebtedness costs and accruing interest herein found, adjusted and decreed to be owing and due complainant and secured by said lien, or providing for the retention, pending appeal from this decree, of said money and bonds upon which said lien is by this decree foreclosed, in case the same be brought in and delivered to the clerk of this court in *lieu* of a supersedeas bond, and for the delivery to the proper person or persons any residue of said money and bonds or proceeds of said bonds which may be remaining after payment of said indebtedness, costs and interest accruing thereon, in satisfaction of said lien, and such other supplemental orders, judgments and decrees, and cause to be issued and executed all such proper and lawful orders, writs and processes, in the premises, as may be necessary, proper and lawful to carry out and fully effectuate the provisions, requirements, intent and purpose of this decree, to the end that justice may be done.

By the Court,

L. C. TUCKER, *Deputy Clerk.*

From the Final Decree the defendants Joseph A. Coram, Henry A. Root and Charles H. Palmer, Trustee, claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and give good and sufficient security that they will prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, and said appeal is allowed.

A true record:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

OPINION OF THE CIRCUIT COURT.

MARCH 22, 1905.

PUTNAM, J. This case was heard on demurrers which were disposed of by an opinion passed down on December 30, 1903, 127 Fed. Rep. 118, accompanied with an order which directed that on final decree the bill should be dismissed as to certain parties respondent, and which determined all the other issues in favor of the complainant. It was again heard on motion for interlocutory injunction, and an opinion passed down on August 15, 1904, 132 Fed. Rep. 168. The case has now been heard on bill, answer and proofs. The substantial conditions on the present hearing are so little changed from what they were at the hearing on the demurrers, and the order on the demurrers so far disposed of the issues in the case, that we have occasion to discuss only a very few topics. Some propositions were argued somewhat more fully by the respondents than when the case was submitted on the demurrers; but, with the following exceptions, we do not think it advantageous to attempt to review the question which we then disposed of.

The respondents especially urge on us that the remedy must be limited to assets which are localized within this district by the proceedings in the Probate Court for Suffolk County in Massachusetts, all of which were intended to be described in the decree for an interlocutory injunction which was entered on the sixth day of September, 1904. As this proceeding is under Section 738 of the Revised Statutes, and can only be sustained in that aspect, it is very plain that the position of the respondents in this respect is correct, and the decree to be entered hereon must be framed accordingly, subject

only to the necessity of entering personal judgments to which the liens asserted herein are incidental.

The respondents also claim that John A. Davis, who was the principal legatee in the will of Andrew J. Davis as the same was offered for probate, has deceased, and that no person has been appointed by the Probate Court within this jurisdiction as the legal representative of his estate, so that, therefore, there is an inevitable lack of necessary parties on the present bill. Under the circumstances of the case, however, John A. Davis, or his estate, stands, so far as these proceedings are concerned, in the same position as Mrs. Ellen S. Cornue, as explained in our opinion passed down on December 30, 1903, already referred to. If any representative of the estate of John A. Davis had been joined as a respondent in this bill, he would necessarily be dismissed therefrom, so that the proposition of the respondents in this particular is wholly ineffectual.

The respondents urge again on us the fact that the Probate Court for the county of Suffolk formally probated the will of Andrew J. Davis as a will, so that, whatever the nature of the proceedings in Montana may be, the relations in the State of Massachusetts are those of legatees; and, also, so that, according to the probate records of Massachusetts, the estate of John A. Davis as principal legatee represents, and must be the sole representative of, all the interests sought to be reached by this bill. It is, therefore, maintained that, on a distribution made by that Probate Court, no apparent interest would be vested in any of the present respondents. This, however, is all a matter of form with which equity does not seriously trouble itself. It may be that, inasmuch as the probate proceedings in Massachusetts are purely ancillary, and so appear on their face when taken altogether, the probate tribunals in that State will regard the proceedings in Montana as dominant, and make decrees of distribution accordingly, if they order distribution. Of course, we do not presume to undertake to determine what they ought to do in this respect, nor do we know what they ought to do; but, again, whatever may be the result of their proceedings in distribution, and whosoever may be regarded by them as the proper nominal distributees, such result involves a mere question of form so

far as we are concerned. Our only duty is to reach the beneficial interests as they must finally rest.

It is now urged on us for the first time that the agreement made with Mr. Ingersoll which forms the basis of this bill, created no lien, either legal, equitable or statutory. We determined on the demurrers that there is no statutory lien. The respondents now press on us that the words in the agreement of August 17, 1891, as follows: "in no event is the said J. A. Coram obligated, except to pay such fee out of the funds secured from the estate of J. A. Davis, deceased", etc., created no legal or equitable lien; and they cite several authoritative decisions which they maintain sustain that proposition. We came to a different conclusion on the determination of the demurrers, and remain of the same opinion. Whether or not a particular agreement creates a lien is a matter of construction. In this case, the fact that there was no primary personal responsibility on J. A. Coram especially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer and proofs, the bill must be sustained.

Consequently, there will be a decree for the complainant, which will provide as follows:

First, it will direct that the bill be dismissed with costs as against the parties as to whom the order on the demurrers determined that it should be dismissed.

Second, the decree will declare the amount remaining due to the estate of Robert G. Ingersoll according to the agreement of August 17, 1891, with interest to be computed on the balance at six per cent per annum, simple interest, from the time the compromise agreement described in our former opinions became finally effective as a judgment of the courts of the State of Montana, such interest to be included with the balance remaining unpaid on the principal, making a total amount, with a further declaration that such total amount carries interest at the rate of six per cent per annum, simple interest, from the entry of the decree herein.

Third, it will declare a personal judgment against Henry V. Root for the amount so determined, to be executed against him so far as

the same is not liquidated from the interests subject to the complainant's lien.

Fourth, it will make perpetual the interlocutory injunction granted on September 6, 1904, so far as the same is applicable to the final decree.

Fifth, it will declare that nothing in the decree is intended to contravene, or shall contravene, any action of any probate tribunal in Massachusetts with reference to distribution, or to any order or judgment remitting to the courts of the domicile.

Sixth, it will declare a lien or liens in favor of the complainant for the total amount remaining due as stated, with interest thereon from the entry of the decree as stated, on the several interests which this opinion, as interpreted in connection with our former opinions, finds to be subject thereto; and, in this respect it shall state in detail and clearly the property within this jurisdiction which, according to said opinions, is subject to such decree, and describe specifically the separate portions thereof subject thereto, and by whom each of the same was originally owned or possessed, and by whom each is at the entry of the decree owned or possessed.

Seventh, it will declare that such lien attaches, and shall attach, to each of said several interests and the proceeds of each, by whomsoever received and into whosesoever hands the same may come, whether the same are received by virtue of any order, judgment or decree of any probate tribunal or other tribunal within the Commonwealth of Massachusetts, or within the State of Montana, or elsewhere.

Eighth, it will provide distinctly and in detail for marshalling as between all of said shares and interests, and between all parties respondent in this bill who are not dismissed therefrom, and especially with reference to said Henry A. Root and Joseph A. Coram, and each of them; but it shall be declared that all of said shares and interests are jointly and severally liable, so that any marshalling shall not prejudice the complainant.

Ninth, it will provide for personal judgment against said Joseph A. Coram so far as he has received, or may receive, the proceeds of the shares of the assets within this jurisdiction pertaining originally to Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar, Ellen S.

Cornue, or Henry A. Root, as stated in said agreement of August 17, 1891, except so far as he may be relieved by a marshalling to be provided for as already stated.

Tenth, it may, if necessary, provide for such process or supplemental proceedings as may be required on the entry of said decree, or from time to time thereafter, to secure the proceeds of said shares or interests, or either of them, subject to the marshalling as already stated, and the application of said shares, or interests, or either of them, or proceeds thereof, to the extinguishment of the amount remaining due to the estate of Robert G. Ingersoll at the entry of this decree, with interest thereon, all as already stated.

Eleventh, it will provide for the recovery of a single bill of costs by the complainant against Henry A. Root and Joseph A. Coram.

Let the complainant file a draft decree, in accordance with our opinion passed down this day, on or before the fourth day of April next, the respondents to file corrections thereof on or before the eighteenth day of April next, all in accordance with Rule 21.

PETITION FOR APPEAL.

Filed June 13, 1905.

Joseph A. Coram, Henry A. Root and Charles H. Palmer, trustee, three of the respondents in the above-entitled cause, conceive themselves to be aggrieved by the decree made and entered on the third day of May, 1905, in the above-entitled cause, and hereby appeal from said decree to the United States Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

They further say that the respondents Andrew J. Davis, Jr., trustee, John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, Charles H. Ladd, Charles H. Ladd, as administrator of the estate of Elizabeth S. Ladd, deceased, and Mary

Louise Dunbar, the remaining respondents in the above-entitled cause, have refused to join in this appeal, as appears by the notice to them and indorsement thereon filed herewith.

JOSEPH A. CORAM,
HENRY A. ROOT,
by their Solicitor,
LOUIS D. BRANDEIS.
CHARLES H. PALMER, *Trustee,*
by his Solicitor,
FREDERICK N. WITH.

ASSIGNMENT OF ERRORS.

(FILED JUNE 13, 1905.)

Now come the defendants Joseph A. Coram, Henry A. Root, Charles H. Palmer, trustee, and say that in the record and proceedings in the above-entitled cause and in the final decree made and entered therein on the third day of May, 1905, there is manifest error, and for error the said defendants assign the following:

FIRST. The Court erred in decreeing that there is due and owing to complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, on the contract in writing, dated August 17, 1891, made between Henry A. Root and Joseph A. Coram and Robert G. Ingersoll, a copy of which is annexed to the bill, and marked "Exhibit B", the principal sum of ninety-five thousand dollars ($95,000) with interest thereon at six per cent. from August 26, 1897, amounting to the sum of one hundred and thirty-eight thousand eight hundred and ten and 83/100 dollars ($138,810.83).

SECOND. The Court erred in decreeing that the defendant Henry A. Root, is personally indebted to this complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, on said contract, in the sum of one hundred and thirty-eight thousand eight hundred and ten and 83/100 dollars ($138,810.83).

THIRD. The Court erred in not decreeing that the defendant Henry A. Root is indebted to the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, on said contract, in no amount whatever and in not dismissing the bill of complaint as against the said Root.

FOURTH. The Court erred in decreeing to the complainant, as such administratrix, against the defendant Henry A. Root, interest upon said principal sum of ninety five-thousand dollars ($95,000) found to be due her on said contract, from August 26, 1897, instead of from the date of the filing of the bill of complaint herein, namely, June 15, 1903.

FIFTH. The Court erred in awarding the costs in this action to the complainant as such administratrix, as against the defendant Henry A. Root.

SIXTH. The Court erred in decreeing that the defendant Joseph A. Coram is personally liable to complainant, as such administratrix, for the payment of said indebtedness, costs and interest thereon, to the full amount which he has received or may be entitled to receive, from the shares of the estate of Andrew J. Davis, deceased, acquired for Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Corbaz and Henry A. Root, or either of them, under or pursuant to the judgment of the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, made August 21, 1897, or under or pursuant to the instruments of writing mentioned in said judgment, directly or through Palmer and Davis, Jr., as trustees, or either of them.

SEVENTH. The Court erred in not decreeing that the defendant Joseph A. Coram is indebted to the complainant, as such administratrix, on said contract, in no amount whatever and in not dismissing the bill as against the said defendant Joseph A. Coram.

EIGHTH. The Court erred in decreeing that the defendant Joseph A. Coram is indebted to the complainant, as such administratrix, for any interest upon the principal sum of ninety-five thousand dollars ($95,000) between August 26, 1897, and the filing of the bill of complaint in this action on June 15, 1903.

NINTH. That the Court erred in decreeing that the defendant Joseph A. Coram is indebted to the complainant, as such administratrix, for the costs in this action or any part thereof.

TENTH. The Court erred in decreeing that the defendant Joseph A. Coram has had and received money heretofore distributed from the estate of Andrew J. Davis, deceased, to Elizabeth

S. Ladd and Mary Louise Dunbar, to the amount of one hundred and seven thousand dollars ($107,000), and also their interests in certain real property heretofore distributed from said estate of value exceeding a million dollars ($1,000,000).

ELEVENTH. The Court erred in decreeing that by virtue of the decree of the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, made on August 24, 1897, and the instruments of writing therein mentioned, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cornue and Henry A. Root were adjudged and they and their successors in interest became entitled to have and receive two hundred and fifty-eleven hundredths (250/1100) of all the estate and property of Andrew J. Davis, deceased, directly, and also to have and receive two hundred sixty-five and one half-eleven hundredths (265½/1100) of all the estate of said decedent in kind, to be distributed to Palmer and Davis, Jr., as trustees, in trust for the use and benefit of the said five heirs of Andrew J. Davis, deceased.

TWELFTH. The Court erred in decreeing that the defendants Coram and Root became and are entitled to have and receive, directly, and through Palmer and Davis, Jr., as trustees, four hundred fifteen and one half-eleven hundredths (415½/1100) of all the estate of Andrew J. Davis, deceased, on distribution thereof, and that they have had and received that proportion of three hundred seventy-four thousand nine hundred and seven and ninety-one one hundredths dollars ($374,907.91) in money, and the same proportion of real property of value exceeding a million dollars ($1,000,000), heretofore distributed from said estate to said five heirs and their successors in interest, directly and through Palmer and Davis, Jr., as trustees, pursuant to said judgment of said District Court of Montana and the instruments in writing therein mentioned.

THIRTEENTH. The Court erred in decreeing that the said five heirs of Andrew J. Davis, deceased, and their legal representatives and successors in interest became and are entitled to have and receive directly and through Palmer & Davis, Jr., as trustees, pursuant to the judgment of the District Court of Montana, made August 24, 1897, and the instruments of writing therein mentioned, five hun-

dred fifteen and one half-eleven hundredths (515½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, and in the custody of the defendant Leyson, as administrator of said estate in Massachusetts.

FOURTEENTH. The Court erred in decreeing that the defendants Coram and Root own and are entitled to have and receive four hundred fifteen and one half-eleven hundredths (415½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, by order of the proper court having probate jurisdiction thereof in the administration and distribution of the estate of Andrew J. Davis, deceased.

FIFTEENTH. The Court erred in so far as it decreed that pursuant to the judgment of the District Court of Montana, made August 24, 1897, the said five heirs of Andrew J. Davis, deceased, or either of them or the legal representatives and successors in interest of them or either of them, ever became entitled, directly, or through Palmer and Davis, Jr., as trustees, to have and receive any part of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, inasmuch as said judgment can have no force and effect outside of the State of Montana.

SIXTEENTH. The Court erred so far as it decreed that pursuant to the instruments of writing mentioned in the judgment of the District Court of Montana, made August 24, 1897, the said five heirs of Andrew J. Davis, deceased, or either of them, or the legal representatives and successors in interest of them or either of them, ever became entitled, directly, or through Palmer and Davis, Jr., as trustees, to have and receive any part of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, inasmuch as said instruments of writing were not set forth in the bill of complaint and were referred to therein not as the basis for any relief but merely incidentally as explaining the two decrees of the District Court of Montana referred to in the bill of complaint, namely, one made March 27, 1895, and one made August 24, 1895.

SEVENTEENTH. The Court erred in decreeing that to secure the

said indebtedness of one hundred thirty-eight thousand eight hundred and ten and 83/100 dollars ($138,810.83) found to be due and owing to the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, a lien exists upon the four hundred fifteen and one half-eleven hundredths (415½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in Massachusetts, so found to be owned by the defendants Coram and Root.

EIGHTEENTH. The Court erred in decreeing that such lien attaches and adheres to said four hundred fifteen and one half-eleven hundredths (415½/1100) of said money and bonds and increase thereof wherever the same may be taken and in the custody of whomsoever the same may come until said lien is fully paid, satisfied and discharged.

NINETEENTH. The Court erred in decreeing that the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, have and receive from the defendants Coram and Root the sum of one hundred thirty-eight thousand eight hundred and ten and 83/100 dollars ($138,810.83) and two thousand five hundred and twenty-three and 92/100 dollars ($2523.92) costs taxed with interest on both said sums at 6 per cent per annum from May 3, 1905, so far as the same can be satisfied out of said four hundred fifteen and one half-eleven hundredths (415½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, which may be ordered, adjudged or decreed by the Probate Court of Suffolk County, Massachusetts, to be distributed, paid over or delivered to Henry A. Root, Sarah Maria Cummings, Herbert P. Cummings, executor of Sarah Maria Cummings, Ellen S. Cornue, her husband, Joshua G. Cornue, Elizabeth S. Ladd, her husband, Charles H. Ladd, Charles H. Ladd, as administrator of the estate of Elizabeth S. Ladd, deceased, Mary L. Dunbar, Joseph A. Coram, as assignee, grantee or successor in interest of any of said persons, Charles H. Palmer and Andrew J. Davis, Jr. as trustees, or to their or either of their successors, agents, attorneys, trustees, legal representatives or assigns.

TWENTIETH. The Court erred in decreeing that the complainant, as such administratrix, have and receive the sums mentioned in the

19th assignment of error, so far as the same can be satisfied out of said four hundred fifteen and one half-eleven hundredths (415½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, which may be ordered, adjudged or decreed by the District Court of the Second Judicial District of the State of Montana, within and for the county of Silver Bow, or by any court now having or which may hereafter have probate jurisdiction of said money and bonds to be distributed, paid over or delivered to the persons named in the 19th assignment of error.

TWENTY-FIRST. The Court erred in decreeing that the lien found to exist upon said four hundred fifteen and one half-eleven hundredths (415½/1100) of said money and bonds be foreclosed to secure payment of said one hundred thirty-eight thousand eight hundred and ten and 83/100 dollars ($138,810.83) and costs and interest.

TWENTY-SECOND. The Court erred in decreeing that said four hundred fifteen and one half-eleven hundredths (415½/1100) of said money and bonds in the custody of the defendant Leyson, as administrator of the estate of Andrew J. Davis, deceased, situate in Massachusetts, be holden subject to the lien foreclosed and subject to the terms and provisions of the decree herein wheresoever said money and bonds may be taken or removed, whether within or without the State of Massachusetts, and in the custody of whomsoever the same may come, subject only to the proper and lawful probate administration of said money and bonds as part of the estate of Andrew J. Davis, deceased, pursuant to the orders, judgments or decrees of the Probate Court of Suffolk County, in the State of Massachusetts, now having probate jurisdiction thereof, or of any Court which may hereafter have probate jurisdiction thereof, to administer the same as part of the estate of Andrew J. Davis, deceased, in the due and lawful course of administration thereof.

TWENTY-THIRD. The Court erred in decreeing that as soon as probate administration of said money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, is finished and distribution thereof is ordered by the Probate Court having jurisdiction thereof, Leyson, administrator in custody thereof, or his successor or successors in custody thereof,

shall set apart and bring into this court and deliver to the clerk thereof four hundred fifteen and one half-eleven hundredths (415½/1100) parts of such portion of said money and bonds as may be ordered distributed to Henry A. Root, Sarah Maria Cummings, Herbert P. Cummings, as executor of Sarah Maria Cummings, deceased, Ellen S. Cornue, or her husband, Joshua G. Cornue, Elizabeth S. Ladd, or her husband, Charles H. Ladd, or Charles H. Ladd, as administrator of the estate of Elizabeth S. Ladd, deceased, Mary L. Dunbar, Joseph A. Coram, as assignee, grantee or successor in interest of any of said persons, and to Charles H. Palmer and Andrew J. Davis, Jr., as trustees for said persons, or to their or any of their successors, agents, attorneys, trustees, legal representatives or assigns, to be applied to the satisfaction of said lien thereon hereby foreclosed.

TWENTY-FOURTH. The Court erred in decreeing that in the event any part of said money and bonds herein mentioned and described as subject to said lien hereby foreclosed thereon, shall be distributed or delivered to said Palmer and Davis, Jr., as trustees, or either of them, in trust for the use and benefit of said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Ladd, Charles H. Ladd, Mary L. Dunbar, or the legal representative, attorney, agent, trustee, assignee, grantee or successor in interest of any of them, the said Palmer and Davis, Jr., as such trustees, shall set apart and bring in and deliver to the clerk of this court to be applied to the satisfaction of said lien and indebtedness owing and due to complainant, the entire portion of said money and bonds which may be distributed or delivered to said Palmer and Davis, Jr., as trustees, to which said Henry A. Root, Elizabeth S. Ladd and Mary Louise Dunbar are entitled, and one third of the portion of said money and bonds which may be distributed to said trustees, to which said Sarah Maria Cummings and Ellen S. Cornue are entitled, by virtue of said decree of said District Court of Montana, made August 24, 1897, or the instruments of writing mentioned in said decree creating a trust in said Palmer and Davis, Jr., in behalf of said persons hereinabove mentioned, with others, and that Palmer and Davis, Jr., as trustees, as aforesaid, and each of them, and their and each of their successors in said trust

are hereby enjoined and required to perform the conditions and requirements of this decree, and to withhold from delivering to said five heirs of Andrew J. Davis, deceased, or the said Joseph A. Coram, or either of them, or their or either of their legal representatives, agents, attorneys, or assigns, any part of said four hundred fifteen and one-half eleven hundredths (415½/1100) of said money and bonds which may come into the possession of said Palmer and Davis, Jr., as such trustees, or either of them, or their or either of their agents, attorneys, legal representatives, successors or assigns, which said lien existing in favor of complainant, Eva A. Ingersoll, as administratrix as aforesaid, is hereby foreclosed.

TWENTY-FIFTH. The Court erred in decreeing that the injunction order made and entered in this action September 6, 1904, be made final and perpetual.

TWENTY-SIXTH. The Court erred in decreeing that Leyson, as administrator of said estate of Andrew J. Davis, deceased, in custody of said money and bonds now situated and being in the State of Massachusetts, be enjoined from removing out of Massachusetts four hundred fifteen and one half-eleven hundredths (415½/1100) thereof unless and until the proper court within Massachusetts having probate jurisdiction of said money and bonds by its final decree, directs said Leyson, as such administrator, to remove said four hundred fifteen and one half-eleven hundredths (415½/1100) of said money and bonds out of Massachusetts.

TWENTY-SEVENTH. The Court erred in decreeing that said Leyson be enjoined from distributing, paying over or delivering to Henry A. Root, Sarah Maria Cummings, Herbert P. Cummings, as executor of Sarah Maria Cummings, deceased, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Ladd, Charles H. Ladd, individually, or as administrator of the estate of Elizabeth S. Ladd, deceased, Mary Louise Dunbar, Joseph A. Coram, or Charles H. Palmer and Andrew J. Davis, Jr., as trustees, or either of them, or their or either of their attorneys, agents, legal representatives, successors or assigns, or to any other person whomsoever without the order of this Court, any part of said four hundred fifteen and one half-eleven hundredths (415½/1100) of said money and bonds upon which said lien is by this decree foreclosed, at any time or place, or pursuant

to the order, judgment or decree of the Probate Court in and for the county of Suffolk, Massachusetts, or pursuant to the order of any other Court, whether within or without the State of Massachusetts.

TWENTY-EIGHTH. The Court erred in decreeing that when such distribution is ordered or directed by the judgment, order or decree of any Court having probate jurisdiction of said money and bonds in the administration and distribution thereof, the said Leyson, as such administrator, or his successor or successors in said office, shall forthwith bring in and deliver to the clerk of this court four hundred fifteen and one half eleven-hundredths ($415\frac{1}{2}/1100$) parts of said money and bonds and the increase thereof, upon which said lien is by this decree foreclosed, to be applied to the satisfaction of said indebtedness and lien.

TWENTY-SIXTH. The Court erred in decreeing that in the event said Leyson resigns or be removed from said office of administrator of the estate of Andrew J. Davis, deceased, or from any other cause it shall become necessary or proper for him or his legal representatives to transfer or deliver possession of said money and bonds constituting the estate of Andrew J. Davis, deceased, in Massachusetts, to a successor or successors in said office of administrator or other custodian, then the said Leyson, or his legal representative, before making such transfer or delivery, shall report such proposed action in the premises to this Court, and make such delivery or transfer of possession of said money and bonds in the presence of this Court, whereupon this Court will make such substitution of the successor or successors of said Leyson, as such administrator, or otherwise, who may come into possession of said money and bonds in his place as party or parties to this action as may be proper.

THIRTIETH. The Court erred in decreeing that in the event of said Leyson's death, his legal representative, who may come into possession, custody or control of said money and bonds, shall, upon notice of this decree, be bound by the terms hereof touching said Leyson and his custody of said money and bonds upon which said lien is hereby foreclosed, and such legal representative of said Leyson, if any there shall be, is hereby enjoined to act accordingly.

THIRTY-FIRST. The Court erred in decreeing that the defendants Coram, Root, and Palmer and Davis, Jr., as such trustees, and their

and each and all of their attorneys, agents, legal representatives, successors and assigns, be enjoined absolutely from asking, demanding or receiving from said Leyson, as administrator of said estate of Andrew J. Davis, deceased, or his successor or successors, either in the State of Massachusetts or in the State of Montana or elsewhere, or from any administrator of the estate of Andrew J. Davis, deceased, in the State of Massachusetts or in the State of Montana or elsewhere, or from any other custodian thereof, any part of said four hundred fifteen and one half-eleven hundredths (415½/1100) of said money and bonds upon which said lien existing in favor of complainant is by this decree foreclosed, and from taking, carrying away, disposing of, or interfering with the same or any part thereof.

THIRTY-SECOND. The Court erred in decreeing that a deficiency judgment may be hereafter entered against the defendant Henry A. Root and recovered from the defendants Root or Coram, jointly or severally, to an amount not exceeding one hundred and seven thousand dollars ($107,000), and that any deficiency judgment in excess of said amount be recovered from the defendant Root, and that execution issue for recovery thereof accordingly.

THIRTY-THIRD. The Court erred in decreeing that Herbert P. Cummings, as executor of the last will and testament of Sarah Maria Cummings, deceased, is not a necessary party to this action.

THIRTY-FOURTH. The Court erred in decreeing that Herbert P. Cummings, as executor of the last will and testament of Sarah Maria Cummings, deceased, be dismissed as a party defendant from this action, and in his absence, and without giving him an opportunity to be heard, declaring a lien in favor of the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, on one third of the interest in the estate of Andrew J. Davis, deceased, in Massachusetts, which the Court found his testatrix was entitled to have and receive from said estate.

THIRTY-FIFTH. The Court erred in decreeing that Ellen S. Cornue is not a necessary party to this action and in declaring a lien in favor of the complainant, as administratrix of Robert G. Ingersoll, deceased, on one third of the interest in the estate of Andrew J. Davis, deceased, in Massachusetts, which the Court found she was entitled to have and

receive from said estate, without giving her an opportunity to be heard in opposition to said action.

THIRTY-SIXTH. The Court erred in decreeing, in the absence as a party to this action, of any legal representative of the estate of John A. Davis, deceased, the principal devisee and legatee under the will of Andrew J. Davis, deceased, that Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cornue, Henry A. Root and Joseph A. Coram, as assignee of Elizabeth S. Ladd and Mary Louise Dunbar, are entitled to have and receive five hundred fifteen and one half-eleven hundredths (515½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, and in declaring and foreclosing a lien in favor of the complainant, as administratrix of the estate of Robert G. Ingersoll, deceased, upon four hundred fifteen and one half-eleven hundredths (415½/1100) of said five hundred fifteen and one half-eleven hundredths (515½/1100) of said money and bonds.

THIRTY-SEVENTH. The Court erred in decreeing, in the absence of Thea J. Davis, the widow of John A. Davis, and Edward Asa Davis, George Wesley Davis, Charles Granville Davis, Morris Allard Davis, Andrew J. Davis and John E. Davis, the children and heirs-at-law and next of kin of John A. Davis, deceased, that Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cornue, Henry A. Root and Joseph A. Coram, as assignee of Elizabeth S. Ladd and Mary Louise Dunbar, are entitled to have and receive five hundred fifteen and one half-eleven hundredths (515½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in the Commonwealth of Massachusetts, and in declaring a lien upon four hundred fifteen and one half-eleven hundredths (415½/1100) of said five hundred fifteen and one half-eleven hundredths (515½/1100).

THIRTY-EIGHTH. The Court erred in decreeing, in the absence of Thea J. Davis, Andrew J. Davis, Jr., John E. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Ellen S. Cornue, Joshua G. Cornue, Charles H. Ladd, Sarah M. Cummings, Edward A. Davis, Harriet R. Sheffield, Henry A. Davis, Helen M. Davis, Tenie B. Davis, Gertrude F. Davis, Mary A. Davis, Rosine B. Root, Elizabeth S. Bowdoin, John A. Bowdoin, Harriet Wood, Calvin P.

Davis, Elizabeth A. Smith and J. Howard Smith, parties to the four instruments of writing mentioned in the judgment of the District Court of Montana, made August 24, 1897, other than Root and Coram, that Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cornue, Henry A. Root and Joseph A. Coram, as assignee of Elizabeth S. Ladd and Mary Louise Dunbar, are entitled to five hundred fifteen and one half eleven-hundredths (515½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in Massachusetts, and in declaring a lien in favor of complainant, as administratrix of Robert G. Ingersoll, deceased, upon four hundred fifteen and one half-eleven hundredths (415½/1100) of said five hundred fifteen and one half-eleven hundredths (515½/1100).

THIRTY-NINTH. The Court erred in not sustaining the defence of *res adjudicata* set up in the answer interposed by Joseph A. Coram, Henry A. Root and others, and dismissing the bill of complaint.

FORTIETH. The Court erred in overruling the demurrer interposed to the bill of complaint herein by the defendants Coram, Root and others.

FORTY-FIRST. The Court erred in deciding that the bill of complaint herein contains facts sufficient to consitute a cause of action in equity.

FORTY-SECOND. The Court erred in not sustaining the demurrer of the defendants Coram, Root and others to the bill of complaint and in not dismissing the bill of complaint.

FORTY-THIRD. The Court erred in deciding that Root and Coram are entitled to four hundred fifteen and one half-eleven hundredths (415½/1100) of the money and bonds constituting the estate of Andrew J. Davis, deceased, in Massachusetts, instead of leaving the decision of the shares distributable to Root and Coram to the proper court having probate jurisdiction.

Wherefore the defendants pray that the said decree be reversed.

THADDEUS D. KENNESON,
LOUIS D. BRANDEIS,
for the Appellants.

SUMMONS AND SEVERANCE.

JUNE 13, 1905.

To ANDREW J. DAVIS, JR., *trustee*, JOHN H. LEYSON, *administrator of the estate of* ANDREW J. DAVIS, *deceased*, CHARLES H. LADD, CHARLES H. LADD, *as administrator of the estate of* ELIZABETH S. LADD, *deceased*, *and* MARY LOUISE DUNBAR, *and* HERBERT P. CUMMINGS, *executor of the will of* SARAH MARIA CUMMINGS, *deceased*:

You are hereby invited to join with us in prosecuting an appeal in the above-entitled cause, returnable to the United States Circuit Court of Appeals, for the First Circuit, to reverse the decree in the above-entitled cause rendered on the third day of May, A.D. 1905; if you do not join with us you will be deemed to have acquiesced in the said decree, and we shall prosecute said appeal without joining you as parties.

JOSEPH A. CORAM,
HENRY A. ROOT,
by their Solicitor,
LOUIS D. BRANDEIS.
CHAS. H. PALMER, TRUSTEE,
by his Solicitor,
FREDERICK N. WIER.

We acknowledge to have received the above notice this twenty-seventh day of May, A.D. 1905, and hereby decline to join in prosecuting the appeal therein referred to.

JOHN H. LEYSON,
by H. G. ALLEN.
ANDREW J. DAVIS, JR., TRUSTEE,
by H. G. ALLEN.
CHAS. H. LADD,
CHAS. H. LADD, ADMR.,
MARY LOUISE DUNBAR,
HERBERT P. CUMMINGS, EXECUTOR,
by F. N. WIER.

BOND TO PARTY ON APPEAL.

[Filed and Approved June 13, 1905.]

Know all men by these presents, that we, Joseph A. Coram and Henry A. Root, as principals, and the American Surety Company, of New York, as surety, are held and firmly bound unto Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, in the full and just sum of three hundred (300) dollars to be paid to the said Eva A. Ingersoll, as administratrix as aforesaid, her certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventh day of June, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts, in a suit in equity depending in said court between Eva A. Ingersoll, as administratrix as aforesaid, and said Joseph A. Coram and Henry A. Root and others, a decree was entered against the said Joseph A. Coram and Henry A. Root and others, and the said Joseph A. Coram and Henry A. Root having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Eva A. Ingersoll, as administratrix as aforesaid, citing and admonishing her to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the eleventh day of July, A.D. 1905.

Now, the condition of the above obligation is such, that if the said Joseph A. Coram and Henry A. Root shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH A. CORAM. [SEAL]
HENRY A. ROOT. [SEAL]
AMERICAN SURETY COMPANY
OF NEW YORK. [SEAL]
by Elthalet F. Philbrick,
Resident Vice-President.
Attest: Walter S. Bucklin,
Resident Ass't Secretary.

Sealed and delivered in presence of
H. W. Wesson.

Approved; but not to operate as a supersedeas.
W. L. Putnam,
Circuit Judge.

June 13, 1905.

MAY 27, 1905.

The above bond is hereby approved as to form and amount and notice of application for approval of surety waived.

HOLLIS R. BAILEY,
Attorney for EVA A. INGERSOLL, *Adm'x.*

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To EVA A. INGERSOLL, *as administratrix of the estate of* ROBERT G. INGERSOLL, *deceased*, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the eleventh day of July next, pursuant to an appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts, wherein Joseph A. Coram, of the city of Lowell, District of Massachusetts, Henry A. Root, of the city of Butte, State of Montana, and Charles H. Palmer, trustee, of the city of Boston, District of Massachusetts, are appellants and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM L. PUTNAM, Judge of the Circuit Court of the United States for the District of Massachusetts, this thirteenth day of June, in the year of our Lord one thousand nine hundred and five.

W. L. PUTNAM,
U. S. Circuit Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION.

JUNE 28, 1905.

Service of the within citation is hereby accepted.

EVA A. INGERSOLL,
as administratrix of the estate of
ROBERT G. INGERSOLL, *deceased*,
by her Attorneys,
E. N. HARWOOD.
HOLLIS R. BAILEY.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the four volumes, entitled as follows:

Volume I., Record for Complainant (pages 1 to 465);

Volume II., Record for Complainant (pages 1001 to 1291);

Volume III., Record for Defendants (pages 1501 to 1682);

Volume IV., Proceedings in said Circuit Court with References to Volumes I., II., and III. (pages 2001 [1701] to 2058 [1741]);

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings of said Circuit Court in the cause in equity entitled,

No. 1757.

EVA A. INGERSOLL, ADMINISTRATRIX, COMPLAINANT,

v.

JOSEPH A. CORAM ET AL., DEFENDANTS,

in said Circuit Court determined, the Opinion of the Circuit Court of March 22, 1905, the Petition for Appeal, the Assignment of Errors, the Summons and Severance, and the Bond to Party on Appeal, and also the original Citation issued upon the appeal of the defendants, Joseph A. Coram, Henry A. Root and Charles H. Palmer, trustee, in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this thirtieth day of August, A.D. 1905.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD

[FILED IN CIRCUIT COURT OF APPEALS JULY 20, 1905.]

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Friday, September 1, 1905.

FRANCIS C. LOWELL,

U. S. Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1906.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,
v.
EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE COLT, LOWELL AND ALDRICH, J.J.

OPINION OF THE COURT.

OCTOBER 16, 1906.

LOWELL, J. Andrew J. Davis died a citizen of Montana, leaving property both in Montana and in Massachusetts. John A. Davis, one of his next of kin, offered for probate in Montana a will which gave to him nearly the whole of this property. Certain other next of kin, desiring to contest the will, retained as counsel Robert G. Ingersoll, a citizen of New York, the plaintiff's intestate. Shortly afterwards two of these clients agreed with him in writing for his employment, and for a fee of $100,000 conditioned upon the defeat of the will.

The validity of the will was tried in Montana, and the jury disagreed. Thereafter, a compromise was entered into, by which Ingersoll's clients became entitled to a larger share of the Davis estate than would have fallen to them in intestacy. Only $5000 was paid to Ingersoll. His widow, as ancillary administratrix of his estate in Massachusetts, brought this bill in equity to obtain a decree

against one of the defendants personally for the payment of the contingent fee, and to establish a lien upon some part of the Davis estate in Massachusetts. On final hearing, the Circuit Court entered a decree for the complainant, from which the defendants have appealed. We need consider only one of their contentions, viz.: that the complainant is barred by a judgment in their favor entered in Montana. In order that this defence shall avail them, the defendants must show that the Montana judgment relied on was rendered, (1) for the same cause of action; (2) upon the merits; (3) between the same parties or their privies.

The present complainant, as administratrix of Ingersoll in New York, brought an action in Montana against the defendants in the case at bar. In addition to an allegation of the facts above stated, her complaint set out that Ingersoll had rendered the services for which the fee was to be paid, that his services had procured the compromise, and had defeated the will of Andrew J. Davis, so far as the defendants were concerned, whereby Ingersoll became entitled to the contingent fee as provided in the agreement, and to an equitable lien on the defendants' interest in the estate. An amendment added an allegation that, by reason of Ingersoll's prosecution of the suit to break the will, the representatives of John A. Davis were constrained to consent to the compromise, and that Ingersoll "counselled, advised, and aided in the making and effectuating the said compromise agreement." The plaintiff in the Montana suit made substantially the same case as that set out in the present bill. The cause of action was the same in both suits.

After Mrs. Ingersoll had begun suit in Montana, Harris was duly appointed Ingersoll's administrator in that State, and, on motion of Mrs. Ingersoll, the original plaintiff in the Montana proceeding and the complainant here, he was substituted for her as plaintiff in the former suit.

The defendants' answer in that suit denied that Ingersoll performed the services contemplated in the agreement, that his services procured the compromise, and that his prosecution of the suit to break the will constrained the representatives of Davis to consent thereto. It set up the Statute of Limitations of Montana, and further alleged that during Ingersoll's lifetime he, together with Root and Coram,

two of the defendants, upon a valuable consideration paid to Ingersoll by Root and Coram, "cancelled, revoked, satisfied, and held for naught" the agreement upon which the suit in Montana and this bill are founded. The plaintiff Harris in his "reply" denied that the contract was cancelled or revoked in any sense. In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, "the parties hereto being present in court as on Wednesday, December 10, 1902, and the jury being present and answering to their names, the further trial herein is by the court resumed now, the opening statement on the behalf of plaintiff is resumed, and being concluded, the introduction of testimony on behalf of plaintiff is commenced. Come now defendants, and object to the introduction of any and all testimony on behalf of plaintiff upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. After argument of counsel, the motion to exclude testimony is by the court sustained, to which ruling of the court plaintiff by counsel duly excepts and is by the court granted thirty days' additional time to prepare and serve bill of exceptions herein, and upon motion of counsel for defendants the complaint herein is by the court ordered dismissed . . . Whereupon the jury herein is discharged from further attendance of this cause." Thereafter judgment was rendered as follows: "This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the court and sustained, — Now, therefore, in consideration of the premises aforesaid and the law, It is ordered, adjudged and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $12.50. Done in open court this twelfth day of December, 1902." The bill of exceptions does not appear in our record, but the case was taken to the Supreme Court of Montana.

The only question presented to that court, under the ruling of the

court below and the plaintiff's exception thereto, was this: Did the complaint set forth facts sufficient to constitute a cause of action? On the one hand, the plaintiff contended that the compromise of the litigation was a defeat of the will, so far as Ingersoll's clients were concerned, and that the final decree which provided for a payment to the contestants of all they had claimed, although brought about by a compromise, was yet a complete performance by Ingersoll of the condition of the contract, and so entitled him to recover the stipulated fee. On the other hand, the defendants contended that the contract was conditioned upon a decree for the contestants setting aside the will; that the complaint itself showed that the payment to the contestants resulted, not from a successful contest but from a compromise of the contest; in other words, that the contract gave Ingersoll his contingent fee only if he conducted the contest to a successful termination, and that it did not provide for his payment in case the litigation was compromised by the parties, and the will admitted to probate; that the failure to continue the litigation and the subsequent resort to negotiation and compromise, as set forth in the bill, were in effect an abandonment of the contract, and left to the plaintiff only the right to recover upon a *quantum meruit* for services other than those mentioned therein.

After stating the facts as alleged in the complaint, the opinion of the Supreme Court of Montana began thus: —

"The action of the court in sustaining the defendants' objections to the evidence presents for decision the question whether the allegations in the complaint, which we have stated in substance, warrant recovery by the plaintiff. The complaint declares upon the contract, and unless it appears therefrom that the plaintiff's intestate fully performed the contract on his part, or facts and circumstances are alleged justifying a failure in any particular, a recovery cannot be had."

The court analyzed the contract, and adopted the defendants' construction of it. The opinion went on to declare that neither by his general retainer nor by the terms of the contract had Ingersoll authority to compromise the controversy, but only to prosecute the suit: therefore his fee was payable only upon a favorable decree, followed by an actual distribution. When authority to compromise was conferred upon him, there was "a mutual abandonment

of the contract" and "when the compromise was consummated the contract could not be performed." "The allegations of the complaint fall very far short of showing an entire performance of the contract." The mutual abandonment of the contract to which the court referred was that exhibited by the allegations of the complaint itself, and had nothing to do with the alleged cancellation of the contract for a valuable consideration set up in the answer and denied in the replication. From the opinion of the Supreme Court it thus plainly appears that the judgment of that court in favor of the defendants was based altogether upon the case presented by the complaint. No evidence and no amendment consistent with that complaint could have altered that judgment. If the contract made Ingersoll's fee contingent upon a defeat of the will by a successful contest (which was the interpretation put upon the contract by the Montana court), then Ingersoll never performed his contract, and could not maintain suit for the $100,000 fee. The Montana judgment was therefore based upon no formal defect in the plaintiff's pleadings, but upon the substantial want of merit in his cause of action.

If we pass to more technical considerations, we shall find that the defendant's objection "to the introduction of any and all testimony on behalf of plaintiff upon the grounds that that complaint does not state facts sufficient to constitute a cause of action" was in effect a demurrer; and, at common law, a judgment upon a demurrer is deemed to be a judgment upon the merits. *Gould* v. *Railroad*, 91 U. S. 526, 533; *Bissell* v. *Spring Valley Township*, 124 U. S. 225; *Green* v. *Sanborn*, 150 Mass. 454. This is also the law of Montana, provided the demurrer goes to the merits. *Kleinschmidt* v. *Binzel*, 14 Mont. 31, 52. Sections 1004 and 1005 of the Montana Code of Civil Procedure provide that, with exceptions inapplicable here, all judgments shall be upon the merits. In *U. S.* v. *Parker*, 120 U. S. 89, 96, a statute of Nevada was construed, similar to the Montana statute mentioned above, and the Supreme Court held that all judgments, save those specifically excepted, were rendered on the merits. That the defendants' objection above referred to is deemed a demurrer in Montana further appears from the decided cases. *Wilson* v. *Harris*, 21 Mont. 371; *Hampton* v. *Indian Teleg. Co.*, 25 Mont. 122.

So, also, the similar practice by which, after answer, the plaintiff prays for "judgment on the pleadings." *Horsky* v. *Mann*, 13 Mont. 250; *Flagg* v. *Johnson*, 17 Mont. 469; *Ivernia S. & L. Soc.* v. *Thornton*, 117 Cal. 181, 182; *Wangenheim* v. *Graham*, 39 Cal. 169, 175. In *Hang* v. *Great Northern Railroad*, 102 Fed. Rep. 74, decided by the Circuit Court of Appeals in a case coming from North Dakota, where the practice seems to be like that in Montana, the court treated a motion to dismiss for the reason that the "complaint does not state facts sufficient to constitute a cause of action" as a judgment upon the pleadings, and put itself in agreement with the Supreme Court of Montana by stating that "a motion for judgment on the pleadings is in effect a demurrer, and, if sustained by the court and final judgment entered thereon, it has the same effect as if the demurrer to the complaint had been sustained and final judgment entered in favor of the party demurring." The court went on to observe that a judgment on the pleadings is a final judgment which cannot be collaterally attacked, and it held that a judgment of dismissal like that rendered by the court in Montana in the case at bar could be set up as *res judicata* to an action subsequently brought. To like effect is *In re Reynolds*, 133 Fed. Rep. 585, 127 Fed. Rep. 760, decided by the United States District Court in Montana. The judgment of the Montana court was rendered upon the merits. On this point we find ourselves in agreement with the learned judge in the Circuit Court.

We next consider if the judgment was rendered in a proceeding between the parties here before us. The defendants in the Montana suit were the defendants in the case before us. The complainant there defeated was Harris, Ingersoll's administrator, appointed in Montana. As has been stated, the complainant here is Mrs. Ingersoll, his administratrix appointed in Massachusetts. Is the former in privity with the latter so that a judgment against him binds her? To answer the question we must examine in some detail the doctrine of the privity of parties. If Ingersoll had sued these defendants in Montana in a court of competent jurisdiction, or had there been sued by them, a judgment in his favor or against him, either as plaintiff or as defendant, would have bound him and the defendants everywhere. After his death, his executors and administrators everywhere, speak-

ing generally, would take the benefit or the burden of the judgment, as the case might be, because all of them would be in privity with him as their testator or intestate.

Let us next suppose that Ingersoll had died before suit brought in Montana, leaving no judgment in his favor or against him, but only a chose in action wherein he was debtor or creditor. Let us suppose that his executor or administrator appointed in Montana sued there on this chose in action and recovered judgment as plaintiff. What would be the effect of this judgment upon the rights of his executor or administrator appointed in Massachusetts? The executor and the administrator represent their testator or intestate so that both are in privity with him. But there may be several executors and administrators, each appointed in a different jurisdiction. The authority of the executor to represent his testator and administer his goods is derived from the concurrent operation of the will and of the court of probate: the authority of the administrator is derived from the latter only. Every probate court, speaking generally, has jurisdiction of property found in its State. How far is administration in the several States independent, and how far does the act of one executor or administrator bind another?

That an executor in one jurisdiction is to some extent in privity with an executor appointed in another jurisdiction has been decided. *Hill* v. *Tucker*, 13 How. 458; *Goodall* v. *Tucker*, 13 How. 469; *Strange* v. *Carpenter*, 141 U. S. 87. How far this privity extends we need not here consider. Here we are dealing not with executors, but with administrators.

The case of an administrator is not that of an executor. In *Stacy* v. *Thrasher*, 6 How. 44, it was said: —

"An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him: but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts, as in the case of an administrator *de bonis non*, who may be truly

said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties." 6 How. 59, 60.

The law regards the estate of an intestate as divided between the different jurisdictions in which it is situated. The administrator represents his intestate only as to the property within the jurisdiction of the court which appointed him. Thus in *Stacy* v. *Thrasher* the court said further: —

"Each administrator is severally liable to pay the debts of the deceased out of the assets committed to him, and therein they resemble joint and several co-obligors in a bond. A judgment against one is no merger of the bond, nor is it evidence in a suit against the other. Their common liability to pay the same debt creates no privity between them, either in law or in estate. It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: that the judgment against the administrator is against the *estate* of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem* and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. A judgment may have the "effect" of a lien upon all the defendant's lands in the State where it is rendered, yet it cannot have that effect on lands in another State by virtue of the faith and credit given to it by the Constitution and act of Congress. The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

To the same effect are *McLean* v. *Meek*, 18 How. 16; *Johnson* v. *Powers*, 139 U. S. 156, 159; *Low* v. *Bartlett*, 8 All. 259.

Had Ingersoll been indebted to these defendants, and had they recovered judgment in Montana against Harris, his administrator appointed there, they could not have enforced that judgment here against Mrs. Ingersoll, the Massachusetts administratrix. If judg-

ment had gone in favor of Harris in a suit brought by them against him in Montana, it would not have availed Mrs. Ingersoll, sued by them on the same claim in Massachusetts.

But within his jurisdiction, and as to the property there situated, the "authority of each is paramount to the other." 6 How. 59. All property, according to its *locality*, is *deemed to pass to* someone administrator and, having been taken into his possession, it is wholly within his control, and beyond the control of any other. His dealing with that property binds it not only in his jurisdiction, but everywhere it may be carried. If he sells a horse, the vendee may take it to another jurisdiction, and may hold it against the administrator appointed there. If property situated in the jurisdiction of his appointment be taken from an administrator, the courts have held that he may follow it into another jurisdiction and there sue to recover it. *Crawford* v. *Graves*, 15 La. Ann. 243; *Adams* v. *Batchelder*, 173 Mass. 258, 259. If the Montana administrator had transferred a note due from a resident of Montana, the transfer would be valid as against all other administrators appointed elsewhere. *Wilkins* v. *Ellett*, 108 U. S. 256, 259. If the Montana administrator had discharged a note which was assets in his hands, no administrator elsewhere could have sued upon it. *Slocum* v. *Sanford*, 2 Conn. 533.

Accordingly, if an administrator sues upon a chose in action which is deemed to be assets in his jurisdiction, and by recovery merges the chose in action in a judgment, that judgment is assets in his hands, and may be sued upon elsewhere, even in a jurisdiction where he could not have brought suit upon the original claim. *Biddle* v. *Wilkins*, 1 Pet. 686; *Moore* v. *Petty*, 135 Fed. Rep. 668; *Talmage* v. *Chapel*, 16 Mass. 71. That the administrator's suit upon the judgment recovered may or must be brought in his own name, without qualification as administrator, is a requirement merely formal. Hence it follows that, if Harris had recovered judgment in the Montana suit, he could have sued thereon in Massachusetts, notwithstanding the present complainant's appointment as administratrix here.

Furthermore, it has been held that, if one administrator has brought suit upon a chose in action situated in his jurisdiction,

this suit is a bar to a suit brought upon the same claim by another administrator in his jurisdiction. *Sulz* v. *Mutual Reserve Fund*, 145 N. Y. 563; *Merrill* v. *New England Mutual Life Insurance Co.*, 103 Mass. 245, 249. This is true, though the original chose in action might have been deemed assets indifferently in either jurisdiction. 145 N. Y. 572, 573. The New York case in effect is like the case at bar, for, if the pendency of the suit brought in Montana by Harris would defeat this proceeding, a judgment against him in that suit must have the same effect *a fortiori*.

It remains only to consider if the chose in action sued on by Harris in Montana was there assets of Ingersoll's estate in his hands. Dicey on the Conflict of Laws, Am. ed., page 460. The defendants appeared there, and there carried on the litigation. Some of them were citizens of that State. The proposition has not been disputed in argument, but has been everywhere assumed, and especially by the present complainant, who there began the suit which Harris carried on. Though she did not herself continue the Montana suit, yet, having procured Harris's substitution in her place in the suit which she had begun, she cannot well say that the chose in action had not its situs in Montana and was not assets there.

Most of the cases cited by the defendant and by the learned judge of the court below have been already referred to. The debt of a person deceased, speaking generally, is due and may be sued on wherever his property is found. Every administrator, wherever appointed, is in privity with his intestate, and so is liable to pay his intestate's debt out of the funds in his hands. Until the debt is discharged, the creditor may sue administrators in as many jurisdictions as he can find them, since the debts of the intestate are owed, and so have their situs, in each and every one of these jurisdictions. But a given article of the testator's property, generally speaking, is not assets everywhere. It is ordinarily limited to a situs in one jurisdiction, and thus passes under the control of a single administrator. Even if its situs be deemed originally indifferent as between two jurisdictions, yet, if it is brought into suit in one of these by an administrator appointed there, the suit is taken to fix its situs and to exclude any other administrator from its control. *Sulz* v. *Mutual*

Reserve Fund, 145 N. Y. 563. This is the necessary result of the independence of administrators appointed in different jurisdictions. One cannot sue upon a judgment obtained by another, because administrators have no privity with each other, and every article of their intestate's property belongs to one or another of them independently, without right of interference in the rest. But the inability of one administrator to sue upon a judgment obtained by another does not empower the former to sue upon the original chose in action, which was the basis of the judgment. Debts owed to an intestate are not multiplied by the number of his administrators. There is but one debt, and when it has come into the hands of the appropriate administrator, other administrators are excluded from its control. If he reduces it to judgment, it is merged in that judgment, not only in his jurisdiction but everywhere. Conversely, if he seeks to collect an alleged debt found in his jurisdiction, and judgment goes against him, the defendant is everywhere relieved. A judgment for the plaintiff in a given suit is binding only so far as a judgment for the defendant in the same suit has the like effect.

Any other result would be intolerable. Had Harris obtained judgment against these defendants in the Montana suit, he could have sued on it in Massachusetts in his own name, and the Massachusetts administratrix could not have sued on it in her representative capacity. If the complainant's theory is sound, these defendants would then be liable in Massachusetts to two suits at the same time, one brought against them by Harris individually upon the Montana judgment, and another brought against them by Mrs. Ingersoll, as the Massachusetts administratrix, upon the original claim which had been merged in that judgment.

It follows that the matter herein litigated was adjudicated in Montana, inasmuch as the cause of action in the two proceedings was the same, the Montana judgment was rendered on the merits, and was so far between privies that the administratrix in Massachusetts is bound by the judgment rendered against the administrator in Montana.

The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to dismiss the bill, with costs; and the appellants recover costs of appeal.

DISSENTING OPINION.

ALDRICH, J. I cannot agree with the result reached in this case. I do not question, however, the general proposition that a judgment upon the merits by a state court having jurisdiction of the parties and the subject-matter is entitled to full credit, and conclusive as a bar to further litigation in another jurisdiction. This rule unquestionably applies not only to cases where the judgment is upon actual trial, but to cases heard upon demurrer going to the merits, and to cases set down for hearing upon bill and answer.

In my view the case under consideration is not fairly in either class, or in any class of cases to which the rule of *res judicata* applies. It is a fundamental and familiar principle that it is only in cases where it is clearly beyond question that a party's rights have been determined upon the full merits that the rule of *res judicata* holds good.

The majority opinion accepts the situation as one to be solved as though it were a judgment in a case standing upon general demurrer. I do not think it is at all like that. In a case on general demurrer, the defendant in effect says, take all the plaintiff alleges to be true, still he is not entitled to recover.

In the Montana case the defendants did not and could not stand upon general demurrer, for the reason that the complaint as amended contained general allegations of the plaintiff's rights, which, upon his theory, entitled him to judgment if all alleged was to be accepted as true. This was so because the plaintiff alleged the fact of the contest, which involved vast preparation and a six weeks' jury trial, in which the jury disagreed; he also alleged the compromise in which it was claimed that Colonel Ingersoll and the other parties to the contract participated, and which it is alleged was an expedient and effective means adopted by the parties for defeating the substantial provisions of the will, and of giving Colonel Ingersoll's clients all and more than they would have received if the contract had been literally and technically fulfilled and the estate administered intestate.

Under these allegations uninfluenced by the probative force of an answer, the plaintiff might have fairly contended that the contest and the disagreement of the jury at least suspended the probate of the will, and rendered it inoperative as an instrument to pass the property according to its terms, and that his evidence would show that the parties verbally accepted the compromise result in lieu of performance according to the strict letter of the contract.

To all intents and purposes, so far as the interests of those who employed Colonel Ingersoll were concerned, the will was defeated because it did not under the compromise operate in any substantial sense according to its terms. Its substantial provisions were defeated.

Where allegations are general in the assertion of a right, it is permissible to explain them by evidence, and, if there is any view upon which the allegations can be accepted as sufficient in law, judgment will not go against the plaintiff upon demurrer.

Although the allegations of a complaint may not show performance strictly like that provided for in the contract, if the allegation is that that kind of a performance was performance under the contract, it necessarily presents a situation to be aided by subsequent pleadings and by proofs, as, for instance, where it is claimed that the alleged performance was to be accepted and paid for as a better, though technically somewhat different, performance than that contemplated by the original contract. Like a contract to build a house or a bridge according to written specifications, and where the parties by agreement, and in order to meet exigencies developed in the progress of performance, substitute a different way of doing it at and for the contract price. The allegations of performance must be aided in such a case by proofs upon issues properly joined by subsequent pleadings. At all events, the defendants did not demur, but answered, alleging certain facts and setting forth their side of the controversy, and, among other things, they alleged that the consideration for the contract was not truly stated in the complaint; that Colonel Ingersoll received five thousand dollars ($5000) in full for his services and expenses and in revocation of the contract; that the compromise was not effectual in defeating the will, so far as the rights of Root and the other Ingersoll clients were concerned;

that the compromises were negotiated by the parties and counsel other than Ingersoll, and that Colonel Ingersoll did not perform any services other than those in assisting in and endeavoring to enforce the contest of Root and others.

To the answers, and upon all these matters, the plaintiff filed a replication, joining issue, and denied that the contract for the one hundred thousand dollar fee was ever abandoned, and alleged that it was in force and fully performed as alleged.

To the answers, thus raising mixed questions of law and fact as to performance, and as to other aspects of the case, as well as the question of fact as to Colonel Ingersoll's service in procuring the compromise which, it is alleged, was effectual in defeating the will, the plaintiff had the right to reply, and to controvert the various matters alleged therein. *United States* v. *Dalles Military Road Co.*, 140 U. S. 599, 616, 617.

The Montana court ignored the issues raised by the answer and the replication, denied to the plaintiff his right of trial and all opportunity to introduce proofs, and assumed to decide the case upon the bill of complaint, notwithstanding the fact that the bill had been answered and issues joined by replication upon questions of fact and upon mixed questions of law and fact.

It is quite difficult to find warrant for this, or for basing the decision, as was done, upon the ground of mutual abandonment in view of the emphatic allegations of the replication to the contrary effect. This is, however, a question not to be discussed here except so far as it bears upon the question, which we must consider, whether there was a determination of the rights of the parties in Montana upon the full merits.

The case was never set down for determination upon demurrer. The case was never set down for hearing upon bill and answer nor was it a case where the defendant moved for judgment on all the pleadings. The plaintiff never waived his constitutional right to a trial or his right to introduce proofs, but, on the contrary, insisted upon his rights in that respect. Issues of fact being joined, it was the fundamental right of the plaintiff to introduce his proofs, explaining the allegation of performance and his proofs controverting the allegations of the answer.

In *Martin* v. *Texas*, 200 U. S. 316, the right to introduce proofs in support of a material allegation was recognized as an essential right, and it was there said if the court had refused to admit evidence, or if the opportunity to establish the alleged facts had been denied, the judgment would be reversed.

The State law as applied in the Montana case did not accord to the plaintiff "due process of law." It is said in *Howard* v. *Kentucky*, 200 U. S. 164, 173, that it may be admitted that the words "due process of law," as used in the Fourteenth Amendment, protect fundamental rights and that the inquiry is, did the State law as applied afford due process as those words are used in the Fourteenth Amendment? Therefore, under the circumstances, it is not so much a question here as to what the Montana law and practice is, as whether the kind of a trial had in Montana afforded to the plaintiff the opportunities usually accorded to a party under "due process of law" in courts administering justice and establishing rights according to the general course of law and equity. Still, while saying this, I by no means concede that the Montana law is correctly stated in the majority opinion, or that the Montana code practice is such as justifies what was done in this case in that State.

The Montana record shows, as will be seen by reference to the statement which precedes the opinion of the Montana Supreme Court, that the case regularly came on for trial in Montana upon the issues raised by the bill and answer, and that the plaintiff offered to introduce proofs in support of his allegations, yet the motion and the order of court, as already pointed out, entirely ignored the issues joined, and denied to the plaintiff the fundamental right of an opportunity to prove his case, which was taken from the jury and judgment rendered therein against him upon the ground that the complaint in the abstract did not state a cause of action.

It is one thing to hold against a plaintiff upon demurrer where the plaintiff after demurrer elects to stand upon his declaration. That is regular and involves "due process of law." It is, however, quite another thing to ignore an answer and the replication and to deny the plaintiff all opportunity of explaining and sustaining his allegations of fact by proofs, or even of explaining and sustaining allegations which involve mixed questions of law and fact. That would

not be regular and would not be according to a party "due process of law."

We should assume here that the plaintiff was prepared, upon the trial, for which he contended and to which he was entitled under "due process of law," to offer proofs tending to show that Colonel Ingersoll, as alleged, advised about and actively participated in the effective and beneficial compromise, and that the substantial defeat of the terms of the will, as the result of the contest, the trial, and the compromise which secured to the Ingersoll clients greater beneficial results than would the technical defeat which it is contended was contemplated by the original contract, was accepted by the Ingersoll clients in lieu of the kind of a defeat perhaps originally intended; and that his evidence would tend to show that it was a result or a defeat, as in effect alleged in the bill before us, upon which Root and Coram had in interviews and correspondence admitted their indebtedness under the contract.

In that part of the contest involving the preparation and trial, Colonel Ingersoll performed valuable and effective service,— service which left the probate of the will at least suspended. Having incurred expense and so far entered upon performance, his rights under the contract were substantive, and he was entitled to an opportunity to continue the contest to defeat the will. The Montana answer contained an allegation, which was denied by the plaintiff, that the favorable compromise was effected by counsel other than Colonel Ingersoll. When and where and upon what trial, pray, was this issue determined upon "due process of law," and upon what process and what trial was it determined that Root and Coram, after part performance and the creation of substantive rights, might compromise and might exercise the right to withdraw from Colonel Ingersoll the opportunity to perform the contract according to its terms, and that nonfulfillment of the contract should, under such circumstances, be their defence, which should leave the Ingersoll interests and rights remediless.

The decision of the Montana Supreme Court is grounded upon the idea that duty required Colonel Ingersoll to contest, and that the compromise in which he participated created a situation which made performance impossible. In this connection, it is interesting to note

that the defendants' answer alleges that Ingersoll did not participate in the compromise; that the parties and other counsel made the compromise without his help or assistance, and thus, if the defendants' allegation be true, the defendants themselves, and not Ingersoll, made strict and literal performance impossible.

The decision also proceeds upon the idea of a mutual arrangement between Colonel Ingersoll and his clients, a mutual arrangement which, according to the decision, in effect amounted to an abandonment of the contract. Whether there was a mutual arrangement and abandonment was largely a question of fact upon which the plaintiff took issue and about which the plaintiff was never heard or allowed to produce his proofs. There was no hint or suggestion in the complaint of an abandonment. The allegations in effect are that the desirable result was reached upon different lines than those contemplated by the contract, and that that was done under an arrangement between the parties.

The very nature of the controversy which involved mixed conditions relating to the question whether there was a substantial defeat of the will; the question of fact whether Colonel Ingersoll received five thousand dollars in full for his services and whether the contract was abandoned and rescinded, or, whether what was done by way of compromise was under an arrangement between the parties with the idea that it was to be accepted in lieu of literal performance and the technical defeat, perhaps, contemplated by the original contract; the question whether the parties acknowledged indebtedness under the contract and agreed to pay, made it peculiarly a case for issues of fact through an answer and a replication, upon which the plaintiff was entitled to such a trial as would allow the questions of fact to be settled under instructions, and this being denied, it follows that the "due process of law" contemplated by the constitution was not accorded to him.

I think it quite clear, and so clear that it needs no extended elaboration, that the Montana court had no right to disregard the issues joined and to foreclose the plaintiff's rights upon assumptions of fact, and upon assumptions upon mixed questions of law and fact, which were contrary to the allegations of the complaint upon which issue had been joined.

Moreover, the conclusion is irresistible, upon a critical examination of the reasoning of the Montana Supreme Court, that the court having denied to the plaintiff the right to be heard upon proofs in support of the allegations of the complaint and in support of his side of the issues raised by the replication, which was a denial of "due process of law," proceeded to determine the rights of the parties under the influence of the probative force of the answer, though the case was never submitted for hearing on bill and answer. I say this because the reasoning of the Montana court is based upon substantial matter contained in the answer, matter contrary to the express allegations of the complaint.

The majority opinion here is based upon the assumption that no evidence consistent with the complaint could have changed the result in Montana, and upon the further assumption that if the fee was contingent that there was no cause of action. The fundamental error in the Montana judgment, and in the majority opinion here as well, resides in these assumptions in respect to controverted questions involving law and fact, and in deciding against the plaintiff without hearing his evidence. It is plainly deciding against a party without hearing him. How was it possible for the Montana court, without hearing the proofs, to rightfully pass upon the controverted question of waiver of contract, or upon the controverted questions relating to the waiver of the contingency and to the agreement to pay, and how is it possible for this court to rightfully say that no evidence would have changed the result in Montana?

As has already been observed, the subject-matter of the controversy was such that the rights of the parties could not fairly or intelligently be ultimately concluded by a court except upon pleadings and proofs, and upon such a trial as would give the parties an opportunity to be heard, a trial conducted under such conditions as would allow the disputed questions of fact to be determined by the court upon evidence, or by a jury upon evidence under proper instructions to that end. This is so, because under the changed conditions resulting from the admitted departure from the contract in respect to literal performance, and under the issues joined in respect to the circumstances which varied the kind of performance, the situation became such that the rights of the parties could not be ascer-

tained and established, under reasonable rules of interpretation, by taking the contract by its four corners. From the very nature of the resultant situation the plaintiff was entitled under due process and procedure to introduce his explanatory proofs.

It results, therefore, in my view, that the Montana judgment was not based upon such a trial as entitles it to be accepted as conclusive of the merits, and as one which settles the ultimate rights of the parties and becomes a bar to proceedings involving the merits in another jurisdiction.

Judge Putnam, in an elaborate opinion in the Circuit Court (127 Fed. 418; see also 136 Fed. 689), decided the question of *res judicata* against the defendants upon an application of the rule that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and upon the ground that the parties in this case are not the same as the parties in the Montana case. Holding the view, as I do, that the Montana case was never determined upon its full merits, and that the plaintiff was denied the constitutional right of "due process of law," I have no occasion to discuss that position, and therefore leave that phase of the case upon the reasoning of Judge Putnam and the authorities cited in his opinion in the Circuit Court.

Moreover, and entirely aside from the questions discussed in the majority opinion, there is another phase of the situation which should be taken into consideration. Upon this phase of the case I urge, as strenuously as I properly may, that the Circuit Court should not be directed to dismiss the bill in the equitable proceeding pending here, and it is upon this ground. The Montana Supreme Court, as will be seen by referring to its opinion, only undertook to determine the rights of the parties under the special contract in respect to the contingent fee, expressly leaving open and unadjudicated the *quantum meruit* rights of the plaintiff to recover for services other than those provided for by the contract. It is clear that the Montana court intended to leave open the question as to the meritorious service, which, though actually performed, did not, according to the views of that court, accomplish the literal defeat of the will, that is to say, that what was done did not amount to the particular performance which in its view was contemplated by the special contract. The

services thus referred to were at least substantial. They were services which were potential in staying a verdict sustaining the will, thereby paving the way for the favorable compromises (in which it is alleged Colonel Ingersoll participated and about which the issue of fact raised by the pleadings has never been determined), through which, as is claimed, the Ingersoll clients, these defendants, received something like five and one half million dollars in money and real estate titles, — assets admitted to be in excess of their shares and which were apparently, in fact vastly, in excess, — which they would not have received if the will had not been contested and had been probated in its original form and according to its terms. Therefore, if it shall be determined, upon the theory of the majority opinion, that the rights of the parties in respect to the contingent fee under the contract have been concluded by the Montana courts, still, the questions relating to the *quantum meruit* are fairly open, and the plaintiff in this equitable proceeding should be allowed to recast her bill and have the question as to what she ought to recover upon *quantum meruit* and all questions of lien ascertained and established. That, at all events, is something which has never been actually determined or adjudicated here or elsewhere. No one pretends that it has. Manifestly, as before pointed out, the reference of the Montana court was to services for which the plaintiff could not, in the view of that court, recover under the contract. Accepting the theory of that court for the purpose of stating the question, the reference was to a service for which Colonel Ingersoll, according to the plaintiff's allegation, was never compensated, and this allegation holds for purposes of equitable considerations in respect to an amendment without regard to the question whether the services were under or aside from the contract. If the plaintiff, under the operation of the rule of *res judicata*, must accept as final the theory of the Montana court that recovery of the contingent fee cannot be had under the contract, then, as an equitable alternative in this equitable proceeding to recover upon a contract and to establish a lien, she should be allowed to turn her bill into an equitable proceeding to recover upon *quantum meruit* what is right and just for the manifestly important service for which, according to the allegations and the theory of the plaintiff, compensation has never in fact been made. If it shall be deter-

mined here that the question of the right to recover under the contract is foreclosed by the Montana judgment, and if, in that event, opportunity is not given in this proceeding to recast the bill and have the value of the professional services actually rendered ascertained and established, the plaintiff will go hence with an important and at least equitable claim defeated upon the somewhat technical, and under the circumstances inequitable, ground of non-fulfilment of a special contract, and the underlying equitable question as to the value of the services actually performed in respect to the subject matter of the contract will be wholly unconsidered, and as a result the real value of the alleged meritorious services, in preparation for the contest, upon the trial and in connection with the compromises, through which the enormous financial returns were realized by these defendants, must forever remain untold and unrewarded, and thus the plaintiff will have lost a well known and familiar equitable right founded upon the principle that if a laborer labors well and fails to perform the strict letter of the bond that he may still have what his labor merits.

Under all the circumstances if the Circuit Court is peremptorily directed to dismiss the bill and the plaintiff is turned away under the rule of *res judicata* drastically founded upon the Montana situation where the court only pretended to deal with the right of the plaintiff to recover the contingent fee under the special contract, she will not have been accorded the opportunities in this court which modern practice and procedure usually extend to a plaintiff whose case manifestly involves a right, and who, through inadvertence or oversight, has failed in the first instance to place the case upon the right ground. It is for this reason, if the Circuit Court is reversed upon the ground stated in the majority opinion, that the plaintiff should have an opportunity in that court to move to amend her bill.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1906.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,

v.

EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

FINAL DECREE IN CIRCUIT COURT OF APPEALS.

OCTOBER 16, 1906.

This cause came on to be heard December 19, 20 and 21, 1905, upon the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed as follows: The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to dismiss the bill, with costs; and the appellants recover costs of appeal.

By the Court,

JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 610.

JOSEPH A. CORAM ET AL.,
DEFENDANTS, APPELLANTS,

v.

EVA A. INGERSOLL, ADMINISTRATRIX,
COMPLAINANT, APPELLEE.

CLERK'S CERTIFICATE.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the four volumes, entitled in the above cause, namely:

Volume I., Record for Complainant, — Pleadings, Court Records, Proofs, etc.;

Volume II., Complainant's Exhibits;

Volume III., Record for Defendants;

Volume IV., Transcript of Record of Circuit Court and Proceedings in Circuit Court of Appeals;

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of November, A.D. 1906.

[SEAL.] JOHN G. STETSON, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Joseph A. Coram, Henry A. Root, and Charles H. Palmer, Trustee, are appellants, and Eva A. Ingersoll, as Administratrix of the estate of Robert G. Ingersoll, deceased, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of December, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued "that the certified transcript of record filed in the office of the clerk of the Supreme Court of the United States with the petition for writ of certiorari in said cause may be taken as a return to said writ issued pursuant to order of said Supreme Court, dated the 26th day of December, A. D. 1906."

In testimony whereof, I, John G. Stetson, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this thirtieth day of January, 1907.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

United States Circuit Court of Appeals for the First Circuit.

No. 610.

JOSEPH A. CORAM ET AL., Defendants, Appellants,
vs.
EVA A. INGERSOLL, as Administratrix of the Estate of Robert G. Ingersoll, Deceased, Complainant, Appellee.

Stipulation.

Counsel for the respective parties above named hereby stipulate "that the certified transcript of record filed in the office of the clerk of the Supreme Court of the United States with the petition for writ of certiorari in said cause may be taken as a return to said writ issued pursuant to order of said Supreme Court, dated the 26th day of December, A. D. 1906."

SAMUEL BRANDEIS,
PUTNAM H. DUNBAR,
Counsel for Defendants, Appellants, and Respondents.
E. W. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Counsel for Complainant, Appellee, and Petitioner.

Dated January 22nd, 1907.

[Endorsed:] No. 610. United States Circuit Court of Appeals, for the First Circuit. Joseph A. Coram, *et al.*, Defendants appellants, *vs.* Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, Complainant, appellee. Stipulation for Return to writ of certiorari from the Supreme Court of the United States.

[Endorsed:] File No. 20,484. Supreme Court of the United States. No. 519, October Term, 1906. Eva A. Ingersoll, as Administratrix &c., *vs.* Joseph A. Coram *et al.* Writ of Certiorari and Return of United States Circuit Court of Appeals for the First Circuit thereon. Filed February 2, 1907.

No. [redacted]-169.8

Supreme Court of the United States.

OCTOBER TERM, 19[redacted]

Supreme Court, U. S.
FILED.
DEC 13 1906
JAMES H. McKENNEY

EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,
Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,
Respondents.

Petition and Motion of Eva A. Ingersoll as Adm'rx of Estate of Robert G. Ingersoll, Deceased, for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Counsel for Petitioner.

HANNIS TAYLOR,
Of Counsel.

The Supreme Court of the United States.

OCTOBER TERM, 1906.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL DECEASED,

Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,

Respondents.

THE PETITION OF EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED, FOR A WRIT OF CERTIORARI TO BE DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, TO BRING BEFORE THIS HONORABLE COURT THE CASE NO. 610, THERE PENDING, ENTITLED JOSEPH A. CORAM ET AL., DEFENDANTS, APPELLANTS, *v.* EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED, COMPLAINANT, APPELLEE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, respectfully represents:

That your petitioner is a citizen and resident of the State of New York, and is the duly qualified and acting administratrix of the estate of Robert G. Ingersoll, deceased, in the State of New York, and also in the State of Massachusetts, by appointment duly made by the proper surrogate and probate court of those states respectively.

First: Statement of the Case—

In the year 1890 Andrew J. Davis, a citizen and resident of the State of Montana, died there, leaving estate without incumbrance or indebtedness, of the value of about six and a half million dollars, consisting of about a half million dollars of money and bonds in Boston, Massachusetts, and real estate, principally mining property bearing gold, silver and copper, situate in the county of Silver Bow, State of Montana, of value, according to undisputed testimony introduced in the case brought by your petitioner in the United States Circuit Court, herein mentioned, of about five million dollars, and personal property in Montona of the value of about one million dollars; and leaving him surviving brothers and sisters and the children of deceased brothers and sisters who were his next of kin and heirs at law, entitled under the laws of the State of Montana to succeed to all of his estate if it were not disposed of by a will to be duly proved and admitted to probate.

Soon after the decease of said Andrew, one of his brothers, John A. Davis, who then resided at the City of Butte, Silver Bow county, Montana, propounded for admission to probate in the district Court of the Second Judicial district of that State, within and for the county of Silver Bow, a writing

purporting and alleged to be the last will and testament of said Andrew, made in the year 1866, at Van Buren County, Iowa, where he formerly resided. By the terms of which alleged will the entire estate left by said Andrew, except bequest for maintenance to three persons—two of whom were deceased before said alleged will was offered for probate—was devised and bequeathed to his brother John A. Davis, who propounded said alleged will for probate. And thereupon said John A. Davis and his successors and legal representatives prosecuted for many years, in said District Court of Montana, proceedings to cause said alleged will to be admitted to probate, until the contests thereof interposed and prosecuted on behalf of other heirs of said Andrew were determined as hereinafter shown.

Among the heirs of said Andrew there were five living in the eastern part of the United States, namely: Henry A. Root and his sister, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd, and Mary Louise Dunbar, who were altogether entitled to three and one-half elevenths, or three hundred and fifty eleven-hundredths, of said estate in case it were not disposed of by said will.

That for the purpose of protecting and securing their inheritance in said estate said *five* heirs associated themselves together to contest and oppose the admission of said alleged will to probate, and for that purpose two contests thereof were instituted in said District Court of Montana, by filing in the time and manner provided by law objections to the admission of said alleged will to probate; one of which contests was brought in the name of said Henry A.

Root, and the other in the name of said Sarah Maria Cum
mings.

To aid in the prosecution of said contests and in procurin
attorneys and counsellors at law for that purpose, and i
consideration of the undertaking and promise of said Henr
A. Root to procure attorneys and counsel for that purpos
and prosecute said contests, four of said associate heir
assigned and transferred one-third of each of their share
and interests in said estate to said Henry A. Root by forma
assignment in writing; and in that writing provided an
agreed that any portion of the one-third of the shares s
assigned, which might *not* be expended for the purpos
aforesaid, should be the property of said Henry A. Root
In the same instrument said four associate heirs also auth
orized and empowered said Henry A. Root, by irrevocabl
authority, to represent them in the prosecution of said
will contests, and to demand, sue for, collect, receive and
receipt for their shares and interests in said estate.

That Joseph A. Coram, who had been engaged in mining
operations in Montana, came into interest with said contest-
ants by acquiring the remaining interests of two of said
associate heirs, namely, that of Elizabeth S. Ladd and Mary
L. Dunbar. The said Coram in his answer to your petition-
er's bill in equity in the United States Circuit Court herein
mentioned, admits: "that the claims, rights and interests
of said Coram in said estate were dependent upon the prose-
cution of said objections to and contests of the validity of
said alleged last will and testament of Andrew J. Davis,
deceased, in opposition to the admission thereof to probate,

instituted in the names of Henry A. Root and Sarah Maria Cummings, until said shares of said estate to which said five heirs were entitled, as heirs at law of Andrew J. Davis, deceased, were secured to them by grant and assignment from the proponent of said will or by decree of said District Court of the State of Montana having jurisdiction of said estate and contests, in the determination of said contests." (See Answer of Coram *et al*, Vol. I, page 102 of the record herewith submitted.)

Before trial of either of said will contests was had, said Henry A. Root sought the services of Col. Robert G. Ingersoll to prosecute the same on behalf of said associate heirs and Coram, upon a promise of compensation therefor out of their shares of said estate if they succeeded in getting them; and the evidence shows that it was understood and stated by Col. Ingersoll in a letter referring to his compensation for said services, that, "Of course if you should lose the case you could not pay." (See "Exhibit XXXII," Vol. II, p. 1044, Record herewith presented.)

The result of said negotiation was that said Coram and Root, who owned a large part of the interests of said five heirs in said estate, engaged and employed Col. Ingersoll to prosecute said will contests as counsel and attorney for said associate heirs and Coram; and in consideration of his services in that behalf said Coram and Root executed and delivered to Col. Ingersoll a promise in writing that: "We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis deceased, rendered and to be rendered, that

your fee in case the will is defeated and our clients get thei shares, shall be one hundred thousand ($100,000) dollars and that your expenses and disbursements shall be paid in any event;" and they further promised and agreed by the terms of said writing, "to pay such fee out of the fund secured from the estate of A. J. Davis deceased, for Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar, and Mrs Ellen S. Cornue and Henry A. Root"—the five heirs associated in said will contests. (See Record Vol. I, page 1-48 said agreement is set forth as "Exhibit B," Vol. I, page 45.)

In fulfillment of said engagement on his part, Col. Ingersoll during many years commencing early in 1891, devoted much of his time and services to the prosecution of said will contests, and therein rendered the full measure of services agreed or contemplated by the terms of said agreement to be done on his part; and effectuated a result in favor of his clients greatly exceeding that expressed or contemplated in said agreement, through the decree finally rendered and entered by said District Court of Montana, on August 24, 1897, determining said will contests and awarding to his said clients all the shares of said estate to which they were entitled as heirs of said Andrew, and a large portion in addition thereto.

In the course of said litigation involving said estate, among other proceedings, there was a trial of said will contest, which lasted about seven weeks, before said District Court of Montana, whereat Col. Ingersoll constantly attended and took an active part in all its details as leading

attorney and counsel in behalf of said five heirs and Coram, being opposed therein by eminent counsel for the proponent of said will; and at the conclusion of that trial he addressed to the court and jury the argument in behalf of said contestants in opposition to the admission of said will to probate—a verified stenographic report of which argument was proved and received in evidence in the action in equity prosecuted by your petitioner against said Coram and Root, in the United States Circuit Court herein mentioned. (See Record herewith presented, Vol. II, pages 1047 *et seq.*)

That as a result of said trial the proponent of said will was defeated in his effort to establish and procure the admission thereof to probate. Seven members of the jury sitting therein refused to return a verdict in favor of the validity of said writing as the last will and testament of said Andrew J. Davis, deceased. And it was clearly shown by undisputed evidence presented in the action in equity prosecuted by your petitioner against said Coram and Root in the United States Circuit Court herein mentioned, that the proponent of said will was not only defeated in his effort, at great expense, to establish said writing as the will of his brother Andrew, but his hopes and the hopes of those connected with him in that undertaking, of ever accomplishing the admission of said alleged will to probate, were blasted, by the presentation of the evidence against the validity of that writing, in the argument delivered by Col. Ingersoll in behalf of said contestants, in opposition to the admission of said alleged will to probate. (See Testimony Record, Vol. I, 343–347; *ib.* 361–362; Vol. II, 1252 and 1257–1258).

It was also shown by the admissions of defendants, and by evidence in said action in equity prosecuted by your petitioner against said Coram *et al.*, in the United States Circuit Court herein mentioned, that following the trial of said will contest Col. Ingersoll "continued without remission to make preparation for another trial" thereof, "and to counsel, advise and aid said contestants in relation thereto;" that he insisted on another trial of said contest and the same was set for another trial to commence on a certain date; that while preparation was being made for said second trial and shortly before the time set for the same to commence, the legal representative and heirs of said John A. Davis the deceased proponent of said will, "by reason, and in consideration of the force, effect and stress of the prosecution of said contests by Col. Ingersoll in opposition to the admission of said will to probate, and without any other reason or consideration whatever," were constrained to yield consent to, and make certain stipulations providing for the entry of a decree by said District Court of Montana, determining said will contestants, and awarding to said five heirs represented by Col. Ingersoll, greater portions of said estate, both real and personal, in kind, than their shares thereof as heirs at law of said Andrew. That such stipulations were made and so executed in writing as to have the effect of an assignment and grant of such interests in said estate to said five heirs, even though said will should be admitted to probate. It was also provided in and by said stipulations that the shares of said estate therein allotted to said five heirs represented by Col. Inger-

soll, should be by the decree of said District Court of Montana, determining said will contests, awarded and decreed to them, to be distributed directly from said estate in kind.

In their answer to your petitioner's bill in equity brought in the United States Circuit Court herein mentioned, said Coram and Root, "admit that said Ingersoll not only rendered services as counsel in the prosecution of said contests for and on behalf of said five heirs mentioned in said agreement and promise made to and with him as aforesaid in fulfillment thereof on his part, but also advised, counseled and aided in consummating and effectuating said arrangements and proceedings by which said decree of August 24, 1887, was obtained"—that is, the decree finally determining said will contests, and awarding to said five heirs represented by Col. Ingersoll five hundred, fifteen and a half eleven-hundredths (515½ 1100) of all said estate of Andrew. (See answer of Coram, *et al.*, Vol. I, page 107, of the record herewith presented.)

Afterward other stipulations were made with *other heirs* of said Andrew who had filed in said District Court of Montana, but never prosecuted to trial, objections to the admission of said alleged will to probate, whereby it was stipulated that they should be awarded in a decree finally determining all said will contests, about one-half of the share of said estate to which each of said *other heirs* were entitled as heirs at law of said Andrew.

A final decree was rendered and entered in said District Court of Montana on August 24, 1897, determining said will contests prosecuted by Col. Ingersoll on behalf of said

five heirs and Coram, by the terms and effect of which, said five heirs, who as heirs at law of said Andrew, were entitled to only three hundred and fifty eleven-hundredths of said estate, got absolute right and title to five hundred, fifteen and a half eleven-hundredths thereof in kind both real and personal and wheresoever situate. Copy of said decree marked "Exhibit C" is annexed to your petitioner's bill in the United States Circuit Court herein mentioned. (See Record herewith presented, Vol. I, page 46).

Thereafter the Supreme Court of Montana—its highest judicial tribunal—in determining an appeal which drew in question the validity of said decree determining said will contests and parcelling and ordering said estate to be distributed as therein provided, and the jurisdiction of said district court to render that decree, ruled, held and decided that said decree of August 24, 1897, determining said will contests is valid and in effect superseded and took the place of said will, and "*itself became the basis of administration and controlling as to the devolution of the property*," of said estate. It was so ruled and decided in the case entitled *In Re Davis Estate*, reported in 27 Montana Report, 497.

Following the entry of the decree determining said will contests distributions in accordance wherewith have been made of all property of said estate in Montana, and said Coram and Root in their answer to your petitioner's bill in the United States Circuit Court herein mentioned, "admit that said five heirs and Coram have participated in and have had and received and had the use and benefit of 515½ 1100 of each and all distributions heretofore made

of funds and other property of said estate of Andrew J. Davis, deceased, both real and personal" (See Record, Vol. 1, page 107). It was shown by evidence and admissions in the action of your petitioner in the United States Circuit Court herein mentioned, that money and its equivalent in bank stock to the amount of $374,900 besides 515½ 1100 of all said real estate situate in Montana, has been distributed and delivered to said five heirs and Coram pursuant to said decree determining said will contests prosecuted in their behalf by Col. Ingersoll.

That no part of said stipulated fee promised Col. Ingersoll for his services and counsel in the prosecution of said will contests has been paid, except five thousand dollars paid on account thereof out of the first money distributed from said estate in 1897, as shown by undisputed proof in the case before the United States Circuit Court herein mentioned.

Robert G. Ingersoll died on July 21st, 1899, at Dobb's Ferry in the State of New York, of which state he had long been a citizen and resident prior to his decease; and he had with him then and there in his possession among his effects in the State of New York at the time of his decease the said contract and promise in writing made and delivered to him by said Coram and Root, whereby they promised to pay said stipulated compensation for his services rendered in behalf of said five heirs and Coram, in the prosecution of said will contests; all which was shown by undisputed proof in the action in equity brought by your petitioner against said Coram and Root in the United States Circuit Court herein mentioned. (See testimony, Vol. I, page 130,

131, 161, 163, 181, 215, 287, 289 of the Record herewith presented.)

Shortly after the decease of said Robert G. Ingersoll, to wit, on the 21st day of August, 1899, his widow, your petitioner, who was then and ever since has been a citizen and resident of the State of New York, was by order of the Surrogate of Westchester County, in that State duly made and entered of record, appointed sole administratrix of the estate of Robert G. Ingersoll, deceased, in the State of New York; and thereupon your petitioner duly qualified as such administratrix according to law and the order of said Surrogate, and letters of administration were duly issued by him attested by the seal of his court, appointing and commissioning your petitioner as such administratrix, which letters have never been revoked; and your petitioner has ever since been and is the duly appointed, qualified and acting administratrix of the estate of Robert G. Ingersoll, deceased, in the State of New York.

That in virtue of the law, as ruled and held by this court in the case of Noonan *v.* Bradley, 9 Wall. 405, and in many other cases, by said appointment as administratrix of the estate of Robert G. Ingersoll, deceased, in the State of New York, your petitioner then and there became invested with the title to, and right of possession of, and right of action upon, and then and there your petitioner took possession of the said contract in writing, and chose in action whereby said Coram and Root promised and agreed to pay said stipulated compensation for the services rendered by Robert G. Ingersoll in the prosecution of said will con-

test. It is admitted in the answer of said Coram and Root to paragraph 21 of your petitioner's bill in her suit in the United States Circuit Court herein mentioned, that said Robert G. Ingersoll was a resident and citizen of the State of New York at the time of his decease, that he died in the State of New York as alleged in said bill, and that your petitioner was appointed administratrix of his estate by the Surrogate of Westchester County, State of New York, as alleged in paragraph 21 of her said bill of complaint; all which allegations of the bill appear at page 25, and said admissions of the answer appear at page 111, of Volume I of the record herewith presented.

After her appointment as administratrix as aforesaid your petitioner demanded of said Coram and Root payment of the balance due on their said contract and promise in writing to pay for the services rendered by Col. Ingersoll in the prosecution of said will contests. The balance due on said contract being the sum of ninety-five thousand dollars and lawful interest thereon from the date on which a sum of money exceeding three hundred thousand dollars was actually distributed from said estate and paid over to said five heirs and Coram pursuant to said decree determining said will contests. That in response to said demands said Coram and Root at divers times in written correspondence and in interviews had with, and in behalf of your petitioner, acknowledged and confessed said indebtedness, but they have neglected and failed to pay the same or any part thereof.

Second: Proceedings in Montana in attempt to prosecute an action to enforce payment of said indebtedness and nonsuit thereof.—

Your petitioner having been informed that said five heirs and Coram had conveyed away and divested themselves of all said interests in the real estate acquired for them from said estate through the prosecution of said will contests and decree determining the same; and being further informed that said Coram and Root were seeking and attempting to get possession of all remaining funds and effects acquired for said five heirs through the prosecution of said will contests; and being desirous to take such action as she could to secure relief and payment of said indebtedness out of the fruits acquired by the labors of Col. Ingersoll through the prosecution of said will contests, before the same were all placed beyond the reach of legal process; your petitioner in the year 1901, through attorneys at law caused an action to be commenced in said District Court of the State of Montana, in the name of your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, appointed by said Surrogate of Westchester County, State of New York, setting up said claim of indebtedness against said Coram and Root for said services rendered by Robert G. Ingersoll in the prosecution of said will contests, and claiming a statutory lien on certain interests in property of said estate acquired for said five heirs, situate in Montana, founded upon a statute of that State creating a lien in favor of attorneys at law for services rendered in actions and proceedings in courts thereof.

When that action was commenced in Montana in the name of your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in the State of New York, your petitioner had not been, nor has she ever been, appointed administratrix of the estate of Robert G. Ingersoll, deceased, in the state of Montana; nor has she ever been in the state of Montana in person since the decease of said Robert G. Ingersoll. The laws of the State of Montana in force when said last mentioned action was commenced and ever since, do not permit the appointment of a non-resident of that State as administrator of the estate of a decedent. The complaint in said action brought in the name of your petitioner in the State of Montana expressly alleged the appointment of your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, by the Surrogate's Court of Westchester County in the State of New York (as appears in paragraph 13, at page 1658, Vol. III of the record herewith presented) and contained no other allegation of her appointment as administratrix of the estate of Robert G. Ingersoll, deceased, elsewhere than in the State of New York. Demurrer to that complaint was interposed by said Coram and Root, but that complaint was never answered by any defendant named therein. In certain proceedings in said District Court of Montana wherein it was attempted to present and use said complaint brought therein in the name of your petitioner as administratrix of the estate of Robert G. Ingersoll, appointed in the state of New York as aforesaid, on objection by said Coram and Root, the said District Court of Montana held, ruled and decided that it would *not* hear or con-

sider the claim set up in said complaint in the name of your petitioner as administratrix of Robert G. Ingersoll, deceased, appointed in the State of New York.

Thereafter one John S. Harris was by order of said District Court of Montana appointed administrator of the estate of Robert G. Ingersoll, deceased, in the State of Montana, and he was by order of said District Court substituted in said last mentioned action as plaintiff in the place and stead of your petitioner who was dismissed therefrom, and her name was stricken from the complaint in that action, by order of said District Court of Montana, as appears at pages 1676, 1677 of Vol. III of the record herewith presented. Then said John S. Harris as administrator of the estate of Robert G. Ingersoll, deceased, appointed in the State of Montana brought in and filed in said District Court of Montana, his amended complaint in said action therein alleging said indebtedness of Coram and Root upon their said contract and promise to pay for the services rendered by said Robert G. Ingersoll in the prosecution of said will contests; and asserting a statutory lien under a statute of Montana, on certain interests in the property of said estate situate in Montana, acquired for said five heirs through the prosecution of said will contests. But said Harris did not assert in his said complaint any equitable lien. Nor did said Harris allege in his said complaint, or in any other pleading or proceeding, how, or by what act, proceedings or facts he claimed to have acquired or been invested with title to said contract, demand, or chose in action, existing in favor of said Robert G. Ingersoll and being in his possession at the time of his decease in the State of New York, or that

any attempt had ever been made to invest him, the said Harris, as said administrator appointed in the State of Montana, or otherwise, with title thereto—if it be possible at all to have transferred the title to said chose in action from your petitioner as administratrix of Robert G. Ingersoll, deceased, appointed and invested with title thereto in New York, over to the said Harris as administrator of said decedent afterward appointed in the State of Montana. (Noonan *v.* Bradley, 9 Wall. 405).

It was alleged in the complaint of said Harris as said administrator appointed in Montana, that Robert G. Ingersoll died at Dobbs Ferry in the County of Westchester, State of New York, on July 21, 1899, and that your petitioner was on the twenty-first day of August, 1899, appointed administratrix of the estate of Robert G. Ingersoll, deceased, by the Surrogate of Westchester County, State of New York, as appears in paragraph 16 of the complaint of said Harris, set forth at page 1544 of Volume III of the record herewith presented; and the same is admitted in the answer of said Coram and Root to the complaint of said Harris as administrator in Montana, as appears in paragraph 16 of said answer at page 1588, Vol. III, of the record herewith presented.

Your petitioner further shows that no proceedings have ever been taken by her or otherwise, in the Surrogate's Court of Westchester County, State of New York, or in any other court, to enable or authorize your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, in the State of New York, to transfer or attempt to transfer

said contract whereby said Coram and Root promised to pay said compensation for the services of Robert G. Ingersoll rendered in the prosecution of said will contests, or the right of action thereon, to the said John S. Harris as administrator or otherwise, or to any other person whomsoever; nor has your petitioner ever assigned or attempted to assign said contract to said John S. Harris personally or as administrator of the estate of Robert G. Ingersoll, appointed in the State of Montana, or to any other person whomsoever, by any endorsement thereon or by executing any other writing whatsoever. Your petitioner placed said contract in the hands of her attorney in New York, and directed him to take and cause to be taken such action for the purpose of enforcing payment thereof as might be proper and lawful.

To said complaint of John S. Harris as administrator in Montana, said Coram and Root demurred on the ground among others that said complaint did not state facts sufficient to constitute a cause of action, and having filed their said demurrer in said District Court of Montana, by leave of that court withdrew it and filed their answer to said complaint of Harris as administrator appointed in Montana. In that answer said Coram and Root denied the indebtedness alleged in said complaint of Harris as administrator; denied the fulfillment of the contract therein mentioned on the part of Robert G. Ingersoll; denied "that by reason or in consideration of the prosecution of said contests or force, effect, or stress thereof" the proponents of said alleged will entered into the agreements mentioned in said complaint of Harris

providing for the determination of said will contests; denied "that by reason of the prosecution of said contests said will was defeated or in effect annulled in so far as it could affect the rights, interests or claims of said persons for whom said Robert G. Ingersoll performed said services;" denied that Robert G. Ingersoll counseled, advised, or aided in making or effectuating the agreements and arrangements whereby said five heirs for whom Robert G. Ingersoll prosecuted said will contests, were granted and decreed the shares of said estate of Andrew awarded to them in the decree finally determining said contests; and denied all vital facts which were alleged in said complaint of Harris as administrator in Montana, to show liability of defendants Coram and Root for the indebtedness therein mentioned. Those denials appear in said answer on pages 1584, 1587, 1588, and in the answer to amendments on page 1590, Vol. III, of the record herewith presented.

But there was *no allegation or defense of abandonment*, by Robert G. Ingersoll, of said contract, whereby he was promised payment for his services rendered in the prosecution of said will contests, or anything to that effect, set up in any answer in said action which Harris as administrator attempted to prosecute in Montana. *Nor is the word abandon, or abandoned, or abandonment, or any words of like effect used in any pleading in that action.*

After the pleadings in said action which Harris as administrator attempted to prosecute in Montana, were framed and filed as aforesaid, that case was called for trial, and said Harris attempted to introduce the testimony of a

witness called on his part; whereupon, before said witness had answered the first question put to him, and before any evidence whatever was introduced at said attempted trial, the said Coram and Root by their attorneys "objected to the introduction of any and all testimony on behalf of plaintiff upon the grounds that the complaint does not state facts sufficient to constitute a cause of action;" and the court then and there sustained said objection, and refused to permit any evidence to be introduced; and then and there immediately following that ruling, upon motion of counsel for said defendants Coram and Root, the said District Court of Montana, ordered said complaint of Harris as administrator dismissed. The order of that court refusing to permit any evidence to be introduced and dismissing said complaint of Harris as administrator, is in words and figures as follows: —

"In the district Court of the Second Judicial district of the State of Montana, in and for the County of Silver Bow. John S. Harris, administrator, plaintiff, *v.* Henry A. Root *et al*, defendants. Department one. Cause No. 9346.

This day the parties hereto being present in court as on Wednesday, December 10, 1902, and the jury being present and answering to their names, the further trial herein is by the court resumed, now, the opening statement on behalf of plaintiff is resumed, and being concluded the introduction of testimony on behalf of the plaintiff is commenced. Come now defendants and object to the introduction of any and all testimony on behalf of plaintiff upon the grounds that the complaint does not state facts sufficient to consti-

tute a cause of action. After argument of counsel the motion to exclude testimony is by the court sustained, to which ruling of the court plaintiff by counsel duly excepts and is by the court granted thirty days additional time to prepare and serve bill of exceptions herein, and upon motion of defendants the complaint herein is by the court ordered dismissed, and the motion to discharge receiver herein is by the court reserved for further consideration. Whereupon the jury herein is discharged from further attendance of this cause and this term of court." (See Record Vol. III, page 1611, 1612).

Judgment for costs was also entered in said action, which after reciting the title of the court and cause, is in words and figures as follows:—

"This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the court and sustained— Now therefore in consideration of the premises and the law, it is ordered, adjudged and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $12.50. Done in open court this twelfth day of December, 1902." (See Record, Vol III, page 1613).

The statute of Montana, in section 1007 of the Code of Civil Procedure, relating to orders of nonsuit or dismissal

of an action, in force when said order of dismissal was made, provides as follows:—

"Sec. 1007. A final judgment dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits."

Section 1008 of the same code provides that, "upon the dismissal or disposition of an action" it is the duty of the court to render "judgment for costs."

The Code of Civil Procedure of Montana, in section 1151, also provides that "the final decision in an action or proceeding" or an order "striking out a pleading or a portion thereof" is "deemed to have been excepted to and no bill of exceptions is required."

From said order for nonsuit and judgment dismissing said action, John S. Harris as administrator, the plaintiff therein, took an appeal to the Supreme Court of Montana, and asked that court to reverse and set aside said judgment of nonsuit and dismissal.

It has been held by the courts of Montana, to the same effect as held by this court in the case of Nash v. Town, 5 Wallace 689, and many other cases, to be the rule of law, that:

"Courts in the constructions of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place them-

selves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the things described." (5 Wall. 689).

And that "Instruments are to be interpreted according to their subject matter, and parol evidence may be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Whatever indicates the nature of the subject is a just medium of interpretation of the language of the parties, and is also a just foundation for giving the instrument an interpretation when considered relatively, different from that which it would receive if considered in the abstract." (1 Mont. 526).

The law is so held and declared by the Supreme Court of Montana in the case of Donnell *v.* Humphreys, reported in 1 Montana Report, page 518; and in the case of Shrieve *v.* Copper Bell Mining Co., reported in 11 Montana Report, pages 233, 234; and there is no rule of law to the contrary in that State.

The question of *abandonment* of a right has also been held in a long line of decisions of the highest court of Montana, commencing with the case of Atchison *v.* Peterson, reported in 1 Montana, 561, and affirmed by this court in 20 Wall. 507, to be *a matter of intention*, and a *question of fact*, and that if *abandonment* is to be relied on or used in litigation to defeat a right claimed by a party, such alleged *abandonment must be set up in the pleading* of the party who asserts it, so that issue may be raised thereon, and such *issue of fact*

as to the abandonment must be tried and determined upon the proofs submitted in the trial court.

Nevertheless in passing upon the appeal of said Harris, as administrator in Montana—notwithstanding the rule of law governing the courts of that State in respect to the *interpretation of contracts*, and in respect to pleading the claim of *abandonment*, if it is to be asserted in an action, has always been held and decided by the courts of Montana as above stated; and notwithstanding the fact of abandonment by Robert G. Ingersoll of his rights under said contract was *not* set up in any answer in said action which Harris as administrator attempted to prosecute in Montana, nor was anything of that nature or effect set up in any pleading therein; and notwithstanding the Supreme Court of Montana had ruled, held and decided that said alleged will of Andrew J. Davis was set aside and superseded by the decree of August 24, 1897, determining the contests of said will prosecuted by Robert G. Ingersoll, mentioned in said promise of Coram and Root to pay for his services rendered in prosecuting said contests, and had also held and declared that the decree rendered by said District Court of Montana, determining said will contests, was valid and "itself became the basis of administration and controlling as to the devolution of the property," of said estate (27 Mont. 497); and notwithstanding it was shown in said complaint of Harris as administrator, that by the decree determining said will contests prosecuted by Col. Ingersoll his said clients got absolute right and title to 515$\frac{1}{1100}$ of all property of said estate of Andrew, both real and personal in kind; and notwithstanding it was alleged

in said complaint of Harris as administrator in the manner and form prescribed by section 746 of the Code of Civil Procedure of that State, that Col. Ingersoll **duly** performed all services mentioned, implied or contemplated by the terms of said agreement to pay therefor (Record Vol. III, paragraph VIII, page 1536), and "that by reason and in consideration of said prosecution of said contests and the force, effect and stress thereof," the proponents of said will, "were constrained to yield consent, and did yield consent, to" said compromise agreements and stipulations providing for the entry of a decree determining said will contests and awarding to the clients of Col. Ingersoll larger shares of said estate than they could claim as heirs at law of said Andrew, and also alleged that "by reason of said prosecution of said contests, said will was defeated and in effect annulled in so far as it could affect the rights, interests or claims of said persons for whom Robert G. Ingersoll performed said services, in said estate as heirs at law of Andrew" (See Record Vol. III, page 1578); all which allegations as well as all other vital allegations of said complaint of Harris as administrator, were put in issue by the denials of the answer of said Coram and Root thereto, as shown by the record herewith presented (*See Vol.* III, *page* 1584-1588, *and answer to amendments, page* 1599); and notwithstanding the light of evidence had been shut out by the ruling of said trial court and the dismissal of the complaint and nonsuit of said action—the Supreme Court of Montana, in passing upon the question whether it would reverse or set aside said order of nonsuit and dismissal of the complaint of said Harris, administrator,

as prayed in his appeal, in its opinion made certain observations touching the subject of said action, wherein there was inadvertently assumed as the basis of its conclusions certain issuable facts which were not properly before that court in any record for consideration at all.

In its opinion after making brief mention of the claim set up in the complaint of said Harris as administrator in Montana, and the ruling of the lower court refusing to permit any evidence whatever to be introduced and dismissing said complaint, the Supreme Court of Montana says: "Counsel for defendants *contended*," that because a successful termination of the will contests was reached "by means of a compromise of the litigation in the negotiation of which Mr. Ingersoll took part, instead of by means of a contest which Mr. Ingersoll did not conduct to a successful termination, the contract for the contingent fee was abandoned by the parties, and that a recovery against the defendants, if any may be had at all, must be upon a *quantum meruit* for services other than those provided for by the contract." And after reciting the *contentions of defendants*, the Montana Supreme Court said in its opinion: "We agree with the *contention* of defendants. An attorney as such has no authority to compromise a controversy of his client," and that "if a compromise of the controversy be made it must be made under special authority delegated for that purpose, otherwise in the absence of a ratification by the client," such compromise would be void. "Mr. Ingersoll could not therefore under the contract assume the authority to make any compromise of the contest." That "additional authority was therefore necessary to this end, and when this was

conferred by his clients and accepted by him, there was a mutual abandonment of the contract," (See Opinion, Vol. II, pages 1622, 1623; Harris v. Root, 28 Mont. 167, 168.)

In that *dicta* the Montana Supreme Court inadvertently, being misled by *contention* of counsel for said Coram and Root, *assumed* and attributed to Col. Ingersoll these *issuable* facts: (1) that he made a compromise of his clients' interests; (2) that he had no authority so to do; (3) that special authority to make a compromise of his clients interests was conferred on him; (4) that such special authority was accepted; and (5) that Col. Ingersoll *abandoned* all his rights to compensation for his labors in said will contests under the contract promising payment therefor.

On the assumption of those issuable facts the entire theory and conclusions announced by the Supreme Court of Montana, in the case which Harris as administrator attempted to prosecute, is based; but no such facts were set up in any pleading in that case and all evidence was excluded. Nor did Col. Ingersoll, or either of his clients, make any compromise whatever in respect to their rights and interests in said estate. Certain *other heirs* who joined in the stipulations finally made providing for entry of decree determining said will contests (who had simply filed contests which lay dormont while Col. Ingersoll was prosecuting the contests on behalf of his clients) did make a compromise—that is, said *other heirs* made concession and relinquishment of a portion of their shares. And because those *other heirs made such concession and compromise*, the stipulations and agreements in which they joined

providing for the entry of a decree determining said will contests were *called compromise agreements*. But only as applicable to said *other heirs* were they compromise agreements. No compromise concession or relinquishment was made by Col. Ingersoll or either of his clients of so much as a farthing of the shares of said estate to which they were entitled as heirs of Andrew. On the contrary Col. Ingersoll demanded for his clients, and they got through his prosecution of said contests, the full measure of their shares and a large portion in addition.

There was no allegation in the complaint of said Harris, or in any other pleading in that case, that "additional authority" to make any compromise was "conferred by his clients" upon Col. Ingersoll, or "accepted by him," or that he made any compromise of his clients' interests in said estate. The forcing of stipulations from the other parties was a great victory on the part of Col. Ingersoll for his clients, and his clients in person joined in signed and executed said stipulations, as shown by the evidence where it was permitted. But the exhibition of evidence was not permitted in that case which Harris as administrator attempted to prosecute in Montana. In the face of the evidence where its exhibition was permitted, there was no attempt even to *contend* that "additional authority" to make a compromise "was conferred" upon Col. Ingersoll "by his clients," or "accepted by him," or that he made any compromise for his clients, or abandoned his right to compensation under said contract with Coram and Root for services rendered in the prosecution of said will contests.

It is also said in the opinion of the Montana Supreme Court, that, "defendant's counsel contended," that "this is the only construction of which the contract is susceptible." (Record Vol. III, page 1622; *Harris v. Root*, 28 *Mont.* 167.) But the facts asserted in that *contention* and inadvertently assumed by the court in expressing its opinion on the appeal of said Harris, *do not relate at all to the construction of the contract.* They are issuable facts relating to things which might or might not have been done.

In connection with and as part of the theory of assumed abandonment, it was suggested in the opinion of the Supreme Court of Montana, "that a recovery against defendants, if any may be had at all, must be upon *quantum meruit* for services other than those provided for by the contract." If services were performed for Coram and Root by Col. Ingersoll "*other than those provided for by the contract,*" and a claim therefor were not barred by the statute of limitations, of course suit might be brought to recover therefor. But whether such a suit for services "other than those provided for by the contract" (if there were any) should be upon *quantum meruit*, or otherwise, would depend upon whether such *other services outside of the services provided for by the contract*, were employed, and fully, or only in part, performed.

But that suggestion that "a recovery against defendants, *if any may be had at all*, must be upon *quantum meruit* for services "*other than those provided for by the contract,*" if allowed to prevail would deprive the legal representative of Col. Ingersoll, without due process of law, of all compen-

sation for his services rendered in the prosecution of said will contests, for there was no trial or opportunity of trial of rights under the contract permitted. It would, moreover, deny all relief and all hope of relief, for no proof could be made of employment of Col. Ingersoll by said defendants to render "*services other than those provided for by the contract*," or that Col. Ingersoll performed other services of consequence. All services rendered by Col. Ingersoll for said defendants Coram and Root, known and susceptible of proof, are services rendered in the prosecution of said will contests under said contract. And he fully performed all services expressed or implied in said contract, and achieved a result over-reaching that mentioned therein as the event upon which payment of his compensation should be made. All which was shown by undisputed evidence where the presentation of evidence was permitted, as well as by admissions where equity requires full and specific answer.

The contract with Col. Ingersoll does not provide that the result therein mentioned must be accomplished by a verdict or in any specified manner. It could be accomplished under his contract by forcing from his adversaries through the prosecution of said contests, stipulations which as evidence authorized the entry of a decree defeating the will and awarding his clients their shares, as well as by any other method. The contract simply provides that for his services in prosecuting the contests Col. Ingersoll should be paid the stipulated fee, "in case the will is defeated and our clients get their shares." (See "Exhibit B," Record Vol. I, page 45.) The will was broken and defeated through

the prosecution of said contests by Col. Ingersoll, and the decree determining the same, and his clients got their shares.

Upon said data of issuable fact inadvertently assumed by the Supreme Court of Montana, without pleading or proof, it refused to reverse or set aide said order of nonsuit and judgment dismissing said action which Harris as administrator attempted to prosecute. But that case was not such as could be properly brought to this Honorable Court for review, by writ of error to the Supreme Court of Montana, because the determination of that case in Montana was merely a nonsuit and dismissal, and by the rule of law established by decisions of the highest court of Montana, rendered in conformity to the law as declared by this court, and by provisions of the statute of Montana, such a dismissal or nonsuit "does not prevent a new action for the same cause of action." (*Section 1007 of Montana Code of Civil Procedure.*) Moreover, according to the law as affirmed by this court in the case of *Noonan* v. *Bradley*, reported in 9 Wallace 405, and in many other decisions, the said Harris as administrator appointed in Montana, had no title to said contract or chose in action, whereby Coram and Root promised to pay for said services rendered by Col. Ingersoll. For which reasons and rules of law the said Harris, administrator appointed in Montana, could not successfully maintain an action to recover said indebtedness, or successfully prosecute a writ of error from this court to the Supreme Court of Montana to reverse its said decision on the ground that said Harris as admin-

istrator had been deprived of property without due process of law.

Third: Proceedings in Massachusetts, in the United States Circuit Court, in Action in Equity brought therein by your Petitioner against said Coram et al.—

Your petitioner further shows that John H. Leyson is the duly appointed qualified and acting administrator of the estate of Andrew J. Davis deceased, in the State of Montana, and also in the State of Massachusetts; and as such administrator has in his custody in Boston, Massachusetts, said bonds and money belonging to said estate of Andrew, of the value of over four hundred and fifty thousand dollars; of which money and bonds said five heirs and Coram are entitled to five hundred, fifteen and a half eleven-hundredths, acquired for them through the prosecution of said will contests and decree determining the same. And of that portion of said money and bonds said Henry A. Root as one of said heirs, and said Coram and Root as assignees of others of said five heirs, own, and are entitled to have and receive on distribution thereof, four hundred, fifteen and a half eleven-hundredths.

That on June 15, 1903, before right of recovery of said indebtedness owing by Coram and Root to your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, was barred by any statute of limitations, your petitioner being a citizen of the State of New York, commenced action in the United States Circuit Court for the district of Massachusetts (having been appointed administratrix there), by her bill in equity against said Coram, Root

and others, to foreclose the lien existing in favor of your petitioner on the interests of said Coram and Root in said money and bonds acquired as part of the fruits of the labors of Col. Ingeroll in the prosecution of said will contests, to enforce payment of said indebtedness. The defendants in said action were each a citizen of a State other than New York; and they all personally appeared after service, by demurrer and by answer to said bill.

That your petitioner alleged in her said bill many other additional material facts which were *not* alleged in the complaint in said action which Harris as administrator attempted to prosecute in Montana; among which are the following:

"That said Henry A. Root, Joseph A. Coram and their associates in said will contests agreed to sanctioned approved and acquiesced in, each and all of said stipulations, arrangements and proceedings whereby said contests were successfully determined in their favor as aforesaid, and whereby said five heirs for whom said Robert G. Ingersoll rendered said services in the prosecution of said will contests mentioned in said agreement and promise made and delivered to and with him by said Root and Coram, got their shares and largely more than their shares of said estate of Andrew J. Davis, deceased, to which they were entitled as his heirs at law." (See Record, Vol. I, page 18, 19.)

And further alleged that:

"There was no compromise, concession or relinquishment by either of said five heirs represented by said Robert G. Ingersoll in the prosecution of said contests, of any part or item of the shares, rights or interests to which they, or

either of them, were entitled of in and to said estate, as heirs at law of Andrew J. Davis, deceased." (See Record, Vol. 1, page 18.)

All the allegations in paragraph 22 of your petitioner's bill in said United States Circuit Court, setting forth acknowledgements of said indebtedness under said contract to pay for Col. Ingersoll's services in the prosecution of said will contests, and promises and pledges to pay the same, made by said Coram and Root, since the decease of Col. Ingersoll, are also new and additional averments, which were not in said complaint of Harris as administrator in Montana. Among which acknowledgments of said indebtedness and promises to pay the same, made since the decease of Col. Ingersoll, are the following:

In a letter sent to your petitioner dated September 2, 1899, said Henry A. Root stated, that the "Davis estate matters" were "reaching a conclusion that will bring substantial results to you."

In another letter dated September 26, 1899, replying to a letter sent to said Henry A. Root, on the subject of said indebtedness, he said: "I have yours of the 24th. You may be sure I shall do the very best I can for Mrs. Ingersoll as regards the Davis estate."

By letter dated March 3, 1900, written and sent to said Henry A. Root in regard to said indebtedness, a representative of your petitioner stated to him as follows:

"As you know, I am very anxious that Mrs. Ingersoll should realize out of the Davis will case; and I am very sorry not to have seen you when you were in New York, so that I might have talked the matter over with you fully.

As I understand Col. Ingersoll was to have all his expenses paid and to have $100,000 as his fee."

In reply thereto, by letter dated May 7, 1900, said Henry A. Root stated in part as follows:

"Since seeing you I have received your letter of March 3, which was sent to me in Montana, and I hasten to reply to it. With you I am also desirous that Mrs. Ingersoll should realize out of the Davis estate as much as possible, and to that end I shall myself bend every effort in my power, regardless of any personal interests that I might sacrifice by so doing. I want to wait until I see Mr. Coram in Boston where I am going the first of next week, before writing the letter to Mrs. Ingersoll which you suggested I should do, and which will cover the whole situation."

In another letter dated May 21, 1900, signed and sent by said Henry A. Root to your petitioner, referring to said contract of Coram and Root to pay for the services of Col. Ingersoll, rendered in the prosecution of said will contests, said Henry A. Root stated to your petitioner that: the "agreement with Col. Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis estate, for his services." And in the same letter referring to the money and bonds of said estate in Boston, Massachusetts, he said to your petitioner: "I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can."

Again in another letter signed and sent by said Henry A. Root to the representative of your petitioner, in regard to said indebtedness, said Henry A. Root stated in part as follows:

"Now, what I thought I said was this: That I would do everything I could at the time of an actual distribution of the Boston money for Mrs. Ingersoll, and all I can do is to say to you in the first place that she may rely upon it that that money, if distributed to our people, will not be distributed until after she has had an opportunity to have a hearing upon the claim of the Colonel for his services rendered, and I will at that hearing do all that I can do which will tend to increase the amount to be paid her for such services." (See Record, Vol. 1, pages 26–28).

That said Coram and Root also at divers other times since the decease of Col. Ingersoll, in interviews with representatives of your petitioner, acknowledged and promised to pay their said indebtedness owing on said contract, as alleged in paragraph 22 of your petitioner's bill in said United States Circuit Court. None of those acknowledgments, promises and pledges made since the decease of Col. Ingersoll were alleged in said complaint of Harris in Montana. (See Record, Vol. 1, page 25–28). Nor did said complaint of Harris in Montana contain any such or similar allegations as those set forth in paragraph 24 of your petitioner's bill in said United States Circuit Court. (See Record, Vol. 1, pages 31–34).

Your petitioner also set forth in her said bill the facts as to the attempt of said Harris as administrator appointed in Montana, to prosecute said action in that State, and the dismissal and nonsuit thereof by order of said district court as aforesaid. (See Record, Vol. I, page 34, Par. 25.) And your petitioner alleged in her said bill: "that your orator has herein averred, and can aver, prove and establish,

other and further facts in addition to the facts set forth in said former complaint, which cover and supply each and every insufficiency mentioned in objections to said former complaint, brought in said District Court in the State of Montana." (See Record, Vol. I, page 37.)

Defendants demurred to your petitioner's bill on divers grounds, among which it was alleged that your petitioner is estopped from prosecuting her action in equity in said United States Circuit Court, by reason of the commencement and dismissal of said action which Harris as administrator attempted to prosecute in Montana. (See Record, Vol. I, page 50, Par. 2.)

The said demurrers were heard by the Circuit Court, Hon. William L. Putnam, Circuit Judge, presiding, upon argument and briefs presented by counsel for the respective parties. And after due consideration said Circuit Court overruled said demurrers, basing its ruling on the question of said alleged estoppel, upon the law as affirmed in the rulings and decisions of this Honorable Court, that there is no privity between administrators appointed in different states. On that question, speaking of the order dismissing said action which Harris as administrator attempted to prosecute in Montana, the Circuit Judge in his opinion said:

"But in no aspect can it operate as an estoppel. The law is settled beyond question that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction; so that no judgment by or against Harris as ancillary administrator in Montana could avail for or against an ancillary administrator appointed by the courts of Massachusetts, bringing a suit

in that State, or in this district, although the cause of action was identically the same, this rule is so thoroughly established that we need not dwell upon it, only to say that it has been fully recognized and enforced by the Supreme Court, in *Asbden* v. *Nixon*, 4 *How.* 467, 497; *Stacy* v. *Thresher*, 6 How. 44, 58 *and sequence*; *Johnson* v. *Powers*, 139 *U. S.* 156, 159; *Carpenter* v. *Strange*, 141 *U. S.* 87, 104." (See Record, Vol. I, pages 86-87. *Ingersoll* v. *Coram*, 127 *Fed. R.* 432.)

In the meantime, said Circuit Court granted an interlocutory injunction order restraining said defendants from removing out of Massachusetts or distributing, taking, or carrying away or disposing of said money and bonds upon which the said lien existing in favor of your petitioner rests. (See Record, Vol. I, 139; *Ingersoll* v. *Coram*, 132 *Fed. R.* 168.)

From that injunction order, defendants Coram and Root prosecuted an appeal to the United States Circuit Court of Appeals for the first circuit; and that court affirmed said order of injunction without discussing any question urged on that appeal. (*See Coram* v. *Ingersoll*, 133 *Fed.* 226.)

Answers to your petitioner's bill were filed in said Circuit Court by defendants Coram, Root and others. In their answer to the 25th paragraph of the bill, wherein is alleged the facts as to attempt of said Harris as administrator to prosecute said action in Montana, and the nonsuit thereof, said Coram, Root and other defendants admit that:

"When said cause came on to be heard in said District Court of the State of Montana, said Root and Coram, by

their attorneys, made objection to the introduction of any evidence whatever in said cause on the alleged ground that the plaintiff's complaint did not state facts sufficient to constitute a cause of action; that said District Court sustained said objection and refused to permit any evidence to be introduced in support of the allegations of said complaint, and then and there nonsuited said plaintiff and dismissed said complaint," on that alleged ground, "and no other ground whatsoever." (See Answer, Record, Vol. 1, 114).

However, defendants set up in their said answer the same alleged estoppel by reason of the dismissal of said action which Harris as administrator attempted to prosecute in Montana.

Proofs were taken in the action brought by your petitioner in said United States Circuit Court of Massachusetts, during the summer of 1904, as the same appears in Volumes 1, 2, and 3 of the record herewith presented.

By the proofs and the admissions which defendants were obliged to make in their answers, your petitioner maintained and established all the material averments of her said bill. The defendants, Coram and Root, although they vigorously opposed your petitioner by numerous objections, presented no proofs attempting to controvert any averments of the said bill.

The only alleged defense said defendants attempted to prove was said alleged estoppel by reason of the dismissal of said action of Harris as administrator in Montana. A certified transcript of the pleadings in, and order dismissing said action of Harris, and judgment for costs therein, and

also a certified transcript of said opinion of the Supreme Court of Montana, were offered in evidence in the suit of your petitioner in said United States Circuit Court. The opinion of the Supreme Court of Montana, however, is no part of a judgment roll in an action in that State. Section 1196 of the Montana Code of Civil Procedure prescribes what shall constitute the judgment roll. Those transcripts of records from Montana appear as "defendant's exhibits" Nos. 5 and 6, Vol. III, pages 1529 to 1626 of the record herewith presented. All those copies of records offered in evidence by defendants were objected to by your petitioner as "irrelevant, immaterial and incompetent to prove or tend to prove any estoppel or bar or any other defense" to the cause set up in this action in said United States Circuit Court and further because that part of said transcript taken from records of the Supreme Court of Montana "is no part of the judgment roll" in said action. (See Record, Vol. III, page 1503).

Upon final hearing of said action brought by your petitioner in the United States Circuit Court of Massachusetts, upon the pleadings and proofs, and after due consideration thereof and of the law as held and affirmed by this Honorable Court, in the case of *Wylie* v. *Coxe*, 15 *How.* 415, *McPherson* v. *Cox*, 96 *U. S.* 404, *Central R. R. Co.* v. *Pettus*, 113 *U. S.* 116, *Louisville, E & St. L. R. R. Co.* v. *Wilson*, 138 *U. S.* 507, *Walker* v. *Brown*, 165 *U. S.* 654, *Meddaugh* v. *Wilson*, 151 *U. S.* 333, *Mackall v. Willoughby*, 167 *U. S.* 681, and many other cases, said United States Circuit Court on May 3, 1905, made and entered its final decree in said cause foreclosing the lien existing in favor of your petitioner upon

the interests owned by said Coram and Root in said money and bonds situate in Boston, Massachusetts, to enforce payment of their said indebtedness, in the sum of ninety-five thousand dollars and interest due thereon, out of that part of the fruits of the labors of Col. Ingersoll, acquired through the prosecution of said will contests. (See decree, Vol. IV, page 1706 *et seq.*)

Fourth: Appeal from the United States Circuit Court, from its said decree, to the United States Circuit Court of Appeals for the first circuit, by said Coram et al., and proceedings therein.—

Appeal from said circuit court from its said decree to the United States Circuit Court of Appeals for the first circuit, was prosecuted by said defendants Coram, Root and Palmer as trustee, the respondents named herein. The case on that appeal was heard by the Honorable Judges Colt, Lowell and Aldrich, sitting in said Circuit Court of Appeals, in December, 1905. And recently, on October 16, 1906, that Court by two judges concurring rendered and entered its decision and order therein as follows: "The decree of the Circuit Court is reversed and the case remanded to that Court with directions to dismiss the bill, with costs; and the appellants recover costs of appeal." (See opinion Record Vol. IV, pages 1743-1753, and Order *ib.* 1765.)

The only ground upon which that ruling and decision is based, is stated as follows at the close of the prevailing opinion:—

"It follows that the matter herein litigated was adjudicated in Montana, inasmuch as the cause of action in the two proceedings was the same, the Montana judgment was

rendered on the merits, and was so far between privies that the administrator in Massachusetts is bound by the judgment against the administrator in Montana." (See Opinion, Record Vol. IV, page 1753.)

Judge Aldrich dissented from that ruling and order of the Circuit Court of Appeals, holding with said Circuit Judge who tried said case, that your petitioner having fully made out her cause in the United States Circuit Court is entitled to recover; and that she is not estopped by reason of the dismissal of said action which Harris as administrator attempted to prosecute in Montana. His dissenting opinion appears at pages 1754–1763, Vol. IV of the record herewith presented.

The said decision of the Circuit Court of Appeals, your petitioner believes, is erroneous and in conflict with the decisions of this Honorable Court, as well as the decisions of the federal courts in other circuits, and of the highest court of the States where like questions have been decided, and is also contrary to, and fails to give effect to, the rule of law prescribed by the statutes of Montana, and the decisions of the highest court of that State.

THE POINTS WHEREIN THE CIRCUIT COURT OF APPEALS ERRED AS YOUR PETITIONER BELIEVES, AND WHEREIN ITS SAID RULINGS AND DECISION ARE CONTRARY TO AND IN CONFLICT WITH THE RULES OF LAW AS DECLARED BY THIS COURT AND OTHER COURTS, AND THE STATUTE, AND DECISIONS OF THE HIGHEST COURT OF MONTANA, ARE AS FOLLOWS:

(1) The said Circuit Court of Appeals erred in holding, ruling and deciding that said Harris as administrator

appointed in Montana was invested with title to and right of action upon said contract of Coram and Root to pay for the services rendered by Col. Ingersoll in the prosecution of said will contests, by the mere fact that said Harris as administrator was substituted as plaintiff in said action commenced in the name of your petitioner as administratrix and dismissed in the State of Montana.

This Court in the case of *Noonan* v. *Bradley*, 9 *Wallace* 405 said:—

"The second plea like the first puts in issue the representative character of the plaintiff in Wisconsin; not by direct denial, as in the first plea, but by averring that there were effects of the decedent in that State at the time of his decease, among which was the bond in suit; that an administrator of those effects had been duly appointed and qualified, and had entered upon and was engaged in the discharge of his duties as such officer at the time the action was commenced, and that by reason of this appointment and qualification the effects of the decedent, under the laws of Wisconsin were vested in him, with right of action in relation thereto, and that as a consequence the letters issued plaintiff in the State of New York with reference to the cause of action, stated in the declaration are void and of no effect.

"This plea is a good plea in bar to the action. The bond in suit was *bona notabilia* in Wisconsin, and a plea that the subject of the action constituting such *bona notabilia* was, on the death of the decedent in another jurisdiction than the one which appointed the administrator suing as plaintiff has always been a good answer to the action." (9 Wall. 405).

It was alleged in the complaint in Montana that Col Ingersoll died in New York and that your petitioner wa there appointed administratrix of his estate long prior to th appointment of said Harris as administrator in Montana as shown under the foregoing *second* head in this petition There were no averments in the complaint or any pleadin in said attempted action in Montana that said contrac or chose in action whereby Coram and Root promised t pay for said services rendered by Col. Ingersoll, was i Montana when he died. No such allegation could in truth have been made, for said contract was in the possession o Col. Ingersoll in New York at the time of his decease. Nor is there any averment in the complaint of said Harris as administrator in Montana attempting to show any facts whereby he could claim to have been invested with titl to said chose in action.

In the prevailing opinion of the Circuit Court of Appeals in your petitioner's case it is said: That Harris was appointed as administrator in Montana, and "on motion of Mrs. Ingersoll, the original plaintiff in the Montana proceeding and the complainant here, he was substituted for her as plaintiff in the former suit," (Record, Vol. IV page 1,744). And that: "Though she did not herself continue the Montana suit, yet having procured Harris's substitution in her place in the suit which she had begun, she cannot well say that chose in action had not its situs in Montana, and was not assets there." (Record, Vol. IV, page 1,752.)

The record of the Montana proceedings offered in evidence in the United States Circuit Court of Massachusetts simply

shows that in said action in Montana wherein Eva A. Ingersoll as administratrix etc. is named as plaintiff, on motion of counsel for plaintiff it was by the Court ordered that John S. Harris as administrator, etc., be substituted as plaintiff; and that the name of Eva. A. Ingersoll as administratix, etc., be stricken therefrom. (Record, Vol. III, page 1,676.)

In that action in Montana the Court had, on objection of said Coram and Root, refused to recognize or hear your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in New York, and ruled that she had no right or authority to do anything whatever in Montana as representative of said decedent. And according to the statute of Montana your petitioner was denied the right to be appointed administratrix of said decedent in the State of Montana.

In the case brought by your petitioner in said United States Circuit Court, the said Circuit Court of Appeals held, ruled and decided that because counsel in said case brought in said Montana court in the name of Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in the State of New York, whom said Montana court refused to recognize or hear, moved that her name be stricken from that action, and that said Harris as administrator appointed in Montana be substituted as plaintiff therein, thereby the said Harris as administrator in Montana was invested with title to said chose in action.

The motion of an attorney or counsel in an action in said Montana court, even if made in the name of or in behalf of an administratrix appointed in New York, who could not

act as such in Montana, and whom that court had refused
hear, surely could not be the medium of taking the title
property held by the administratrix in New York, awa
from her and conveying it to an administrator appoint
in Montana.

According to the decisions of this court and the ruling
the Montana court, your petitioner as administratrix of t
estate of Robert G. Ingersoll, deceased, appointed in Ne
York could do no act as representative of said decede
in Montana. And being without power herself to do an
act in Montana touching the property of the estate of Robe
G. Ingersoll, deceased, your petitioner surely could not
any act there affecting the property of said decedent throug
the mere motion of counsel in an action in said Montan
court.

On this subject it is deemed sufficient for the preser
to refer to the decisions of this court mentioned by th
Circuit judge in overruling demurrers to your petitioner
bill in said United States Circuit Court, namely: *Asbden* v
Nixon, 4 *How.* 467; 497; *Stacy* v. *Thresher*, 6 *How.* 44, 5
Johnson v. *Powers*, 139 *U. S.* 156; *Carpenter* v. *Strange*, 14
U. S. 87; *Opinion of Putnam, Circuit Judge, Record, Vol.*
86, 87; *S. C. Ingersoll* v. *Coram*, 127 *Fed. R.* 432; and t
the case of *Noonan* v. *Bradley*, 9 *Wall* 405, and the numerou
cases cited in the notes of Mr. Rose upon the decisions
this court above mentioned.

A motion by counsel to substitute one person in plac
of another as a party to an action in court could not operat
to transfer the title to any private property from one
those persons to the other. And much less could a mer

motion by an attorney in a case in Montana have the effect of transferring property of the estate of Robert G. Ingersoll, deceased, vested in your petitioner as administratrix in New York, to an administrator appointed in Montana.

(2) The ruling of the Circuit Court of Appeals, that there was privity between your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in the State of New York, or in the State of Massachusetts, and the said Harris as administrator appointed in Montana, is erroneous, and in direct conflict with the decisions of this court, and of all the lower federal courts, and of all the state courts of last resort, wherein that question has been determined, as your petitioner believes.

This court has always held, without exception to the rule, that there *is not and cannot be any privity* between administrators of a decedent appointed in different jurisdictions, "either in law or in estate." It is so held in the cases last above cited and in all other cases involving that question decided by this Court. And that rule has been so uniformly followed in a great number of decisions of the federal and states courts, on every phase in which the question has been presented, that counsel for said defendants Coram *et. al.*, were unable to cite said Circuit Court, or Circuit Court of Appeals, to any case asserting privity of any kind or character between administrators appointed in different States. This was *not* a case of *executors* who receive title direct from the testator by will.

The said Circuit Court of Appeals in passing upon the appeal of said Coram *et. al.*, herein mentioned, having stated in the prevailing opinion that Harris was "Ingersoll's

administrator appointed in Montana," and "the complainant here, is Mrs. Ingersoll his administratrix appointed in Massachusetts," said: "Is the former in privity with the latter so that a judgment against him binds her?" (Record, page 1,748.) And after discussing that question, coming to the conclusion that there is such privity between the two administrators mentioned, it is observed: "Any other result would be intolerable. Had Harris obtained judgment against these defendants in the Montana suit he could have sued on it in Massachusetts in his own name, and the Massachusetts administratrix could not have sued on it in her representative capacity. If the complainant's theory is sound, these defendants would then be liable in Massachusetts to two suits at the same time, one brought against them by Harris individually upon the Montana judgment, and another brought against them by Mrs. Ingersoll, as the Massachusetts Administratrix, upon the original claim which had been merged in that judgment." (Record, Vol. IV, page 1,753.)

The supposed intolerable result suggested by the learned court, could not take place under the law as affirmed by this Honorable Court in the case of *Noonan* v. *Bradley*, 9 *Wall*, 405 and other cases, and as held by all the national and state courts wherein such questions have been determined. Because Harris as administrator appointed in Montana never had title to the chose in action upon which he attempted to sue. The law was available to defendants to defeat the attempt of Harris as administrator to obtain judgment in Montana. His complaint showed no title in him to said chose in action; but it did show that Col.

Ingersoll died in New York, and that your petitioner was appointed administratrix of his estate in New York long before Harris was appointed administrator in Montana. The complaint of Harris as administrator in said action which he attempted to prosecute in Montana, not only did not show title in him to the chose in action mentioned in his complaint, but he could not show that he had ever been invested with title, or that any attempt had ever been made to invest him with title thereto, if indeed it could be done at all.

The supposed intolerable result suggested in said prevailing opinion that unless a new rule of law be made, holding that there *is* privity between administrators appointed in different States, it might happen that two actions could be prosecuted upon the same claim, assumes that the law as it is settled by the uniform decisions of this and other courts, would not have been invoked to prevent said Harris as administrator appointed in Montana, from obtaining judgment on said chose in action. There is no danger of two actions growing out of the attempt of different administrators, to enforce a claim belonging to the estate of a decedent, for when the title is sought out it is found in one administrator; and if another attempted to obtain judgment thereon he would fail, as in the case of *Noonan* v *Bradley*, 9 *Wallace*, 405.

The rulings expressed in said prevailing opinion, on the theory of *situs* of said chose in action, are erroneous as your petitioner believes. It was not a question of *situs*, but a question of *title*, which said Circuit Court of Appeals had to consider. The *title* to *realty* of an intestate *vests* by law in

his heirs; and the *title* to *choses in action and other personal property* of an intestate, *in his possession at his domicile where he died, vests in the administrator appointed in that jurisdiction.* According to good reason and the rule of law settled by the decisions of this Honorable Court, there is no such thing in law as the title to such property, or the right of action thereon, being *indifferently* in either administrator appointed in different jurisdictions. *Noonan* v. *Bradley*, 9 *Wall.*, 405, *Wilkins* v. *Ellett*, 9 *Wall.*, 740, and other decisions of this court *supra*. There could be cited a great number of authorities to the same effect.

(3). The holding of said Circuit Court of Appeals, that the order of nonsuit and judgment dismissing said action which Harris as administrator attempted to prosecute in Montana is a judgment on the merits, or an adjudication of the rights of your petitioner set up in her bill in said United States Circuit Court, is erroneous, as your petitioner believes.

In said prevailing opinion of the Circuit Court of Appeals it is held that the dismissal of said action of Harris in Montana, is a judgment as on demurrer—although defendants admit in their answer to your petitioner's bill in said Circuit Court, "that said District Court (in Montana) sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint and then and there *nonsuited* said plaintiff and dismissed said complaint." (Record Vol. I, page 114).

The Montana code provides for demurrer to a complaint on specified grounds, to be filed, heard and disposed of before answer. But it does not provide for a demurrer

after answer is filed raising issues by its denial of all material allegations of the complaint. Nor does the Montana code provide for a demurrer in the form of an objection to the introduction of any evidence upon the issues raised by the complaint and answer; and if such objection be sustained, then complete the demurrer by a motion to dismiss the complaint, and an order of court dismissing it. A demurrer to the complaint regularly interposed, admits its averments. But an objection to the introduction of any evidence offered by plaintiff upon the issues raised by the complaint and answer does not admit the allegations of the complaint. If such objection be overruled, the answer is there denying the complaint, and nothing is admitted, whatever the ruling may be. Nor does a motion to dismiss the complaint admit anything. If such motion be overruled, the answer is there denying the averments of the complaint. Such objections and motions have none of the legal elements or effects of a demurrer. The rulings and orders thereon are not judgments on the merits or estoppels. "Estoppels by judgment must be mutual," *i. e.*, "a party cannot claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same matter if adverse to him." *Moore* v. *City of Albany*, 98 N. Y. 409.

The said Circuit Court of Appeals putting said objection and motion together, held that they constituted a sort of general demurrer, and that the ruling thereon was a judgment on the merits. But that ruling of the Circuit Court of Appeals, even on such premise, is erroneous according to the ruling of this court in the case of *Gilman* v. *Rives*, 10 Pet.

301. Therein this court *per* Story J. said: "A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is, in no just sense, a judgment upon the merits." (10 Pet. 301, 302). And, moreover, the motion to dismiss said Harris case was not a demurrer.

According to the decisions of this court the nonsuit or dismissal of an action in a State court, such as that in the case of Harris as administrator in Montana, is not allowed the force or effect of a judgment on the merits, or permitted to operate as a bar to another action for the same cause. *Homer* v. *Brown*, 16 *How.* 354, *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121, *Gardner* v. *Mich. Cent. R. Co.*, 150 *U. S.* 349. Those cases, however, are stronger than that of Harris in Montana. One of them had been tried in the State court upon an agreed statement of facts, and the others upon the evidence where plaintiff was given opportunity to introduce all evidence he then had. But in said Harris case in Montana there was no evidence introduced and it was dismissed without trial.

In the case of *Canal Co.* v. *Gordon*, 73 *U. S.* 561, brought in the United States Circuit Court for the district of California, to foreclose a lien, one of the defenses was that the case was barred by a judgment dismissing a case brought in the State court upon the same cause of action. This Court overruled that defense, saying: "The dismissal of that suit can obviously have no effect upon the rights of the parties in this litigation." (73 U. S. 571).

It was held to the same effect in the case of *Hughes* v. *United States*, 4 *Wall.* 232, and *Keller* v. *Stolzenbach*, 20 *Fed. R.* 47, and those cases are cited, in the case of *Kleindschmidt* v. *Binzel*, 14 *Montana R.* 56, and relied upon as authority as to the effect of such dismissal of an action.

The law of Montana as held in decisions of its highest court and as provided by statute, denies to all such judgments of nonsuit or dismissal, as that in said Harris case, the force or effect of a judgment on the merits, or a bar "to a new action for the same cause of action."

In the case of *Kleindschmidt* v. *Binzel*, 14 *Montana*, 31, *S. C.* 43 *Am. St. Rep.* 606, decided in 1893 and *approved in* 18 *Montana R. pages* 42 *and* 400, the Supreme Court of that State, in deciding as to the effect of a judgment on demurrer said: That if a case is submitted to the court upon a demurrer admitting all the facts alleged in the complaint, "and upon weighing the law and facts those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand, those facts thereby pass under the rule of things adjudicated"—citing *Gould* v. *Evansville, etc., R.R. Co.* 91, *U. S.* 526, and some other cases (14 Mont. 52, 53). But immediately following that observation, it is said in that Montana opinion: "But this rule should always be stated and applied with due regard to some modifying conditions, which it is not permitted to violate. Thus when the pleader has submitted to the ruling of the court on demurrer, against the sufficiency of the cause of action, or defense, as stated, that ruling would not bar him or those in privity with him from again asserting the same facts, accompanied by additional allegations which complete the statement of

good cause of action or defense. (*Gould* v. *Evansville, etc. R. R. Co.* 91 *U. S.* 526)." (14 Mont. 53.)

The Montana court there points to the exception to the rule stated in *Gould* v. *Evansville, etc., R.R. Co., supra* where it is said:

"But it is equally well settled that if the plaintiff fails on demurrer in the first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration, were not heard and decided in the first action." (91 U. S. 526, cited in 14 Mont. 53).

That Montana opinion also quotes the language of this Court in *Packet Co.* v. *Sickles*, 5 *Wall.* 592, that:

"When the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined, . . . but even where it appears from the extrinsic evidence that the matter was properly within the issues controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." (14 Mont. 55.) And quoted from *Russell* v. *Place*, 94 *U. S.* 608, the law as there stated, that to give a judgment the operation of an estoppel, "it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and deter-

mined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence," etc. (14 Mont. 55, 56.)

And the same opinion quotes from this Court in the case of *Hughes* v. *United States*, 4 *Wall.* 232, the following:

"If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment will prove no bar to another suit." (14 Mont. 54).

That case of *Kleindschmidt* v. *Binzel*, *supra*, combined both legal and equitable features. It was commenced as an ejectment action, but defendants set up an equitable defense and asked for equitable relief, as is permissible under the Montana code. In a former action where the same equitable rights had been set up in the complaint, a demurrer thereto was sustained and judgment rendered for the costs and the case went no further. That former judgment was pleaded in bar of the subsequent action, in which the opinion reported in 14 Montana R. 31 was delivered. The result of that consideration was that the Supreme Court of Montana, applying the rules of law announced by this Court, would not accord to the former

judgment on demurrer set up in that case, the operation of a judgment on the merits, or an estoppel.

There was at that time, 1893, a provision of the Montana Code of Civil Procedure (Section 242 Compiled Statutes of 1887) that : "An action may be dismissed or a judgment of nonsuit entered in the following cases:" Then followed five subdivisions of that section providing for a dismissal or "judgment of nonsuit" in certain events. Following those provisions, section 243 of the same code provided as follows:

"Sec. 243. In every case other than those mentioned in the last section, the judgments shall be rendered upon the merits."

Section 244 of the same code provided that upon the dismissal of an action, it "shall be the duty of the court," to enter judgment for costs. (*Compiled St. of Mont.* 1887, pages 118, 119.)

Those statutes of Montana *then* in force were the same substantially as the statute of Nevada mentioned by this Court in the case of *United States* v. *Parker*, 120 *U. S.* 89, cited in the prevailing opinion of said Circuit Court of Appeals in the case at bar. (Record, Vol. IV, page 1,747). But the latter Court is in error in assuming as it did in deciding the case of your petitioner, that the statute of Montana is *now* the same, or was the same when the Harris case was dismissed in Montana. It will be seen by reference to the opinion in *Kleindschmidt* v. *Binzel*, 14 *Mont. R. pages* 60, 61, that it was urged in that case, that because the statute of Montana in section 243 provided that "In every case, other than those mentioned in the last section, the judgments shall be rendered upon the merits," and because "the last section,"

did not provide for cases where judgments were entered on demurrer, therefore by force of statute all judgments, except in the cases specially mentioned in the five subdivisions of section 242, were upon the merits and operated as estoppels. The Court considered that contention as shown in the latter part of its opinion (14 Mont. 60, 61), and expressly held that section 243 of the Montana Code of Civil Procedure providing that, "in every case, other than those mentioned in the last section, the judgments shall be rendered upon the merits," *did not apply to an order or judgment rendered on demurrer*. The Court there also held that certain decisions of the Massachusetts courts as to procedure or the effect of rulings, orders or judgments, would not apply under the code of Montana—although that Court has great respect for the Massachusetts decisions and frequently cites them.

Shortly after that opinion was delivered in the case of *Kleindschmidt* v. *Binzel*, *supra*—in which it had been urged, but without success in that case, that the court was obliged by provisions of statute above mentioned to hold such dismissals and judgments on demurrer to be judgments on the merits and estoppels—the Legislature of Montana, in 1895, manifestly to deny to all such dismissals of actions or complaints as that in the case of Harris as administrator, the force or effect of a judgment on the merits or an estoppel, enacted and inserted in connection with the provisions of said sections 242 and 243 above mentioned, a new provision as follows:

"A final judgment, dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it

appears by the judgment roll, that it is rendered upon its merits."

The complaint of Harris was simply dismissed, as shown by the record of the order. (See Record, Vol. III, page 1,612). All said statutes were in force in the year 1902 when said complaint of Harris was dismissed. Those statutes are now sections 1,004 to 1,007 of the present Code of Civil Procedure of Montana. In said section 1,004 it is provided that "An action may be dismissed or a judgment of nonsuit entered in the following cases:"

"5. By the Court, upon motion of defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury."

In the case of Harris as administrator in Montana, there was no evidence introduced, and, of course, no case was proved. The Court had excluded the evidence by its rulings on objection of defendants. Then, as the record shows, "on motion of counsel for defendants the complaint herein is by the court ordered dismissed." The record does not show that any grounds of that motion were stated. (Record, Vol. III, page 1612). That dismissal is entirely within the provisions of subdivision 5 of section 1,004, of the Montana Code of Civil Procedure. It was simply a nonsuit as defendants *admit* in their answer to your petitioner's bill in the United States Circuit Court of Massachusetts. (See Answer, Record, Vol. 1, page 114).

The Circuit Court of Appeals erred in not allowing the statutes of Montana their proper force and effect as applicable to the question before it; and erred in holding that the statutes of Montana in question are similar to the stat-

utes of Nevada mentioned in the case of United States v. Parker, 120 U. S. 89, because important additional statutory provisions on the same subject were in the Montana Code when said Harris case was dismissed as shown above. Besides in said Nevada case there had been a regular trial of the former action in the United States Circuit Court and judgment upon the evidence.

There has never been a ruling or decision by the courts of Montana that such a dismissal as that in the case which Harris as administrator attempted to prosecute, is a judgment on the merits or a bar to another action for the same cause. Any such holding would be inconsistent with the statutes, and rules of decision established by the highest court of Montana, in harmony with the law as affirmed by this Honorable Court. The said Circuit Court of Appeals erred in not applying to said order of dismissal and nonsuit of said Harris case in Montana, the rule of law applied to such nonsuits by this Court. *Homer* v. *Brown*, 16 *How.* 354; *Manhattan Life Ins. Co.*, v. *Broughton*, 109 *U. S.* 121; *Gardner* v. *Mich. Cent. R. Co.*, 150 *U. S.* 349; Gilman v. Rives, 10 Pet. 298, 301; McComb v. Frink, 149 U. S. 629.

The said Circuit Court of Appeals also erred in adjudging the effect of the dismissal of said Harris case in Montana, by the ruling in the case of Green v. Sanborn, 150 Mass. 454. In the case therein considered evidence had been introduced and trial had as to the alleged off-set. According to the Massachusetts decisions all such dismissals and nonsuits as that in the Harris case in Montana are "like blowing out a candle which a man at his own pleasure lights again." *Clapp* v. *Thomas*, 5 *Allen* 158;

Bridge v. *Sumner*, 1 *Pick.* 370; *Borden* v. *Thomas*, 99 *Mass.* 200; *Hubbard* v. *Hooker*, 102 *Mass.* 202. The latter case above mentioned is cited by this Court in *Russell* v. *Place*, 94 *U. S.* 406.

In California, without statutes like those of Montana above mentioned, the courts deny to such dismissals and nonsuits, as that in said Harris case, the force or effect of judgments on the merits or estoppels.—*Davenport* v. *Turpin*, 43 *Cal.* 602, *Rosenthal* v. *McMann*, 93 *Cal.* 509, *Oakland* v. *Oakland*, 118 *Cal.* 195. In the latter case the judgment of dismissal set up in bar was in a case which had been considered in the lower court and on appeal; but it was held in both the prevailing and dissenting opinion, following the decisions of this Court, that the dismissal of the former action was no bar to the latter.

The said Circuit Court of Appeals in passing upon your petitioner's case, seems to hold that the dismissal of said Harris case in Montana was a judgment on the pleadings, and cite some Montana cases for support that view. None of the cases cited in the prevailing opinion of said Circuit Court of Appeals warrants any claim that said dismissal of the Harris case was a judgment on the pleadings. Where a judgment on the pleadings is sought counsel do not move that the complaint be dismissed; they move for a judgment on the pleadings. Nor does the court order the complaint dismissed if it intends to give judgment on the pleadings. The Montana Supreme Court has emphatically held in several cases (and there is no ruling to the contrary) that there can be no judgment on the pleadings "if there is an issue framed by the pleadings."—*Floyd* v. *Johnson*, 17 *Mont.*

471; *Horsky* v. *Moran*, 13 *Mont.* 267; *Bach, Corey & Co.* v. *Mont. L. & P. Co.*, 15 *Mont.* 345.

To give said opinion of the Montana Court in said Harris case, the effect given thereto by said Circuit Court of Appeals deprives the legal representative of Col. Ingersoll of property without due process of law. As said in the dissenting opinion by Judge Aldrich in the case at bar:

"The Montana Court ignored the issues raised by the answer and the replication, denied to the plaintiff his right of trial and all opportunity to introduce proofs, and assumed to decide the case upon the bill of complaint, notwithstanding the fact that the bill had been answered and issues joined by replication upon questions of fact and upon mixed questions of law and fact. (Record, Vol IV, p. 1,756.)

"In *Martin* v. *Texas*, 200 *U. S.* 316, the right to introduce proofs in support of a material allegation was recognized as an essential right, and it was there said if the court had refused to admit evidence, or if the opportunity to establish the alleged facts had been denied, the judgment would be reversed. The State law as applied in the Montana case did not accord to the plaintiff 'due process of law.' It is said in *Hoxard* v. *Kentucky*, 200 *U. S.*, 164, 178, that it may be admitted that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights and that the inquiry is, did the State law as applied afford due process as those words are used in the Fourteenth Amendment?" (Record, Vol. IV, p. 1,757.)

All that the Supreme Court of Montana decided on said appeal of Harris as administrator, and all its opinion can properly be construed under the statutes and decisions to

have decided, is that there was not enough stated in the complaint of said Harris as administrator in Montana. This is shown by the observation in that opinion to the effect, that if "ratification by the client," of said stipulations providing for the entry of a decree determining said will contests, were shown, there would be an entirely different case. (Harris adm'r *v.* Root, 28 Mont. 168). The inadvertent assumption and discussion in said opinion, of issuable facts gathered from the *contention* of defendant's counsel, is *obiter dicta*, and is not binding upon the United States courts, or any court. *Curtis on Jurisdiction of Federal Courts* (2d. ed.) 233-243; *Neves* v. *Scott*, 13 *How.* 268; *United States* v. *Hoaland*, 4 *Wheat.* 115; *Boyle* v. *Zacharie*, 6 *Pet.* 658; *Gelpcke* v. *Dubuque*, 1 *Wall.* 175; *Thomas* v. *Hatch*, 3 *Sumn.* 170; *Fed. Case No.* 13,899, *by Story, J.*; *Bradley* v. *Lill*, 4 *Biss.* 743 (*Fed. Case No.* 1,783); *Edwards* v. *Davenport*, 20 *Fed.* 756.

The showing of additional facts in your petitioner's bill in the United States Circuit Court—that there was *no compromise* whatever on the part of Col. Ingersoll, or either of his clients whom he represented in said will contests; and the showing that all of Col. Ingersoll's clients "in said will contests agreed to, sanctioned, approved and *acquiesced* in, each and all the stipulations, arrangements and proceedings whereby said contests were successfully determined in their favor" (Record, Vol. I, page 18), and other additional material facts shown in your petitioner's bill—make out an entirely different case than that set up in said complaint of Harris as administrator, before the Montana court. The showing of *acquiescence* alone, which was admitted by defend-

ants in answer to your petitioner's bill (Record, Vol. I, page 107), makes out an entirely different case than that treated in the opinion of the Montana court. *Sacain* v. *Seamens*, 9 *Wall.* 254; *Scott* v. *Jackson*, 89 *Cal.* 258.

The aforementioned decisions of this Court, the statutes and decisions of the highest court of Montana, and of other courts, denying to such orders and judgments of nonsuit or dismissal, as that in said case of Harris as administrator in Montana, the effect of a judgment on the merits, or an estoppel, were urged upon the attention of said Circuit Court of Appeals, at the hearing of said appeal of Coram *et al.* To that end for convenience and certainty (although the United States courts take judicial notice of the statutes and decisions of the highest court of the several States—in order to show the true state of the statute law, and the decisions of the highest court of Montana touching subjects drawn in question in the adjudication of your petitioner's cause in said Circuit Court, a statement thereof verified by the depositions of two former Chief Justices of the Supreme Court of Montana, was presented to said Circuit Court as shown in the record herewith submitted. (Record, Vol. I, pages 387-398.) In that statement the decisions of the highest court of Montana are presented (some of which were affirmed by this Court) showing that *abandonment* is a question of *intention* and an *issuable fact* which if used in litigation as affecting the rights of a party, *must be asserted in pleading, tried and found upon proof*, and cannot be lawfully assumed. (See Record, Vol. I, pages 394 *et seq.*) That verified statement of the laws of Montana also points out the statutes and decisions of that State, denying to such

dismissals or judgments of nonsuit, as that of said Harris case, the force or effect of a judgment on the merits, or a bar to another action for the same cause. (Record, Vol. I, page 394.)

Fifth: Grounds for the issuance of a writ of certiorari in this case.

The effect given by said rulings of the said Circuit Court of Appeals, to said order and judgment of nonsuit dismissing said complaint of Harris, deprives your petitioner of property without due process of law; because no trial of the action which said Harris attempted to prosecute in Montana, was permitted, and the discussion of rights in question by the Supreme Court of that State, (which the said Circuit Court of Appeals seems to regard as binding upon said United States courts) was predicated upon issuable facts assumed without pleading or proof, and in a case where opportunity of raising issue or presenting evidence touching those issuable facts was denied by the rulings of said Montana Courts.

The amount and the rights involved in this case are important. And if the said decision and decree of said Circuit Court of Appeals is permitted to stand your petitioner's rights will be defeated, not because her claim and demand is wanting in equity or legal virtue or is not supported by the amplest proof which the law requires, but because of the doctrine applied by said Circuit Court of Appeals to said proceedings in Montana refusing a trial there, and dismissing the complaint of said Harris; and the holding and ruling of said Circuit Court of Appeals that there *is*

privity between your petitioner as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in New York, or in Massachusetts, and said Harris as administrator appointed in Montana.

That a person should be deprived of property rights without having an opportunity of hearing or trial on the merits under the ordinary and usual forms of law, though diligently sought in the pursuit of justice, is a matter of grave public interest.

The questions of law passed upon by said Circuit Court of Appeals, and upon which its rulings and decision against your petitioner entirely turns, as shown under the foregoing *fourth* head of this petition, are grave questions touching the authority of courts of the United States, as affected by the laws, and acts of the courts of a state, upon important subjects of general jurisprudence. And the said judges of the United States courts of the first circuit are divided in their opinion upon those questions of law.

It is a matter of grave public interest that the Courts of the United States should not be deprived, or deprive themselves, of their lawful authority to administer justice between citizens of different States, because of the action of courts of a State, in case the latter courts may have assumed to decide rights in question depending upon issuable facts without giving any opportunity to raise issue or present evidence upon such issuable facts, and thereby (if such decision of a state court be given effect as conclusive) deprive a person of property, without due process of law, contrary to the laws of that State as well as the laws of the United States.

There is conflict between the rule of decision applied to

your petitioner's case by said Circuit Court of Appeals of the first circuit, and the rule of the law as defined in the rulings and decision of this Honorable Court and followed in the decisions of the United States Courts of all other circuits: first upon said *question of privity between administrators* appointed in different states, and upon the *question in whom was title to said chose in action vested;* and second, *upon said question of res judicata.* The said ruling and decision of said Circuit Court of Appeals, on said question of *res judicata* is also in conflict with the rule of law prescribed by the statutes of the State of Montana and applied in decisions of the highest court of that state, in harmony with the rulings of this Honorable Court. The said conflicts are shown under the foregoing *fourth* head of this petition.

Your petitioner believes that the aforesaid rulings and decree of said Circuit Court of Appeals are erroneous and ought to be reversed, and that this Honorable Court should require the said case to be certified to it for review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the first circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled: "Joseph A. Coram *et al*, defendants, appellants, *v.* Eva A. Ingersoll, administratrix, complainant, appellee," to the end that the said cause may be

reviewed and determined by this court as provided in section 6 of the Act of Congress entitled: "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act; and that the said decree and order of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court, and that the said decree of the said circuit court granting your petitioner relief may be affirmed by this Honorable Court.

And your petitioner will ever pray.

EVA A. INGERSOLL,
Administratrix of the estate of
Robert G. Ingersoll, deceased.
By E. N. HARWOOD,
her Counsel.

DISTRICT OF COLUMBIA)
City of Washington.) *ss.*

E. N. Harwood being duly sworn says: That he is one of the counsel for Eva. A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, the petitioner in the foregoing petition; that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

E. N. HARWOOD.

Subscribed and sworn to before me by E. N. Harwood this 1st day of December, A. D., 1906.

SAM'L W. CURRIDAN,

[NOTARIAL SEAL]. *Notary Public.*

I, Hannis Taylor, attorney and counsellor at law, admitted to practice in the Supreme Court of the United States, hereby certify: That I have examined the foregoing petition for a writ of certiorari; that the same is not made for purpose of delay, and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issue.

HANNIS TAYLOR,

Counsel.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

EVA A. INGERSOLL, as administratrix of the Estate of ROBERT G. INGERSOLL, deceased, *Petitioner*,

v.

JOSEPH A. CORAM, HENRY A. ROOT AND CHARLES H. PALMER, *Respondents.*

Comes now Eva. A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, by her undersigned counsel, and moves this Honorable Court to require by writ

of *certiorari* or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the first Circuit, the said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the respondents Joseph A. Coram, Henry A. Root and Charles H. Palmer were defendants, Appellants, and your petitioner Eva. A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, was plaintiff and Appellee; and to that end now presents herewith her petition, with a certified copy of the entire record in said cause as it is in said Circuit Court of Appeals.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Counsel.

HANNIS TAYLOR,
Of Counsel.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS.
FOR THE FIRST CIRCUIT.

JOSEPH A. CORAM *et al.*,
Defendants, Appellants,

v.

EVA A. INGERSOLL, administratrix,
Complainant, Appellee.

The defendants and appellants are hereby notified that the plaintiff and appellee will on Monday, the 17th day of December, 1906, upon her verified petition and a copy of the entire record in this cause, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of certiorari, as above set forth, are herewith delivered to you) to the Supreme Court of the United States, at its Court Room at the Capitol, in the City of Washington, D. C.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Solicitors and Counsel for Complainant, Appellee, and Petitioner.

HANNIS TAYLOR,
Of Counsel.

Service of the foregoing notice and delivery of a copy of the said motion and petition for writ of certiorari, on the ..... day of December, 1906, is hereby acknowledged.

.....

.....

Solicitors and Counsel for Defendants, Appellants and Respondents.

Supreme Court of the United States

OCTOBER TERM, 1909.

EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,

Petitioner,

v.

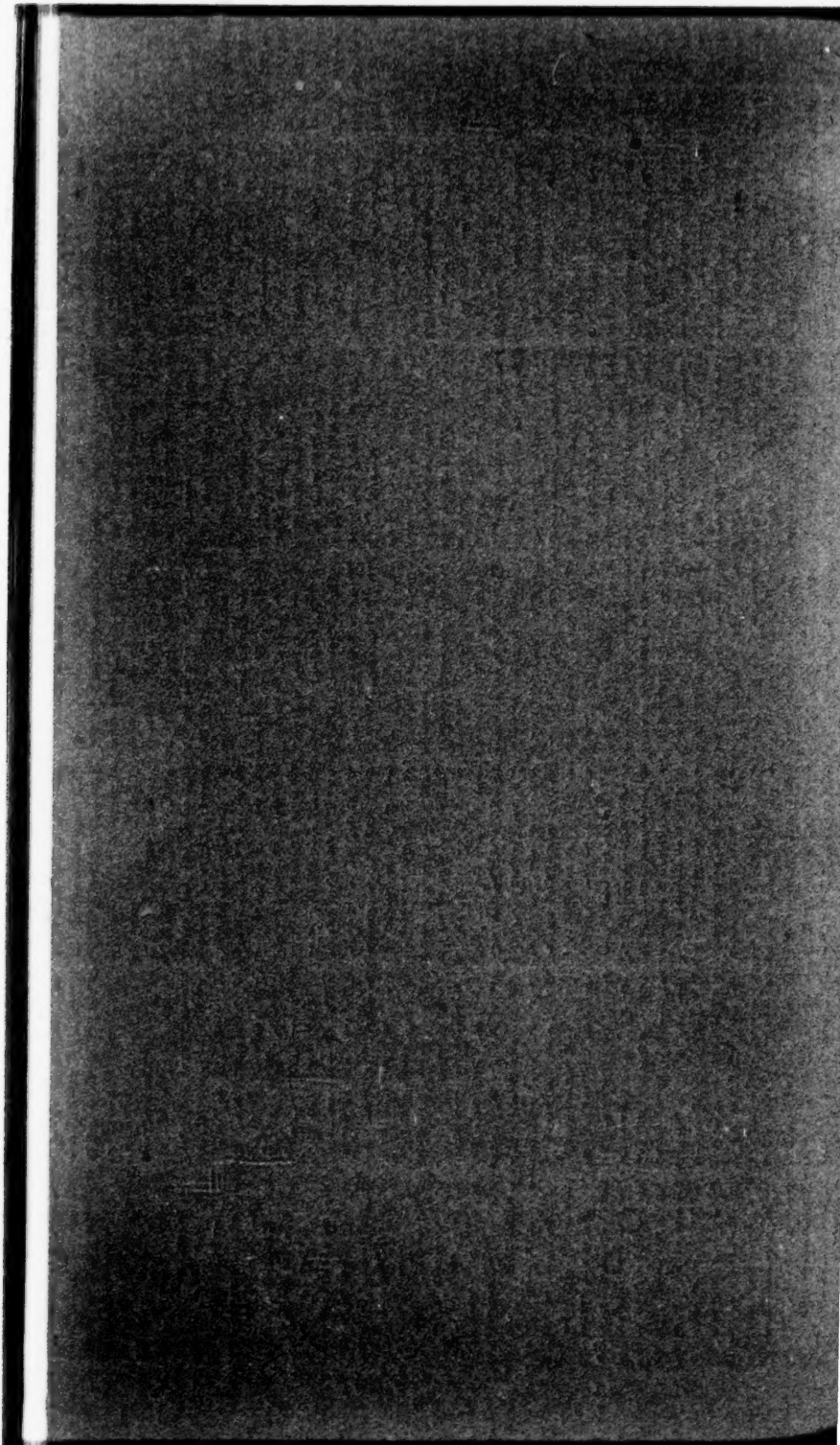
JOSEPH A. CORAM, ET AL.,

Respondents.

Brief on Behalf of Petitioner in Support of Petition and Motion for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Counsel for Petitioner.

HAINES TAYLOR,
Of Counsel.



Supreme Court of the United States.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,

Petitioner,

v.

JOSEPH A. CORAM, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Touching the Contention of Respondents that the Dismissal of said case, which Harris as Administrator Attempted to Prosecute in Montana, is a bar to the Action in Equity Brought by Petitioner in the United States Circuit Court of Massachusetts.

The respondents do not attempt to controvert the showing made by said petition, that in said case which Harris as administrator attempted to prosecute in Montana, the court "nonsuited said plaintiff and dismissed said complaint." They admit that in their answer to petitioner's bill in said United States Circuit Court, Record, Vol. III, page 114. Nor do respondents dispute the fact that the statute of Montana provides as shown in the petition, on the subject of the dismissal or nonsuit of an action (peti-

tion, pp. 56–59); nor do they attempt to controvert the showing that the majority of the Circuit Court of Appeals was clearly in error in assuming that the statute of Montana on the subject of dismissal or nonsuit of an action is similar to that of Nevada mentioned in United States v. Parker, 120 U. S. 89. Neither do respondents dispute the fact that the statute of Montana on the subject under consideration differs very materially from the Nevada statute on the same subject; nor do they dispute the facts which manifestly prompted the Legislature of Montana to extend the statutory provisions so as to deny to all such dismissals and nonsuits or judgments on demurrer the effect of a bar to "a new action for the same cause of action," as shown in the petition at pages 50 to 60.

The majority of said Circuit Court of Appeals also erred in assuming that the practice in North Dakota is like that of Montana, and erred in applying a decision under the practice in the former state to determine the effect of a nonsuit or dismissal of an action in Montana. Besides, the cases and proceedings therein are entirely different. The statutes of North Dakota contain no such or similar provisions as shown in the statutes of Montana on the subject under consideration; nor is the practice in North Dakota like that of Montana. The reports of that state are not looked to for guidance on questions of practice in the courts of Montana. The decisions of the Supreme Court of California and other Pacific states, where the codes are similar, are used in Montana as precedents upon questions of practice generally, but subject, of course, to different statutory provisions.

According to the decisions in those states, citing and following the case of Gilman v. Rives, 10 Pet. 301, it is held, without such statutory provisions as Montana has, that a judgment sustaining a general demurrer and dismissing the complaint with costs, on the ground that it does not state facts sufficient to constitute a cause of action, is no bar to another action brought by a good complaint to enforce the same right.

There is no pretence that petitioner's bill in the United States Circuit Court does not state facts sufficient to constitute a good cause of action. It states a case whereby all objections and contentions which could be urged against said complaint of Harris as administrator in Montana are silenced by showing additional material facts which fully cover and supply every insufficiency, and puts out of sideration every objection urged against said former complaint. (Petition, pages 28–38.) So that the United States Courts have before them a bill which is unquestionably good, and has been adjudged good and sufficient when attacked by demurrers.

The position assumed in the majority opinion of said Circuit Court of Appeals was, that notwithstanding the provisions of the Montana statutes touching nonsuits and dismissals of actions, and the admission of defendants in answer to the bill in the United States Circuit Court, that the Montana Court in said Harris case "nonsuited said plaintiff and dismissed said complaint" (Record page 114), such dismissal was the same as though the case went off on a general demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Taking that position, the premise then is that the bill before the United States Court is unquestionably a good bill of complaint, and (leaving out of consideration for the present any question as to parties being the same or privies), it is claimed that the action in the United States Court, founded on a good bill of complaint, is barred because a complaint in a former action, in which the same right was attempted to be set up, was adjudged bad on general demurrer that it did not state facts sufficient to constitute a cause of action.

Is an action founded on a good complaint barred because a former complaint, attempting to set up the same right, was adjudged bad on general demurrer alleging that it did not state facts sufficient to constitute a cause of action?

That question is answered in the negative by this court, and in the decisions of lower federal courts, and by state courts, without the aid of any such statutes as that of Montana.

Gilman *v.* Rives, 10 Pet. 301.

City of etc., *v.* Clark (C. C. A.) 62 Fed. R. 694.

Los Angeles *v.* Mellus, 59 Cal. 452.

Approved in City etc., *v.* Clark (C. C. A.) 62 Ed. R. 697.

Approved in Gilmer *v.* Morris, 30 Fed. R. 481.

Lockett *v.* Lindsay, 1 Idaho 324.

Wilbur *v.* Gilmore, 21 Pick 253.

Garrish & Brewster *v.* Pratt & Bunker, 6 Minn. 53.

Rodman *v.* Mich. Cent. R. Co. 59 Mich. 305.

Caromy *v.* Hoober, 5 Pa. St. 307.

Moore *v.* Dunn, 41 Ohio St. 62.

Stevens *v.* Dunbar, 1 Blackf. (Ind.) 56.

Estep *v.* Larsh, 21 Ind. 190.

Hassell *v.* Nutt, 14 Tex. 265.

It is held that when a complaint is before the court which states a good cause of action, it makes no difference whether the court thinks the former complaint, which was adjudged bad, may have stated a cause of action. It was adjudged bad and when that judgment is set up against a good complaint the court will assume that the former was defective, for it was so adjudged. Any other doctrine would subject the law to the reproach of an absurd contradiction.

The courts of the present day follow the ruling of this court *per* Story, J., in *Gilman* v. *Rives*, 10 *Pet.* 301, 302, that:

"A judgment that a declaration is bad in substance (which alone and not matter of form is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment on the merits."

To the same effect is *Wilbur* v. *Gilmore*, 21 *Pick.* 253. The California and Idaho cases above cited where the practice in general is similar to that of Montana, are directly in point upon this question.

Besides the general rule of law on this subject we have the Montana statutes and decisions, denying to all such judgments on demurrer the effect of a judgment on the merits or an estoppel, as shown at pages 56 to 59 of the petition for certiorari.

Moreover the disposition of said Harris case in Montana, was simply a nonsuit under the provisions of the code of that state, as fully shown in the petition.

Homer v. *Brown*, 16 *How.* 204.
Manhattan L. I. Co. v. *Broughton*, 109 *U. S.* 121.
Gardner v. *Mich. Cent. R. Co.* 150 *U. S.* 349.
Knox v. *Waldoborough*, 5 *Greenl.* (*Me.*) 185.

Respondents state on page 22 of their brief in speaking of the dismissal of said Harris case in Montana, that: "plaintiff declining to amend the complaint the court entered a judgment dismissing the complaint and for costs."

That statement embraces a mistake of fact. It is not a fact that said plaintiff Harris declined to amend his said complaint. The verified petition for certiorari at page 20 states the facts as to what occurred when said complaint of Harris was dismissed by the Montana Court. The verified bill of petitioner in the United States Court also states the fact in regard to the same matter. (Record, Vol. I, pages 36,37.) And the answer of respondents *admits*, "that said District Court sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint and *then and there* nonsuited said plaintiff and dismissed said complaint." (Record, Vol. I, page 114.)

The record of said dismissal also shows that it was all one order and simultaneous. (Record, Vol. III, page 1612.) When that ruling was pronounced plaintiff Harris was out of Court. He neither declined to amend, nor was he offered the slightest opportunity to amend. When he was nonsuited and his complaint dismissed he could not amend that complaint..

But the complainant of said Harris could not have been amended by alllegation of any facts showing that he had title to said chose in action, or that any attempt had ever been made to invest him with title thereto.

II.

On the Question of Privity between Administrators Appointed in Different States, and in whom was Title to said Chose in Action?

There is no dispute as to the facts shown in the petition, that at the time of the decease of Col. Ingersoll at his domicile in the State of New York, he had in his possession there the said chose in action, or that petitioner Eva A. Ingersoll was appointed administratrix there and came into possession of said chose in action among the assets of said estate in New York. (Petition pages 11, 12, 13, 31, and 42-47.) It was shown that by reason of those facts and the law as declared by this court, said Harris as administrator appointed in Montana could not maintain an action to enforce said obligation. (Petition pages 31-47.)

In attempt to answer that showing respondents now contend that said chose was assets in Montana, and cite and quote from the case of *Wyman* v. *Halstead*, 109 U. S., 654, wherein this court said: "The general rule of law is well-settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor," etc.

If the rule of law were not so in respect to both simple contract debts and bonds or other specialties, an administrator could not be appointed in the jurisdiction where the

debtor is domiciled, because the courts will not appoint an administrator where no assets are in the jurisdiction. So for *that purpose* they are deemed assets where the debtor is. But that rule of law for the purpose of founding administration in a certain jurisdiction does not determine the *title* to particular assets or chose in action. That question is still open and the debtor can insist on payment only to one competent to give an absolute discharge.

Touching this subject in the case of *Chicago etc. R. R. Co.* v. *Strum*, 174 *U. S.* 710, this court, quoting in part from its prior decision, said:

" 'The general rule of law is well settled that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor.' And this is not because of defective title in the creditor or in his administrator, but because the policy of the state of the debtor requires it to protect home creditors." (174 U. S., 714.)

It was also said by this Court in the *Tax Case* 15 Wall. 320, that:

"All the property there can be in the nature of things in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth which is recognized upon its simple statement". (15 Wall. 320.) And in the same opinion it is further said: "But other personal property consisting of bonds, mort-

gages and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt are not separated from the possession of the owners." (15 Wall. 324.)

Respondents claim there is a distinction applicable to the present consideration between obligations created by simple contracts and specialities. Some early English decisions made when different rules of law were applicable to those two classes of contracts, proceed upon such distinction. But those distinctions in the law of contracts have been almost entirely abolished in this country, and the courts do not regard any such distinction in determining questions as to title of administrators, as clearly appears by the decisions.

Chief Justice Shaw in the case of *Rand adm'r* v. *Hubbard et al.*, 2 *Met.* 252, speaks of the distinction mentioned in the English cases and expressly repudiates that doctrine.

It is also practically disregarded in the decisions of this court. Respondents have not cited any authority where such distinction was used as the ground of decision. It is disregarded in the following cases:

Ells adm'r. v. *Holden et al.*, 12 *Fed. R.* 668.
Rand adm'r, v. *Hubbard et al.*, 2 *Met.* 252
Merrill v. *New Eng. M. L. Ins. Co.*, 103 *Mass.* 245
St. John v. *Hodges*, 68 *Tenn.* 334
Peterson v. *Chemical Bank*, 32 *N. Y.* 21.
In Re Election etc. of Directors, 51 *N. J. L.* 82.

In the case of *Sultz* v. *Mutual Reserve Fund.*, 145 *N. Y.* 563 mentioned in the majority opinion of the Circuit Court of Appeals in the case at bar, the intestate died domiciled in the State of Washington and had the insurance policy in question there among his effects. It was held that the administrator appointed there was fully authorized to enforce that contract. That case is entirely in harmony with the decisions of this court and other courts. According to the law as settled by the decisions the title to that policy vested in the administrator appointed at the domicile of the decedent. There is no intimation in the last mentioned case that there is any *privity* between administrators appointed in different states; or that there is any distinction whatever in this country, between specialties and simple contracts as to the investiture of title thereto in an administrator.

The case of *Merrill* v. *New Eng. Mut. Ins. Co.* 103 *Mass.* 245, is also in harmony with the other cases on the subject. The intestate died domiciled in Illinois, but he did not possess the policy of life insurance in question. It was held in Massachusetts under a pledge to secure a debt. The Court there held that the title to the policy, in so far as the administrator had title in connection with the rights of the pledgee, was in the Massachusetts administrator. It is expressly held in that case that there is no *privity* between administrators appointed in different states. And there is no intimation that the court regards any distinction contended for between simple contracts and specialties.

So in *Low* v. *Bartlett*, 8 *Allen* 262, it is held that there is

no privity between executors commissioned in different states. And even though the Massachusetts executor went to Vermont and defended against a claim in the courts there, the Massachusetts court held he was not bound by the judgment, saying he "had no right to go there and defend it."

In *Ela* v. *Edwards*, 13 *Allen*, 48, the same rule of law is affirmed and applied, although the same individual was executor in Massachusetts and ancillary administrator of the same estate in New Hampshire.

In the case of *Taylor* v. *Barron*, 35 New Hampshire 484, Mr. Justice Bell in an elaborate opinion reviewing all the cases up to that date, held that there is *no privity* of any character between administrators appointed in different states.

Recently, but a month after the decision of said Circuit Court of Appeals in the case at bar, holding in the majority opinion that there *is* such privity, the Supreme Court of Michigan by unanimous opinion in an important case showing great consideration, relying upon the authority of the decisions of the United States Supreme Court, held the same as Circuit Judge Putnam and Judge Aldrich in the case at bar, that, *there is no such privity*.

Brown v. *Fletcher's Estate*,

Opinion filed Nov. 13, 1906, *Detroit*,

Legal News No. 35, *Dec* 1, 1906.

But respondents do not claim to have cited any authority holding that there is such privity. The ruling of the majority of the Circuit Court of Appeals in the case at bar is a new

departure, and is in direct conflict with the decisions of this court and of the courts everywhere in this country.

The contention of respondents (brief pages 36, 37) is that the result, unless a new rule of law be made holding that a judgment against an ancillary administrator appointed in one state is binding upon an administrator appointed in another state, would be "shocking to the moral sense," for a suit might be prosecuted in two or more jurisdictions on the same claim or chose in action. This argument misled the majority of the Circuit Court of Appeals, as shown at pages 42–50 of the petition for writ of certiorari.

The suggested result, so "shocking to the moral sense," could not, and does not, take place under the decisions placing the title to the chose in action where the law and facts vest it. When or where has "debts owed to an intestate" been "multiplied by the number of his administrators," as apparently feared by the majority of said Circuit Court of Appeals, unless a new rule of law be made declaring privity exists between administrators appointed in different states? (See majority opinion Record, page, 1753). When or where in the practical administration of justice by the Courts of this country, has a debtor to an intestate been required to twice pay the debt, or any part of it? The doctrine asserted by the majority of said Circuit Court of Appeals denied to the legal representative of Col. Ingersoll so much as *one* trial of the rights in question.

The main showing upon this point and others involved, is set forth in the petition for writ of certiorari at pages 42–62.

As a matter of argument it is suggested by counsel for

respondents that if Harris did not have title to said chose in action as administrator appointed in Montana, then by the same rule Mrs. Ingersoll as administratrix appointed in Massachusetts has no title thereto. It seems hardly necessary to remark, in refutation of that contention, that Mrs. Ingersoll went to Massachusetts vested with title to said chose in action as she has always been vested with title thereto since her appointment as administratrix in New York, as clearly affirmed by the authorities.

One of said debtors under the contract upon which suit was brought by Mrs. Ingersoll as administratrix in the United States Circuit Court for Massachusetts, namely, Coram, resides in that state, and was served with process there; and the other debtor, Henry A. Root, was personally served with process in Massachusetts. And they both appeared and answered.

III.

Other Questions Discussed in Respondents' Brief in Opposition to the Petition for Certiorari:

Going beyond the questions considered by said Circuit Court of Appeals and on which the majority reversed the decree of said Circuit Court and denied complainant all relief, respondents have inserted in their brief in opposition to the petition for certiorari, much of their argument before said Court of Appeals on *other* questions which that court did not notice in determining said appeal. We do not consider it proper at this time to treat in detail the points of controversy raised by said appellants, which the circuit Court of Appeals did not notice in determining said appeal.

Therefore we only make brief reference thereto, and to som
of the showings whereby they were refuted.

Respondents claim that said five heirs, for whom Col
Ingersoll prosecuted said will contests, have not got thei
shares. They contend that the contract means that Col
Ingersoll would not be entitled to payment until said fiv
heirs or their successors and assigns have actually receive
all their shares in hand.

The authorities do not warrant any such construction
as was shown. But in absolute refutation of that conten
tion it was shown by mathematical demonstration, base
on undisputed facts established by evidence and admissions
that said five heirs and Coram and Root as assignees o
some of them, have already actually received more tha
the shares of said estate to which said five heirs were en
titled as heirs at law of Andrew J. Davis. In other words
it was shown that 515½/1100 of said estate which said five
heirs and Coram have already got, amounts to *more* than
the three and a half elevenths of said estate to which said
five heirs were entitled as heirs at law—that is, "their
shares" mentioned in the contract with Col. Ingersoll.

The portions of said estate already received by said
clients of Col. Ingersoll, according to the undisputed evi
dence, exceeds in value over two and a half million dollars.
It was also shown by undisputed evidence that said Coram
had already personally had over $107,000 in money from
part of the shares of two of said heirs assigned to him
besides their shares of said real estate of the value of five
million dollars according to undisputed proof.

It is intimated in the argument set forth in respondents

brief, that there was a shrinkage of value of some of said estate property. There is no proof in the record of any such thing. The value of the estate is not especially material. The bill alleges it to be from two to five million dollars; and undisputed proof shows it to be of the value of about six and a half millions of dollars.

There is also suggestion in the brief of respondents that if the law of evidence had permitted, they might have brought in testimony that they had made some other and different agreement with Col. Ingersoll superseding or rescinding the contract fulfilled by him in the prosecution of said will contests, and getting for said five heirs and Coram their shares of said estate and a large portion in addition, through the decree determining said contests. It was not the law that prevented an attempt to make such showing. The evidence in writings fortunately possessed by complainant, absolutely refutes all such pretensions.

In their brief before this court respondents also claim that complainant did not show that Coram and Root own interests in said money and bonds in Massachusetts on which complainant's lien is foreclosed by the decree of said Circuit Court. That contention is also absolutely refuted by undisputed evidence and by admissions.

In attempt to avoid the lien undoubtedly existing in favor of complainant on said money and bonds in Massachusetts, acquired for said clients of Col. Ingersoll as part of the fruits of his labors in said will contests, respondents set up a contention in said Circuit Court of Appeals, and

the same is in their brief here, that the federal courts have only enforced such lien where the funds on which it rested *were in court*. That contention is answered in the brief for complainant and appellee as follows:

In neither of the English cases cited above were Lord Kenyon or Lord Chancellor Hardwicke or Lord Mansfield enforcing the equitable lien in favor of the attorney, *upon a fund in court*. They were speaking of, and enforcing, the equitable lien *upon the fruits of the attorney's labors which had not been brought into court*, and which the parties were attempting to place beyond the reach of the attorney.

In *Wylie* v. *Coxe*, *supra*, the United States Supreme Court was not considering the question of an attorney's equitable lien on funds *in court*. The funds on which the equitable lien was enforced were in the hands of an ancillary administrator.

In *Louisville, E. & St. L. R. Co.* v. *Wilson*, *supra*, the property on which the attorney's lien was declared was not only out of court; it was in possession of a new corporation, which had bought it, and the attorney in whose favor the equitable lien was enforced had not been attorney for the new corporation, but had served its predecessor in interest.

In *Meddaugh* v. *Wilson*, *supra*, and *Cent. R. R. Co.* v. *Pettus*, *supra*, in which the United States Supreme Court affirmed the decree establishing and enforcing the attorney's equitable lien, the property on which it was foreclosed was not in court at all, nor was it involved in any case then in adjudication; and in the former of these two cases the lien was established and foreclosed on new bonds for which the interests formerly in litigation had been exchanged.

In *McPherson* v. *Cox*, *supra*, the Supreme Court declared that an equitable lien accrued in favor of the attorneys on the land recovered in the litigation, and that lien followed the proceeds for which the land was sold.

In *Walker* v. *Brown*, *supra*, the bonds on which the equitable lien was declared to rest were not in, nor had they been, *in court*.

In *Mahone* v. *Southern Tel. Co.*, *supra*, the bonds which were involved in prior litigation had been sold before the equitable lien was enforced in favor of the attorneys for professional services rendered the former owner. The court declared an equitable lien existed in favor of the attorneys superior to the claims of the purchasers; otherwise it would have been paying one man's debt out of property of another, without any warrant of law. That case is cited with approval in 138 U. S. 507.

In *Frink* v. *McComb*, *supra*, the claim in suit had been assigned before judgment was recovered, and the judgment was assigned after its recovery. So that, without the existence of an equitable lien in favor of the attorneys, the court would have been paying the debt of the former client out of property which was not his, and without any warrant of law.

In *Foster* v. *Danforth*, *supra*, there was no fund *in court*, and moreover, the parties had settled and satisfied the judgment, and yet the attorneys' equitable lien was enforced.

In case of *Semmes* v. *Whitney*, *supra*, it does not appear that the funds on which the attorney's equitable lien was enforced were *in the federal court*.

The decisions of the state courts which we have cited above also show that in declaring and enforcing the attorney's equitable lien they did not found it upon the circumstance that a fund was *in court*; or intimate that otherwise the court would be impotent to give relief.

In *Andrews* v. *Morse, supra*, the judgment had been satisfied by arrangement between the parties, and there was *no fund in court*.

A similar situation is shown in *Rooney* v. *Sec. Ave. R. Co., supra*, and in *Marshall* v. *Meech, supra*, *Rennick* v. *Ludlington, supra*, *McDonald* v. *Napier, supra*, *Weed M. Co.* v. *Boutelle, supra*, *Sexton* v. *Pike, supra*, *Warfield* v. *Campbell, supra*, *Carter* v. *Davis, supra*, *Goad* v. *Hart, supra*, and in other state Supreme Court decisions which we have cited on this subject. *There was no fund in court;* but the attorney's equitable lien was enforced on the fruits of his skill and industry.

Those cases above mentioned on the subject of attorneys equitable lien are cited in the order above noted as follows: 6 T. R. 361; 3 Atk. 719; 1 Amb. 102; 1 Doug. 238; 1 East 464; 15 How. 415; 138 U. S. 501; 151 U. S. 333; 113 U. S. 116; 96 U. S. 404; 165 U. S. 654; 33 Fed. R. 702; 60 Fed. R. 486; 59 Fed. R. 750; 50 Fed. R. 666; 12 Conn. 444; 18 N. Y. 368; 51 N. Y. 140; 16 West Va. 378; 14 Ga. 110; 56 Vt. 570; 13 Ark. 193; 38 Ala. 527; 8 Fla. 183; 128 Cal. 197.

The decisions of this Court and other courts are directly in point affirming the existence of such lien as that claimed by petitioner in the case at bar.

None of contentions raised by respondents on their said appeal can be maintained in law or in fact.

We respectfully submit that said Circuit Court of Appeals has inadvertantly erred in reversing said decree of the Circuit Court and denying petitioner relief; that each and all grounds for review of said decision of the Circuit Court of Appeals, set out in the petition for writ of certiorari, exist in this case, and that said petition ought to be granted and the writ issue.

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HANNIS TAYLOR,
Of Counsel.

NO. [illegible]

Supreme Court of the United States

OCTOBER TERM, 1906

Office Supreme Court, U. S.
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DEC 17 1906
JAMES H. McKENNEY
CLERK

EVA A. INGERSOLL,
PETITIONER,

v.

JOSEPH A. CORAM, ET AL.,
RESPONDENTS.

BRIEF FOR THE RESPONDENTS.

LOUIS D. BRANDEIS,
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of Counsel.

BOSTON
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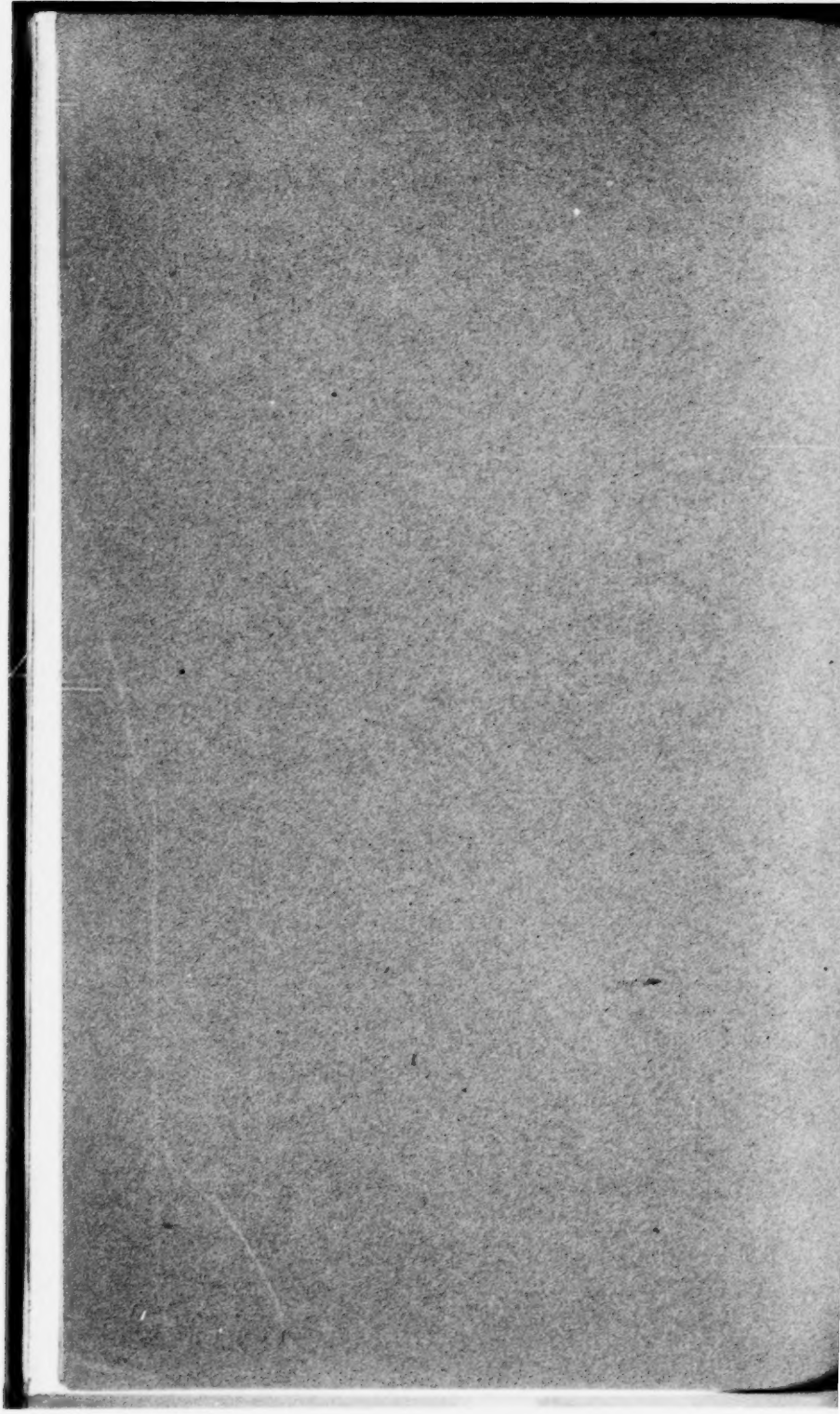

Supreme Court of the United States.

October Term, 1906.

EVA A. INGERSOLL, AS ADMINISTRATRIX, *Petitioner*,

v.

JOSEPH A. CORAM AND OTHERS, *Respondents*.

BRIEF IN BEHALF OF RESPONDENTS

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition is for a writ of Certiorari to review the decision of the Circuit Court of Appeals for the First Circuit in the case of *Joseph A. Coram et al.* v. *Eva A. Ingersoll* as administratrix. The following are the material facts shown by the record:—

Andrew J. Davis, a citizen of Montana, died on March 11, 1890, leaving a large amount of real and personal property in Montana and personal property in Massachusetts. The next of kin of Andrew J. Davis were three brothers, John A. Davis, Erwin Davis, and Calvin P. Davis, four sisters, Diana Davis, Sarah Maria Cummings, Harriet Wood, and Elizabeth S. Bowdoin, a nephew and niece, Henry A. Root and Ellen S. Cornue, children of a deceased sister, two nieces, Elizabeth A. Smith and Mary Louise Dunbar, children of another deceased sister, a niece, Elizabeth S. Ladd, child of another deceased sister, and a niece and

nephew, Harriet R. Sheffield and Henry A. Davis, children of a deceased brother, Asa L. Davis. (Rec., pp. 3, 4.) Each living brother and sister was entitled in case of intestacy to one-eleventh of Andrew J. Davis's estate, and the children of each deceased brother and sister by representation to one-eleventh.

In July, 1890, John A. Davis, one of the brothers of Andrew J., propounded for probate in a Montana document alleged to be the last will of Andrew J. Davis, executed in 1866, by which, after giving certain inconsiderable legacies, all the residue of the estate was given to John A. Davis, to the exclusion of all the other next of kin. (Rec., pp. 4, 5.)

In August, 1890, Henry A. Root and Sarah Maria Cummings, two of the next of kin of Andrew J. Davis, entitled respectively in case of intestacy to fifty and one hundred eleven-hundredths of the estate, filed contests, denying the authenticity of the instrument propounded as a will. On September 25, 1890, Elizabeth S. Ladd, Mary Louise Dunbar, and Ellen S. Cornue joined with Sarah Maria Cummings and Henry A. Root in an instrument by which, after reciting the pendency of the contest and that Root had undertaken to procure evidence and prosecute the contest, the parties to the instrument, other than Root, assigned each one-third of her interest in the estate of Andrew J. Davis to Root and Gideon Wells, in trust, from the avails of such third to reimburse Root for his expenses, any surplus to be retained by him as compensation for his services. It was stipulated that the assignors should be in no way liable for any expenses incurred, and Root agreed to procure counsel, pay expenses, and prosecute the contest. (Rec., p. 43.)

Root determined to employ the late Robert G. Ingersoll to act as counsel in contesting the will in Montana, and on January 17, 1891, wrote to him that all had been arranged, and that he was retained. On May 1, 1891, Colonel Ingersoll wrote to Root with reference to the terms of his employment (Rec., p. 1044) expressing his expectation that unless successful he would receive only his expenses.

This letter was not answered at that time. The trial of the

will contest began in Butte in July, 1891, and continued for six or seven weeks. While the trial was in progress, Root wrote to Colonel Ingersoll, apparently in reply to the preceding letter, the following letter (Rec., p. 45) in which the defendant Coram also joined:—

"BUTTE CITY, MONT., August 17, 1891.

"R. G. INGERSOLL, ESQ., Butte City, Montana.

"*Sir*,—We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

"There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

"HENRY A. ROOT,
"J. A. CORAM."

Coram had at this time apparently some interest, precisely what does not appear, in the shares of Mary Louise Dunbar and Elizabeth S. Ladd, and joined in the foregoing letter on this account.

The trial of the will contest resulted in September, 1891, in a disagreement of the jury. Before the case was brought on for a second trial, negotiations were opened for a settlement. John A. Davis died intestate on January 24, 1893. (Rec., p. 345.) The negotiations proceeded with the knowledge and approval of Colonel Ingersoll until, on April 28, 1893, an agreement of compromise was made between the widow and children of John A. Davis and the administrator appointed in Montana of his estate, on the one hand, and Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Ellen S. Cornue and her husband, and

Elizabeth S. Ladd and her husband, on the other hand. (Rec
p. 1134.)

The agreement of April 28, 1893, provided in substance:

First, that, in case the will was finally allowed, the parties of th
first part should have two-elevenths and the parties of the secon
part three and one-half elevenths of the estate. That each shoul
have from the remainder of the estate five hundred thousand dolla
for expenses of litigation, and the balance of the estate should h
divided equally between them.

Second, that the parties of the first part to carry out this agre
ment assigned three and one-half elevenths of the estate to th
parties of the second part, of which two and one-half eleventh
should be distributed in kind immediately in such interests to eac
as the second parties might at the time direct, and that two-eleventh
of the estate should in like manner be at once distributed in kin
to the first parties. That the remainder of the estate should b
distributed to Charles H. Palmer and Andrew J. Davis, son o
John A., as trustees, to be used in carrying the contract int
effect, including in such remainder the other one-eleventh assigne
to the second parties, such one eleventh to be distributed to th
second parties in such interests as they might direct.

Third, that in case of defeat of the will by contests other tha
those of Root and Mrs. Cummings, so that the estate had to b
distributed as intestate property, the second parties should giv
to the first parties one eleventh of the estate.

Fourth, that the second parties to carry out the agreement
assigned one-eleventh of the estate to the first parties, to tak
effect in the event of such defeat.

Fifth, that in case the will was defeated, but the first parties
obtained the estate by assignment from the heirs or otherwise
the agreement should be in full force, and in that event the firs
parties assigned the interests in such assignment necessary to giv
effect to the agreement.

Sixth, that, in case the appointment of a general administrato
or administrator with the will annexed became necessary, John
H. Leyson should be appointed.

Sixth and a half, that the contests of Root and Mrs. Cummings should be withdrawn whenever the representatives of the parties agreed that it was best to do so.

Seventh, that, if the will should finally be allowed, the decree should be based upon the terms of the agreement as a consideration of the "settlement and compromise" of the litigation.

. . . . . .

Fourteenth, that it was understood that the agreement was made for the purpose of "settlement and compromise" of the action.

At the time this agreement was made Harriet R. Sheffield and Henry A. Davis, two other heirs at law, had also filed a contest of the will which was pending. As the result of further negotiations, an agreement was made March 25, 1895, between these contestants and all the parties to the agreement of April 28, 1893, by which it was agreed in substance that these two contestants should together have in kind one twenty-fifth of the estate, whether distributed under the will or as an intestate estate, and that they should withdraw their contest. (Rec., p. 1149.)

On March 27, 1895, a decree was entered allowing the will. (Rec., p. 1110.) Contests were thereupon entered by Elizabeth S. Bowdoin and Calvin P. Davis. On June 22, 1897, an agreement was made between all the parties to the agreement of April 28, 1893, and their respective husbands and wives, and Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood, interested with them in their contest, by which it was in substance agreed that these latter should each have one twenty-second of the estate in kind, and that the contests be abandoned. (Rec., p. 1158.)

Elizabeth A. Smith, after the probate of the will, filed a petition to revoke the probate. By agreement dated August 6, 1897, between all the parties to the agreement of April 28, 1893, and their respective husbands and wives and Elizabeth A. Smith and her husband, it was in substance agreed that she should have one forty-fourth of the estate, and that the petition for revocation of probate be abandoned. (Rec., p. 1175.)

On August 24, 1897, a decree was entered in proceedings on the

estate of John A. Davis, approving the action of the administra
in making the several "compromise" agreements, authorizing hir
carry them out, and authorizing him to receipt to the administra
with the will annexed of Andrew J. Davis for all interest of
estate of John A. Davis in the estate of Andrew J. Davis up
delivery of the residue after payment of all debts and claims a
satisfaction of the several compromise agreements. (Rec., p. 111

On the same day, August 24, 1897, a decree was entered in t
matter of the estate of Andrew J. Davis, dismissing the contests
Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smi
confirming the probate of the will, and modifying the order
March 27, 1895, to conform to the compromise agreements. T
decree directed that the administrator with the will annexed
Andrew J. Davis retain possession of the estate and distribute
subject to the small bequests in the will and to the expenses
administration and outstanding debts, according to the "compr
mise" agreements, viz.:—

Two hundred eleven hundredths in kind to John E. Dav
administrator of the estate of John A. Davis;

Two hundred and fifty eleven hundredths in kind to Henry
Root, Sarah Maria Cummings, Mary L. Dunbar, Eliz
beth S. Ladd, Charles H. Ladd, Ellen S. Cornue, a
Joshua G. Cornue;

Forty four eleven hundredths in kind to Harriet R. Sheffie
and Henry A. Davis;

Fifty eleven hundredths in kind to Calvin P. Davis;

Fifty eleven hundredths in kind to Harriet Wood;

Twenty five eleven hundredths in kind to Elizabeth A. Smith

Fifty eleven hundredths in kind to Elizabeth S. Bowdoin;

Four hundred and thirty one eleven hundredths in kind
Andrew J. Davis and Charles H. Palmer as trustees fo
the purposes of the trust under the agreement of Apr
28, 1893.

The decree expressly declared that the "compromise agreements
were adopted and made the basis of the decree. (Rec., p. 1116,

On August 26, 1897, a distribution of six hundred and seventy thousand dollars was ordered in the proportions fixed by the decree. (Rec., p. 1118.) On December 18, 1897, the administrator was ordered to turn over all the real estate in Montana to the persons and in the shares fixed by the decree. (Rec., p. 1123.)

By indenture dated November 25, 1898, Elizabeth S. Ladd and Charles H. Ladd, her husband, and Mary Louise Dunbar, assigned and transferred to Joseph A. Coram all their interest in the Davis estate as heirs at law or under the decree confirming the compromise or otherwise. (Rec., p. 1105.) So far as appears, this is all the interest Coram has, or ever has had, in the Davis estate.

On December 3, 1901, a further decree of distribution was made, directing a share as fixed by the final compromise in one hundred thousand dollars in cash and one hundred shares of bank stock to be turned over to Root and his associates. In this decree Coram was substituted for Elizabeth S. Ladd, Charles H. Ladd, and Mary Louise Dunbar. The decree also directed the payment of certain attorneys' liens. (Rec., p. 1128.)

On October 8, 1897, John H. Leyson filed a copy of the will of Andrew J. Davis in the Probate Court for Suffolk County, Massachusetts, with a petition that the will be recorded and letters of administration with the will annexed granted to him. (Rec., p. 1269.) A decree was entered December 9, 1897, allowing this petition, directing that the will be filed and letters of administration issued. (Rec., p. 1271.) From this decree an appeal was taken by Erwin Davis (Rec., p. 1268), which was on March 9, 1898, dismissed. (Rec., p. 1280.) No part of the estate in Massachusetts has been distributed.

Robert G. Ingersoll died a resident of New York on July 21, 1899. On August 21, 1899, the plaintiff was duly appointed in New York administratrix of his estate. (Bill, par. 21, Rec., p. 25.) At the time of his death Colonel Ingersoll had received from Root, on account of services in the Davis will case, five thousand dollars. (Bill, par. 20, Rec., p. 24.) The estate, which had been estimated as over five million dollars, had then shrunk very

seriously. (Rec., p. 1102.) The personal estate in Montana actually distributed was $770,000 and one hundred shares of bank stock, and this with expenses practically exhausted the personal property there. (Bill, par. 24, Rec., p. 33.) The personal property in Massachusetts was found by the Circuit Court to amount to $337,862 and $170,000 par value of bonds. (Rec., p. 1717.) The real estate was only alleged in the bill, and found by the Circuit Court to amount to over one million dollars. (Rec., p. 1709.) The aggregate estate was thus less than half the estimated value.

In July, 1901, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, brought suit in a State court in Montana against Root, Wells, Coram, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar, Herbert P. Cummings, as executor, and Henry A. Root, as administrator, with the will annexed of Sarah Maria Cummings, Palmer and Andrew J. Davis as trustees, and Leyson as administrator with the will annexed of Andrew J. Davis, deceased. The complaint filed set forth the facts above stated as to the employment of Colonel Ingersoll to contest the will, the result and the compromise made, the ownership of certain real estate by the defendants and the existence of property of the estate of Andrew J. Davis in the hands of the administrator, claimed that the balance of ninety-five thousand dollars was due to Colonel Ingersoll at his death, and prayed for judgment against Root for that sum, and that the debt and judgment be declared a lien on the share acquired by Root in the estate and on one-third of the shares acquired by Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, respectively, in each case including the shares acquired and held by Palmer and Davis as trustees for Root and his associates, and upon the interest of Coram in any of those shares, and for satisfaction of the claim from the property so alleged to be subject to a lien. (Rec., p. 1647.)

Objection was taken to the right of the plaintiff as a non-resident administratrix to maintain that suit. (Bill, par. 25, Rec., p. 36.) And on December 4, 1901, John S. Harris was appointed administrator in Montana of Colonel Ingersoll's estate, and on

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December 6, 1901, he was, on motion of the plaintiff, substituted as plaintiff in the suit brought by her in Montana last mentioned. (Rec., p. 1675.)

Sundry amendments to the complaint were made after the substitution of Harris as plaintiff, including the joinder as defendants of various attorneys claiming liens on the property for services and of certain persons who had acquired interests in parts of the property, and the omission as a defendant of Gideon Wells, who had died before the suit was brought. (Rec., pp. 1678, 1529, 1575, 1578.)

Answers were filed by the defendants. (Rec., pp. 1582, 1595, 1598, 1601, 1603.) Root, Coram, and several other defendants joined in an answer denying the existence of the debt, setting up the statute of limitations and alleging a rescission of the contract by Colonel Ingersoll in his lifetime. (Rec., p. 1582.)

This suit came on for trial on December 11, 1902, and the defendants objected to the introduction of any evidence by the plaintiff, on the ground that the complaint did not set forth facts sufficient to constitute a cause of action. The court sustained the objection, and ordered the complaint dismissed. (Rec., p. 1613.) The plaintiff appealed to the Supreme Court of Montana, and on May 28, 1903, the order of the court below was affirmed, and the suit dismissed. (Rec., p. 1613.)

On May 29, 1903, Eva A. Ingersoll was duly appointed by the Probate Court for Suffolk County, Massachusetts, administratrix of the estate of Robert G. Ingersoll in Massachusetts (Rec., p. 25), and on June 15, 1903, as such administratrix, brought a bill of complaint in the Circuit Court of the United States for the District of Massachusetts (Rec., p. 1) against Coram, Palmer and Andrew J. Davis as trustees, Leyson as administrator, with the will annexed of Andrew J. Davis in Massachusetts, Root, Elizabeth S. Ladd, her husband, Charles H. Ladd, Mary Louise Dunbar, and Herbert P. Cummings, executor of the will of Sarah Maria Cummings. The substantial allegations of the bill were as follows:—

BLEED THRU

That Andrew J. Davis died in Montana on March 11, 1890, leaving real and personal property, and next of kin, as above set forth, and that John A. Davis in July, 1890, propounded the alleged will, giving him practically the whole estate. (Par. 1, 2.)

That Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd, and Mary Louise Dunbar associated themselves to oppose probate of the will, and that objections to its probate were accordingly filed in the names of Root and Mrs. Cummings, and that to aid in prosecuting the contest Root and the other four joined in the indenture, dated September 25, 1890, above referred to. (Par. 4, 5.)

That "during the times herein mentioned" Coram acquired and still has all the remaining interests of Elizabeth S. Ladd and Mary Louise Dunbar, and also acquired some interest in the shares of Root, Mrs. Cornue and Mrs. Cummings, and that these rights and interests of Coram were dependent on the prosecution of the contest. (Par. 6.)

That Root and Coram employed Robert G. Ingersoll to prosecute the will contest, and the latter accepted the employment and rendered valuable services, and while Ingersoll was rendering his services Root and Coram made the agreement with him embodied in the letter of August 17, 1891, for payment of a contingent fee of one hundred thousand dollars, and that Ingersoll rendered services mentioned in the letter both before and after its date. (Par. 7, 8, 9.)

That the will contest was tried in Montana in 1891, before a jury, for seven weeks, during which Ingersoll was constantly present and rendered great services, and that the jury finally refused to return a verdict in favor of the alleged will. (Par. 10.)

That Ingersoll made preparations for a new trial, and on April 28, 1893, by reason of the prosecution of the contest and the failure to secure probate of the will, the legal representatives and heirs of John A. Davis, the proponent of the will, made the agreement with Root and his associates

for probate of the will and an accompanying decree directing distribution in accordance with the agreement, by which twenty-five forty-fourths of the estate was to go to Root and his associates. (Par. 11, 12.)

That other contests of the will were pending, which were subsequently, with the acquiescence of Coram, Root, and his associates, and with the counsel and aid of Ingersoll, settled, and that finally, on August 24, 1897, the Montana court made a decree for the distribution of the estate of Andrew J. Davis in accordance with the various agreements and distributions under the decree were made as specified above, including real estate of a value exceeding one million dollars; and that Root, Coram, and their associates received five hundred and fifteen and one half eleven hundredths of all the distributions. (Par. 13, 14, 15, 16.)

That Root, Coram, and their associates have by deeds dated May 10, 1900, conveyed away the real estate. (Par. 17.)

That the five hundred and fifteen and one-half eleven-hundredths of distributions of personal property in Montana received by Root, Coram, and their associates, has amounted to three hundred and seventy four thousand nine hundred and seven dollars and ninety one cents, and the distributions have practically exhausted the estate in Montana, and that any remainder will be consumed in paying costs and expenses. (Par. 18.)

That Robert G. Ingersoll became entitled to one hundred thousand dollars, and by virtue of his services, the contract and the laws of Montana, an attorney's lien accrued to him upon the interests of Root, Coram, and their associates, in the estate of Andrew J. Davis, as provided in the statutes of Montana in force at the time the services were begun and subsequently. (Par. 19.)

That only five thousand dollars was paid to Colonel Ingersoll in his lifetime, and that the balance is due with interest at 10 per cent. from August 26, 1897, to February 28, 1899, and at 8 per cent. thereafter. (Par. 20.)

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That Colonel Ingersoll died July 21, 1899, and the plaintiff was appointed his administratrix in New York on August 21, 1899, and in Massachusetts on May 20, 1903. (Par. 21.)

That soon after her appointment the plaintiff sought to collect the unpaid balance, and that Root and Coram acknowledged the indebtedness, and Root wrote various letters, passages from which are quoted in the bill, saying he would do his best to assist the plaintiff and the like, and that by reason of these acknowledgments and letters the plaintiff acquired an equitable lien on the property of the estate in Massachusetts. (Par. 22.)

That there is property of the estate of Andrew J. Davis in Massachusetts of the value of about four hundred and fifty thousand dollars, and that Coram, Root, and their associates are entitled to receive directly and through trustees five hundred and fifteen and one half eleven hundredths thereof, and have petitioned the Probate Court in Massachusetts for payment thereof; that the plaintiff has a lien on all of their shares, except thirty three and one third eleven hundredths belonging to Ellen S. Cornue and sixty six and two thirds eleven hundredths belonging to the estate of Sarah Maria Cummings. (Par. 23.)

That Root and Coram are seeking to secure distribution of the property in Massachusetts so as to exclude the plaintiff and defeat the lien; that they have no tangible property; that they have assented to all liens claimed for services in the will contests, except this one, and that the administration in Montana is practically closed. (Par. 24.)

That the plaintiff as administratrix appointed in New York brought suit in Montana in July, 1901, to enforce payment of this claim; that, on objection being taken to her right to maintain such suit, John S. Harris was appointed administrator of Colonel Ingersoll's estate in Montana, and was substituted as plaintiff; that upon trial of that suit the defendants therein objected to the admission of any evidence on the ground that the complaint did not state a cause of ac-

tion, and that the objection was sustained, the plaintiff nonsuited, and the complaint dismissed. (Par. 25.)

That John H. Leyson is duly appointed administrator with the will annexed of Andrew J. Davis in Massachusetts, and has control of all the property of his estate there. (Par. 26.)

The bill prayed, first, for an injunction against any payment of the property in Massachusetts to Root, Coram, or Palmer and Davis, as trustees; second, for discovery of the interests of the several defendants in the estate and for judgment against Coram, to the extent of his full interest in the estate, and especially to the extent of two-thirds of the interests therein of Elizabeth S. Ladd and Mary Louise Dunbar, and that the judgment be declared a lien on all interests of said Coram in the estate in Massachusetts; third, for judgment against Root for ninety-five thousand dollars, with interest as claimed, and that the judgment be declared a lien on all interest of Root in the estate and on one-third of the interests acquired by his associates; fourth, for judgment against Leyson and against Palmer and Davis, as trustees, requiring them to apply any estate in their possession subject to such lien in satisfaction thereof after such estate is released from administration by the Probate Court for Suffolk County, and making them personally liable for failure so to apply funds in their hands or hereafter coming into their hands; fifth, for general relief.

The bill was heard upon demurrers filed by the defendants, Root, Coram, Herbert P. Cummings as executor, Leyson and Palmer and Davis as trustees. The court sustained the demurrers to all parts of the bill claiming a statutory lien, and to all parts making Charles H. Ladd, individually, and as administrator of the estate of Elizabeth S. Ladd, Mary Louise Dunbar, and Herbert P. Cummings as executor of the will of Sarah Maria Cummings, parties to the bill, and dismissed the bill as against them. As to all other parts of the bill, the demurrers were adjudged insufficient. (Rec., p. 93.)

Answers were subsequently filed by Andrew J. Davis as trustee (Rec., p. 94) and John H. Leyson (Rec., p. 123), and a joint answer by Coram, Root, Palmer, as trustee, Charles H. Ladd, individually and as administrator, Mary Louise Dunbar, and Herbert P. Cummings, as executor. (Rec., p. 99.)

The joint answer of Coram, Root, and others admitted most of the material facts alleged in the bill, but not the statements of evidence or the conclusions of law contained in the bill. The answer denied that there was any lien or any debt as alleged, and specifically denied that the value of the Davis estate was two million dollars to three million dollars, that Ingersoll fully performed the stipulated services for which his fee was to be paid, that Root and his associates acquired by the compromise agreement title to parts of the Davis estate, that the value of the real estate was over one million dollars, that the plaintiff's intestate ever became entitled to the fee of one hundred thousand dollars, that the rights acquired by the defendant were acquired by the defeat of the will, that the defendants ever acquired any right to receive directly any property of the estate in Massachusetts, and neither admitted nor denied the acknowledgments of indebtedness and promises to pay alleged in the bill. The answer set up as affirmative defences: first, estopped by the judgment rendered in the Montana suit; second, rescission of the contract with Colonel Ingersoll in his lifetime; third, defect of parties in not joining Mrs. Cornue.

Testimony was taken, and the case came on for hearing upon the merits. The defendants, owing to their inability under the United States statutes to testify to personal transactions with Colonel Ingersoll, abandoned the defence of rescission. (Rec., p. 1518.)

The court entered a decree establishing an indebtedness to the amount of ninety five thousand dollars, as claimed, with simple interest at six per cent. from August 26, 1897; a personal liability of the defendant Root for the whole amount and a personal liability on the part of the defendant Coram to the full amount received by him or which he may be entitled to receive from the shares of Root

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and the four heirs associated with him acquired by them under the Montana decree for distribution, including their rights in the trust held by Palmer and Davis; the court declared that Elizabeth S. Ladd, Mary Louise Dunbar, Ellen S. Cornue, and her husband were not necessary parties; made a finding as to the amount received by Coram and Root and the amount to which they will be entitled for the property in Massachusetts and declared that the plaintiff had a lien on the above interest of Root and Coram in the property in Massachusetts for the indebtedness established. The court further adjudged that the plaintiff recover from Root and Coram said indebtedness with interest, so far as it could be satisfied from any of the property in Massachusetts which might be ordered by the Probate Court in Massachusetts or the court in Montana or any other court having jurisdiction, to be distributed to the defendants or Mr. or Mrs. Cornue, and made other orders as to the enforcement of the lien declared, and for satisfying the indebtedness if the property declared subject to the lien proved insufficient.

Coram and Root and Palmer as trustee appealed from this decree to the Circuit Court of Appeals, and the latter court on October 16, 1906, one judge dissenting, reversed the decree and remanded the case with directions to dismiss the bill with costs. This petition was brought by the original plaintiff to review the final decision.

The opinion of the Circuit Court of Appeals proceeds upon the ground that the judgment in the suit brought in Montana (*ante*, p. 9) is a conclusive bar to the present suit. No other objection to the maintenance of the suit was considered. The respondents submit that the opinion of the Circuit Court of Appeals was correct; and that, even if erroneous, the suit could not be maintained for other reasons urged upon the Circuit Court of Appeals and set forth below so that the result reached was right.

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SYNOPSIS OF ARGUMENT.

FIRST.

The Circuit Court of Appeals rightly decided that the judgment in the suit in Montana was a bar to this suit.

I.

The suit in Montana was brought upon the same cause of action and upon the same facts alleged in the present suit.

II.

The judgment in the Montana suit was a final judgment on the merits.

III.

A judgment on the merits against an ancillary administrator in a suit brought by him is conclusive as to that cause of action against the original or any other ancillary administrator.

IV.

Harris as administrator in Montana was entitled to bring the suit.

1. Harris had title to support his action.

2. There was no conflict in the present case between the general administrator and the ancillary administrator in Montana.

V.

The Montana judgment was not void, and it is immaterial whether it was erroneous.

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1. It was due process of law for the court after answer filed and issues joined to give judgment for the defendant for insufficiency of the complaint.

2. The Montana court did not found its decision on the assumption of any fact alleged in the answer.

SECOND.

Even if the Montana judgment was not a bar, there were other sufficient grounds for dismissing the bill.

I.

The plaintiff did not establish the existence of a lien on any interest of any of the defendants in the estate of Andrew J. Davis.

1. There is no lien unless an equitable lien was created by the acts of the parties.

2. An equitable lien is not created by a mere promise or agreement to pay a debt from a specified fund.

3. In the present case there was not even a promise to pay from a particular fund as a foundation for a lien.

4. The authorities that were cited in support of the petitioner's case in the court below do not show the existence of an equitable lien.

II.

The petitioner did not establish the existence of any debt due from the defendants or any of them.

1. To establish the debt sued for, the plaintiff must show that the will was defeated and the defendants got their shares.

2. The will was not defeated either in form or substance.

3. The defendants did not "get their shares" within the meaning of the contract.

GE BLEED THRU

III.

The petitioner failed to show that there was any property in Massachusetts that could be subjected to a lien for the alleged debt.

1. There was no property of the defendants in Massachusetts.

2. It is immaterial what contractual rights not creating a lien the defendants may have in respect to the estate in Massachusetts.

ARGUMENT.

FIRST.

The Circuit Court of Appeals rightly decided that the judgment in the suit in Montana was a bar to this suit.

I.

The suit in Montana was brought upon the same cause of action and upon the same facts alleged in the present suit.

The present suit is a bill in equity to recover a balance of ninety-five thousand dollars alleged to have been due to Colonel Ingersoll for professional services. The only ground for proceeding in equity is to secure the enforcement of the alleged lien. The real relief sought is the establishment and recovery of the debt. Anything that is a bar to the recovery of a judgment or decree for the indebtedness is necessarily a bar to the maintenance of the suit.

In July, 1901, the present plaintiff, suing as the administratrix appointed in New York of the estate of her deceased husband, Colonel Ingersoll, brought a suit in the District Court of Montana for the County of Silver Bow against Root, Coram, and the other defendants in the present suit. In that suit the plaintiff alleged

that Root and Coram employed Colonel Ingersoll to contest the will of Andrew J. Davis; that they made the contract embodied in the letter of August 17, 1891, on which the present suit is founded; that Colonel Ingersoll did act for them in contesting the will with the results set forth in the present bill; and that by reason of these facts Colonel Ingersoll became entitled to a fee of one hundred thousand dollars, of which only five thousand dollars had been paid, and that he also became entitled to a lien upon the portion of the Davis estate which under the compromise in the will contest passed to the present defendants. The relief sought was the recovery of the balance of ninety five thousand dollars alleged to be due, and the appointment of a receiver to receipt for and hold the portion of the estate payable to Root and Coram until satisfaction of the demand. (Rec., p. 1647.)

Objection was taken to the maintenance of this action on the ground that the plaintiff as administratrix appointed in New York could not maintain an action in Montana. On November 30, 1901, John S. Harris was appointed ancillary administrator in Montana, and on December 2, 1901, by order of court entered upon motion of the original plaintiff he was substituted as plaintiff. (Rec., p. 1676.)

An amended complaint was afterwards filed (Rec., p. 1529), joining as defendants sundry other persons who claimed liens on the property or were otherwise interested in the suit, and omitting as a defendant Herbert P. Cummings, as executor of the will of Sarah Maria Cummings, and by further amendment Gideon Wells, who had died before the action was brought, was omitted as a defendant. The facts alleged in the amended complaint and the relief sought were substantially the same as in the original complaint. The defendants by their answer to the amended complaint denied the validity of the claim.

When the Montana suit came on for trial, the defendants objected to the admission of any evidence in behalf of the plaintiff, on the ground that the complaint did not set forth a cause of action. This motion was granted, the complaint was not amended, and a final judgment was entered dismissing the suit with costs. (Rec.,

p. 1613.) On appeal to the Supreme Court of Montana this judgment was affirmed. (Rec., pp. 1613, 1614.)

The cause of action in the Harris suit is the identical cause of action set forth in the present bill. The present suit is merely an attempt in another forum to enforce the alleged cause of action which the plaintiff through Harris sought to enforce in Montana.

The present bill alleges no material facts not alleged in the amended bill of complaint in the Montana suit. A comparison of the amended complaint in Montana (Rec., p. 1529) with the present bill will show that there is no material difference in the facts set forth. The following are the only allegations of fact set up in the present suit, and not in the Montana suit, specified by counsel for the petitioners as new and material. None of them, if new, is material.

> (1) Allegations that all of Colonel Ingersoll's clients acquiesced in all the stipulations, arrangements, and proceedings by which the settlement was made. (Petition, p. 62.)

The complaint in the Montana suit expressly alleged that the compromise agreement which determined the will contest was made by Root and his associates, enumerating them. (Par. IX., Rec., p. 1536.) This allegation therefore is not new.

> (2) Allegations that there was no compromise, concession, or relinquishment by any of Colonel Ingersoll's clients of any part or item of the interest in the estate to which they were entitled. (Petition, p. 62.)

The contents of the compromise agreement which determined the contest were alleged in the complaint in the Montana suit (Par. IX., Rec., p. 1536), as they are alleged in this case, and the final decree giving effect to the compromise was before the Montana court. (Rec., p. 1571.) Whether there was any compromise, concession, or relinquishment of rights is a matter of law dependent on the effect of these instruments. The assertion

that there was not can only be intended to dispute the construction of the instruments. It is not, therefore, an allegation of fact at all, and is not material. It is proper, however, to observe that the agreement itself, which the petitioner says Colonel Ingersoll brought about, describes the transaction as a compromise. (Rec. pp. 1139, 1142.)

(3) Allegations (Par. 22) of promises and pledges made by Root and Coram and acknowledgments since Colonel Ingersoll's death of the alleged indebtedness.

So far as these allegations relate to matters supposed to create a lien, they are obviously immaterial on the question whether there was a debt. So far as they are supposed to bear upon the existence of a debt, they must be deemed either to be alleged as facts creating an indebtedness or as evidence of the alleged indebtedness. They cannot create an indebtedness, among other reasons, because no consideration is alleged. They cannot be effective as proof of the indebtedness sued on, among other reasons, because they do not contain such admissions, and because the facts alleged in the present suit and in the Montana suit as creating the indebtedness were not put in issue by the disposition made of that suit. None of these allegations therefore are material.

(4) The allegations contained in Paragraph 24 of the bill.

Paragraph 24 of the bill contains no allegations in any way bearing upon the existence of an indebtedness from the defendants to the plaintiff. The allegations are all to the effect that Root and Coram have conspired to prevent recovery by the plaintiff, and that the estate in Massachusetts should be applied to satisfy her claims. It cannot be seriously contended that these allegations can affect the question of whether an indebtedness exists.

It appears, therefore, that the Montana suit and the present

suit, which was admittedly brought to recover on the same demand, do rest upon the same facts as to the existence of a debt. The former suit is therefore necessarily a bar to the latter, unless some other reason can be shown why the judgment in Montana is not conclusive.

II.

The judgment in the Montana suit was a final judgment on the merits.

When the suit brought by Mrs. Ingersoll in Montana, in which Harris, the ancillary administrator, was substituted as plaintiff, came on for trial, the defendants objected to the admission of any evidence for the plaintiff on the ground that the complaint did not state facts sufficient to constitute a cause for action, and, the plaintiff declining to amend the complaint, the court entered a judgment dismissing the complaint and for costs. (Rec., p. 1613.) The petitioner contends that this judgment was not a judgment on the merits, and therefore was not an adjudication binding on any one.

A final judgment may be rendered upon the determination of a question of law or of a question of facts. A judgment rendered upon a determination of facts, by a jury or by the court if a jury is waived, is a conclusive adjudication of those facts. The same facts cannot afterwards be litigated between the parties. A judgment rendered upon the determination of a question of law is an equally conclusive determination of that question. In each case the judgment is conclusive as to what was adjudicated, and as to nothing else.

An issue of law is, of course, most often presented by a demurrer. A judgment following the demurrer is conclusive of the issue thus raised. If the demurrer was special, the only thing as to which the parties are bound is the special defect to which objection is taken, because that is the only thing put in issue and adjudicated. If the demurrer was general, the issue raised is the sufficiency of the facts to support the action—that is the

issue adjudicated—and the decision of the court is conclusive in that and all future proceedings as to the sufficiency of those facts.

These principles are the settled law of this court and of all other courts.

In *Gould* v. *Evansville & C. R.R. Co.*, 91 U. S. 526, this court held a final judgment on demurrer in a prior suit between the same parties a conclusive bar, because upon a comparison of the pleadings it appeared (p. 535) that the defects in the declarations in the former suit were not supplied by new allegations. The court said that one of the rules as to the effect of a final judgment on demurrer was

> "That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless." (p. 534.)

In *Bissell* v. *Spring Valley Township*, 124 U. S. 225, the question again arose, and the court said:—

> "The final judgment entered upon that demurrer is a bar to any further action upon the specific coupons in suit. This is conceded; their validity cannot be again litigated in any form between the parties." (p. 231.)

In *Bouchaud* v. *Dias*, 3 Denio, 238, the court said:—

> "But it can make no difference in principle, whether the facts upon which the court proceeded were proved by deeds and witnesses, or whether they were admitted by the parties. And an admission by way of demurrer to a pleading in which the facts are alleged, must be just as available to the opposite party as though the admission had been made *ore*

> *tenus* before a jury. If the plaintiff demurred for want of form, or if for any other reason he wished to controvert the facts alleged in the plea, he might, after learning the opinion of the court, have asked leave to withdraw the demurrer and reply. But he suffered a final judgment to be entered against him. He probably thought that the facts were truly alleged in the plea, and therefore did not wish to amend. But, however that may be, the judgment is a bar to this action." (p. 244.)

The law of Montana as to the effect of a judgment on demurrer is the same.

In *Kleinschmidt* v. *Binzel*, 14 Mont. 31, a previous adjudication on demurrer was set up as a bar to a cross bill. It appeared that the demurrer alleged these grounds: (1) insufficiency of the facts to constitute a cause of action; (2) misjoiner of causes; (3) misjoiner of parties. The Supreme Court of Montana laid down the rule as to the finality of a judgment on demurrer, as follows:—

> "The authorities support the proposition urged by respondent that if the alleged cause of action is submitted on the merits by demurrer, admitting the facts alleged, but placing over against them in the judicial scale, the proposition of law that the facts pleaded and thus admitted are insufficient to warrant judgment in favor of the pleader; and upon due weighing of the law and the facts, those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand; those facts thereby pass under the rule of '*things adjudicated;*' and the party against whom such adjudication proceeds, as well as his privies and representatives, are thereby barred from again asserting the same facts in another action pertaining to the subject as effectually as though such facts were found from the proof or admitted *ore tenus* in the course of the trial." 14 Mont. 52, 53.

The court held, however, that a judgment on demurrer must appear to have been rendered on the merits, that there was no presumption that on a demurrer for several causes all were sustained, but rather it would be presumed the objections to form were the basis of the judgment, and that, as in the case before it

there were objections not going to the merits, it did not appear that the judgment was on the merits. The court did not hold, as stated in the petition (p. 57), that the provisions of the Montana Code as to rendering judgment on the merits was inapplicable to all judgments on demurrer, but only that it was inapplicable to a judgment which was or might have been entered on a demurrer which did not go to the merits.

A motion to exclude evidence, because the facts, if proved, will not establish a cause of action, has precisely the same effect in creating an adjudication as a formal demurrer or as a ruling by the court after the facts have been proved. It is a submission to the court of an issue of law. The decision of the court is an adjudication of that issue. The decision concludes the parties as to the sufficiency of those facts for precisely the same reason and to precisely the same extent as if the question had been submitted to the court by a demurrer.

In *Green* v. *Sanborn*, 150 Mass. 454, an action was brought in the District of Columbia. The defendant in that action pleaded a set-off and offered evidence in support of his plea. The court ruled that, as matter of law, the facts pleaded in set-off did not establish a claim, and excluded the evidence. Judgment was recovered in the District of Columbia, and an action was brought on that judgment in Massachusetts. The defendant in the Massachusetts suit pleaded as a set-off the same facts that he had pleaded and offered to prove in the former suit. The Supreme Judicial Court of Massachusetts held that the decision of the court of the District of Columbia was a conclusive adjudication that the facts alleged in set-off did not constitute a cause of action. The court said:—

> "The defendant certainly regarded the issue upon the plea of set-off as upon trial, for he offered evidence to prove the plea. The defendant argued that the evidence may have been excluded because issue was not joined on the plea, or because the plea did not set out a demand in its nature a matter of set-off. It seems that issue was joined on the plea, and that a demand for money had and received is matter of set-off. If the court had excluded the evidence on either

ground, it seems that it would have been an erroneous ruling in the course of the trial, for which the defendant's remedy would be by exception. But the natural meaning of the language is that the ruling was upon the merits of the defendant's claim, and that the facts relied upon to prove it would not sustain a claim for money had and received. It is not suggested that the plea was not a valid plea of set-off, and the record shows that the ruling was made in the course of the trial of the issue joined upon it.

"The rejection of evidence offered, and the ruling that upon the statement of a party his action or defence cannot be sustained, are ordinary incidents of a trial; and that appears to be all that was done in this case.

"The defendant did not become nonsuit in his plea of set-off. He did not withdraw his plea. It does not appear that he could have done either. The ruling only affected the verdict. If it was wrong, the verdict would have been set aside had the defendant prosecuted the exceptions which he took." 150 Mass. 457.

The petitioner contends that the judgment in Montana now in question was not like a judgment on demurrer, and had no more effect than a voluntary nonsuit.

In support of this position the petitioner refers to section 1004 of the Montana Code of Civil Procedure. (Petition, p. 58.) That section provides that an action may be dismissed or a judgment of nonsuit entered by the court on motion of the defendant when at the trial the plaintiff fails to prove a sufficient case. Obviously, this section has nothing to do with the present case. The suit in Montana was dismissed not for failure to prove the allegations set forth, but for insufficiency of the allegations. A judgment entered for failure to prove a case does not decide anything except that no sufficient evidence has been produced. A judgment entered for failure to state a case decides that the facts stated do not afford any ground for relief. The motion in the Harris case was not based on section 1004, but on the right of a defendant at any stage of the case to raise the question of the sufficiency of the complaint, a right expressly reserved by the following section of the code of Civil Procedure:

SECTION 685.—"If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The petitioner contends further (Petition, p. 57) that the judgment is not conclusive because by the law of Montana a final judgment dismissing the complaint does not prevent a new action, "unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits." The fatal objection to this contention is that it does appear from the judgment roll that the judgment in the Harris case was rendered upon its merits. It appears that the question—and the only question before the court—was whether the complaint stated facts constituting a cause of action. This question went to the merits of the case just as general demurrer goes to the merits. A judgment rendered on the decision of this question, the plaintiff electing to stand on his complaint and not to amend, is a judgment on the merits just as a judgment on general demurrer would be. These facts appear on the face of the judgment roll, and therefore the provisions of the Montana statutes are fully satisfied.

The petitioner has cited no authority which supports the position that the Harris judgment is not a conclusive adjudication on the merits. The cases decided by this court, which are referred to in the petition (pp. 51–59), support no such proposition.

In *Gilman* v. *Rives*, 10 Pet. 298, Mr. Justice Story said a judgment on demurrer for want of parties would not bar a second suit in which there was no such defect. It is clear, and the contrary is not suggested, that a judgment on demurrer is decisive only of the sufficiency of the facts alleged in the pleading demurred to.

In *Homer* v. *Brown*, 16 How. 354, the court held that, where by agreement a case was submitted on agreed facts, the plaintiff to be *nonpros'd* if the court was of opinion that the facts were insufficient, there was no binding adjudication because by the agreement the effect was to be only the same as if the plaintiff had been *nonpros'd* for failure to appear. (p. 365.)

In *Manhattan Life Insurance Co.* v. *Broughton*, 109 U. S. 121, the plaintiff was nonsuited for failure to prove an essential fact. The court held, strictly in accordance with the principles above contended for, that this was no bar to a future suit in which that fact was shown.

In *Gardner* v. *Mich. Cent. R.R. Co.*, 150 U.S. 349, the plaintiff had in former action become nonsuit on his own motion, such nonsuit "not to prevent the right of the plaintiff to bring any suit in any court." (p. 352.) This court held that, as there was no final adjudication, the former suit was no bar.

In *Canal Co.* v. *Gordon*, 6 Wall. 561, the former suit, which was relied on by the defendant as a bar, was voluntarily discontinued by the plaintiff. (p. 564.)

In *Hughes* v. *United States*, 4 Wall. 232, 237, the court held a former suit dismissed for defect of parties and for insufficiency of the facts alleged not a bar, apparently because the decision might have been on the first ground only. The court stated the rule applicable to such cases to be,—

> "If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." (p. 237.)

In *McComb* v. *Frink*, 149 U. S. 629, the judgment in the former suit was upon a different cause of action.

The difficulty with the petitioner's whole argument is the failure to distinguish between the effect of those judgments in which a question raised in the second suit has already been decided and those in which nothing involved in the second suit has been decided.

A voluntary nonsuit decides nothing against the plaintiff. An involuntary nonsuit for failure to prove the necessary facts involves nothing, and decides nothing except that the facts have not been proved. The court is not called upon to exercise the function of a jury, and decide that the alleged facts are not true.

A dismissal for failure to allege sufficient facts to support the action decides that the facts alleged are insufficient, not that the plaintiff may not have a cause of action. It is a bar to recovery in a second suit alleging only the same facts, though it would not bar a second suit alleging other and sufficient facts.

In this case the judgment in the Harris suit set up as a bar involved a decision whether the facts alleged in the complaint in that suit stated a good cause of action. This question was precisely the same as would have been involved on a general demurrer. The decision of the court established that those facts did not state a cause of action. This was a decision on the merits just as a decision on general demurrer would have been a decision on the merits, and its effect is the same; namely, to preclude any one bound by that judgment from contending in any future suit that those facts did state a good cause of action.

III.

A judgment on the merits against an ancillary administrator in a suit brought by him is conclusive as to that cause of action against the original or any other ancillary administrator.

An administrator is an agent appointed by law to collect and administer the assets of a deceased intestate. Because he derives all his authority from the law, and because the laws of one State cannot have extra-territorial effect, the authority of an administrator to act does not extend beyond the territorial limits of the jurisdiction in which he is appointed. Because the assets of a deceased person may be scattered through several States, it is necessary to provide for ancillary administrators to act in jurisdictions other than that where the original appointment is made as to the assets of the estate in such other jurisdictions. Ancillary administrators are the agents appointed by law to deal respectively with such assets as are within the territorial limits of the jurisdiction by which each is appointed. In theory there is no duplication of powers. The principal administrator takes

all assets that are not outside the jurisdiction of the principal appointment. Each ancillary administrator takes such assets only as are within the limits of the jurisdiction by which he is appointed.

To the working of such a system of law it is plainly necessary that the acts of each administrator, principal or ancillary, as to the assets within his jurisdiction, should be final. If, in the course of ancillary administration, property within the jurisdiction is sold or distributed in accordance with law, the title of the purchaser or distributee should not be, and is not, open to attack.

See

Holcomb v. *Phelps*, 16 Conn. 127.
Wells v. *Wells*, 35 Miss. 638.
Walton v. *Hall*, 66 Vt. 455.

If payment is made to an ancillary administrator of a claim in favor of the estate existing within his jurisdiction, such payment should be and is a discharge.

Slocum v. *Sanford*, 2 Conn. 533.
Stevens v. *Gaylord*, 11 Mass. 256.

If an ancillary administrator in the course of the lawful performance of his duties has compromised a claim within his jurisdiction, such compromise should be, and is everywhere, binding. If the ancillary administrator in the lawful performance of his duties brings suit upon a claim in favor of the estate, and recovers judgment, such judgment should and does merge the cause of action so as to preclude suit upon it elsewhere.

See

Biddle v. *Wilkins*, 1 Pet. 686, 693.
Talmage v. *Chapel*, 16 Mass. 71, 73.

In each of the instances mentioned, the real ground, and the only intelligible ground, for giving effect elsewhere to the act of the ancillary administrator, is that he, having the lawful control for the time being of the particular asset, has as the lawfully consti-

tuted agent of the estate, or as lawfully appointed trustee for the next of kin, done an act affecting that asset, by sale, discharge, compromise, or merger, as the case may be, and that, because the property was at the time subject to the laws and jurisdiction of the State in which the ancillary administrator was appointed, therefore that act must be recognized as valid everywhere if due faith and credit are to be given to the laws of that State.

No principle of privity is involved in this rule. It is merely the application of the general principle governing the effect to be given to acts done pursuant to the laws of one State as to property over which it has for the time being jurisdiction.

In the case of transmissible assets, obviously there is strong occasion for the application of the principle. If the property lawfully sold in one jurisdiction is brought into another, it is certain that the sale cannot be disregarded. If a debtor who has properly paid in one jurisdiction comes into another, it is certain that he cannot be required to pay again. If a judgment has been recovered, the cause of action is merged; and the judgment debtor cannot be sued by another administrator in another jurisdiction, although the chose in action may after the judgment have been transmitted to such other jurisdiction. The courts recognize the effect of the act of the administrator in another jurisdiction in converting the claim into a judgment debt. The judgment recovered can be enforced only by the judgment creditor, and may be so enforced anywhere without the necessity of ancillary appointment.

Wilkins v. *Ellett*, 108 U. S. 256.
Biddle v. *Wilkins*, 1 Pet. 686.
Talmage v. *Chapel*, 16 Mass. 71.

These results do not depend upon privity, but upon successorship. The case is governed by the general rule that, when one having legal dominion over property is succeeded by another, that other takes the property in the condition in which it then is, subject to whatever has been legally done by his predecessor. There are other instances of the same rule.

(*a*) An administrator *de bonis non* takes the title of the deceased in succession to the preceding administrator.

United States v. *Walker*, 109 U. S. 258, 261.
Waterman v. *Dockray*, 78 Me. 139.

There is no privity of estate between him and his predecessor, but whatever the predecessor has lawfully done as to that property which passes to the administrator *de bonis non* is binding on the latter.

> "It is well settled, both at common law and in all the States, that acts binding upon the original administrator as acts of administration, by which the right of a debtor, creditor, legatee, or distributee against or in favor of the estate of the deceased is affected, are equally binding upon all successors. To this extent, the privity between them is complete, because what an administrator does lawfully within the sphere of his powers is in law the same as if his testator or intestate had done it, and not to be questioned by any one representing him. This privity does not arise out of any relation between *them* to each other, but is the result of the relation of each of them to the testator or intestate, which, to the extent to which property left by him may come into their hands respectively, is the same in both." Woerner's American Law of Administration, 2d ed., § 353.

Bell v. *Speight*, 11 Humph. 451, 453, 454.

Thus payment to a former administrator is binding upon an executor if a will is afterwards found,

Benson v. *Rice*, 2 Nott & McCord, 577,

or upon an administrator *de bonis non*,

Eckert v. *Triplett*, 48 Ind. 174.

If a claim has become barred by the statute of limitation against an original administrator, the administrator *de bonis non* is equally barred.

Wych v. *East India Co.*, 3 Peere Williams, 308.
Heard v. *Meader*, 1 Me. 156.

(*b*) The rule is the same in the case of successive receivers. A receiver appointed in supplementary proceedings who brings suit is barred by the result of a former suit brought by a former receiver.

Verplanck v. *Van Buren*, 76 N. Y. 247.

The principle was in that case explained by Judge Folger as follows:—

> "True, the parties plaintiff in the two actions differ in name of person; but their representative character is the same, in that each stands for the estate and right of Thomas W. Chrystie. True, they were appointed at the instance of different creditors; but one succeeded the other in title, and took into possession the same estate and right,—that of Thomas W. Chrystie. Monell took all that Chrystie owned; so did Verplanck; and both took the agreement with the defendants." 76 N. Y. 256.

(*c*) In the case of succeeding trustees there is the same absence of privity in any legal sense; but the holding and administration of property by trustees would become impossible if, whenever a new trustee was appointed, the acts of his predecessor in the lawful administration of his trust could be ripped up.

In the case of a transitory claim passing from one ancillary administrator to another, the application of the principle is equally clear. If an ancillary administrator brings suit upon the claim and recovers judgment, it is said that the original cause of action is merged, and that thereafter no other administrator, ancillary or principal, can bring suit upon it, although the instrument, if there be one, on which the action is brought, may still be in existence and pass to such other administrator. If the ancillary administrator brings suit and is defeated by an adverse judgment on the merits, the cause of action is equally gone. He clearly cannot thereafter bring another suit on the same cause of action, nor can an administrator *de bonis non* appointed in the same jurisdiction. The reason is the same, that the lawfully constituted agent has done in the proper performance of his duties an act which has

destroyed the asset. Representing the estate of the deceased, continuing the existence of the deceased, according to the conception of the civil law, he has done an act which, if done by the deceased himself during his lifetime, would have been final. That act is equally final when done by the administrator.

The act of an ancillary administrator in dealing with a cause of action, real or supposed, belonging to the estate, is in its nature the same, so far as effect upon the rights of the principal administrator are concerned, as any other act affecting property of the estate within the ancillary jurisdiction. The same principles that make dispositions by the ancillary administrator of tangible property that is within his jurisdiction binding against the principal administrator make any other acts of his within his authority, including the results of suits upon transitory claims, binding. This has been fully recognized by the Supreme Court of the United States. Speaking of the acts of ancillary receivers, who stand in a precisely analogous position, the court in *Reynolds* v. *Stockton*, 140 U. S. 254, 272, said:—

> "If Parker had still remained the ancillary receiver in the State of New York, a judgment rendered against him as such would bind only that portion of the estate which came into his hands as ancillary receiver, and would not be an operative and final adjudication against the receiver appointed by the court of original administration. Where a receiver or administrator or other custodian of an estate is appointed by the laws of one State, the courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness."

The same necessity for such a rule is apparent from a consideration of the nature of an administrator's office in relation to the

persons interested in the estate. He takes his title in a representative capacity as trustee or agent for the creditors and next of kin of the deceased.

Yonly v. *Lavender*, 21 Wall. 276, 280.
Tate v. *Norton*, 94 U. S. 746, 752.
Cowen v. *Adams*, 78 F. R. 536, 543, 544.
Blood v. *Kane*, 130 N. Y. 514.

What the administrator does is binding upon his *cestuis que trust*. A judgment against the administrator concludes them.

Pickens v. *Yarborough*, 30 Ala. 408.
Morris v. *Murphey*, 95 Ga. 307.
Fraser v. *Charleston*, 19 S. C. 384.

If the administrator permits a right to recover property to become barred, it bars those interested in the estate. Thus, in *Meeks* v. *Olpherts*, 100 U. S. 564, an administrator in California made an invalid sale of real estate. Subsequently other administrators were appointed, and upon a distribution the lot sold was set off to the plaintiff. The Supreme Court held that the plaintiff could not recover the land. Mr. Justice Miller for the court said:—

> "The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. 'In all suits for the benefit of the estate he represents both the creditors and the heirs,' said the Supreme Court in *Beckett* v. *Selover*, 7 Cal. 215." (p. 569.)

See also

Cunningham v. *Ashley*, 45 Cal. 485.
Manly v. *Kidd*, 33 Miss. 141.
German v. *Clark*, 71 N. C. 417.

The acts of an administrator, including the recovery of a judgment against him, are binding upon those whom he as trustee represents to the extent to which he represents them, and are, for this reason, as has been shown, binding upon a succeeding

administrator *de bonis non*. If they are not equally binding upon one who succeeds to the possession as trustee for the same persons of the identical property as to which the acts in question were done, the result is the very extraordinary anomaly that, while the principal would be bound, the succeeding agent would not be bound.

In the present case, if the plaintiff had, after judgment against Harris in Montana, been herself appointed there in his place as administrator *de bonis non*, she could not have sued as administratrix. In her individual capacity as one of the next of kin, for whose benefit the Harris suit was brought, she cannot dispute the judgment. Except for the accident that she can get jurisdiction over the same defendants in another State, the cause of action would confessedly be concluded. Yet it is said that, because the cause of action is transitory, and can be prosecuted as well in some other State as in Montana, she can disregard the result of the suit originally brought by her and later prosecuted in the name of Harris with her full consent and authority, and by removing the cause of action from Montana maintain a second suit on it in Massachusetts, and in case of failure here continue to bring still other suits as often as she can find a fresh jurisdiction in which process can be served on the defendants.

Again, if by the laws of Montana an administrator appointed in New York had been able to sue without ancillary appointment, as is the law in some States, and the plaintiff had herself prosecuted the suit to the end without the intervention of Harris, it is clear that she could not afterwards have sued on the same cause of action in New York. The judgment would have been binding upon her as principal administratrix.

Lawrence v. *Nelson*, 143 U. S. 215.

Yet it is said that the suit brought under her authority after an ancillary appointment is less conclusive.

Such conclusions, involving the result that a cause of action in favor of a deceased person can never be concluded against his representatives as long as a jurisdiction remains somewhere in

which suit has not been brought, are as opposed to any orderly administration of justice or reasonable theory of law as they are shocking to the moral sense and inconsistent with any practical system of administration.

There is no authority to support the doctrine for which the petitioner contends. It has never been held that as many successive suits may be brought on one cause of action as there are administrators, principal and ancillary, who can obtain jurisdiction. On the contrary, the authorities recognize that, if an administrator, having the right to do so, has brought suit, that suit must be conclusive.

In *Sulz* v. *Mutual Reserve Fund*, 145 N. Y. 563, an action was brought in New York by an administrator appointed there to recover upon a life insurance policy. The defendant set up in defence that a suit had been brought in Washington on the same policy by an administrator appointed there, and was pending. This defence was sustained, and the suit dismissed. The court said:—

> "In this case we do not assert that the courts of this state might not have had jurisdiction to entertain this action, even though the policy were in the state of Washington, provided the courts of that state had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this state. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the courts here. But in the case of administrators duly appointed in each state, when the foreign administrator first duly commences an action by the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign state at the death of the assured in that state, we think the courts of the foreign state have obtained jurisdiction, and, therefore, could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this state upon the same policy. In such a case as this we think that the principle of comity between the states calls for the refusal on the part of the courts of this state to entertain jurisdiction." 145 N. Y. 572, 573.

Clearly, if a judgment for the defendant in the Washington suit would not have prevented the maintenance of the New York suit, the defence set up showed no bar to that action, but at most a ground for continuing the suit to await the result of the suit in Washington.

So in *Merrill* v. *New England Mutual Life Ins. Co.*, 103 Mass. 245, the principal administrator, appointed in Illinois, brought suit there on a policy of insurance, and an ancillary administrator, appointed in the interest of a pledgee, brought suit on the same policy in Massachusetts. The Supreme Judicial Court of Massachusetts, while holding that by reason of the presence of the debtor in Massachusetts the court there had jurisdiction, and that by reason of the pledge the general administrator was not entitled to sue, recognized that, but for these facts, the pendency of the suit in Illinois would have been a bar. Mr. Justice Wells said: —

> "If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it." (p. 249.)

The cases in which it is held that a cause of action on which a judgment has been recovered is "merged" in the judgment, so that no action can thereafter be brought upon it, recognize the same doctrine. The act of the administrator who rightly brings a suit so converts the asset that it no longer exists as property of the estate. The judgment is not binding upon an administrator appointed in another State by way of privity of estate, or in any other sense, except that as an act lawfully and rightfully done, affecting a part of the estate, it has the result as to his rights, if that part of the estate is transmitted to him, that it would have if done by himself or if it had been done by the deceased. A judgment against the estate is an act of the same nature in this respect as

one in favor of the estate. A cause of action is merged in a judgment for a defendant as effectually and in the same sense legally as in a judgment for the plaintiff.

See

Sweet v. *Brackley*, 53 Me. 346.
Weeks v. *Harriman*, 65 N. H. 91.

It is perfectly consistent with the principle laid down, and indeed is its logical result, that, if an ancillary administrator has recovered a judgment, an administrator in another jurisdiction cannot maintain an action on the judgment. By the judgment the asset which belonged to the estate, and might have been transmitted, has ceased to exist. The cause of action has been converted into a judgment in favor of the administrator who brought the suit. He is accountable for the proceeds of that judgment, but it is no longer a chose in action which existed in favor of the deceased, and could come under the lawful dominion of an administrator appointed in any jurisdiction in which the debtor could be found. Full effect is thus given to the act of the administrator in recovering judgment, and the permanent change wrought by that act is recognized as effective in all jurisdictions.

Those cases in which it is held that a judgment against or in favor of an administrator in an action brought against him in his representative capacity is not binding upon an administrator appointed in a different jurisdiction offer no exception to the principle contended for.

An action brought against an administrator in his representative capacity– that is, seeking a judgment *de bonis testatoris*—is in effect an action brought to recover satisfaction from the assets in the hands of the administrator. Whether the action is by a creditor or by a next of kin, it is by one who claims a beneficial interest in or right to the property. The administrator, ancillary or original, against whom the suit is brought, represents only those assets which are in his possession. He holds those assets to dispose of them according to law among creditors and next of kin. Except in case all the property of the deceased is in one jurisdic

tion, an administrator appointed in one jurisdiction does not full represent the estate. His representative capacity and powers ar limited to what affects the property in that jurisdiction. He can not bind his beneficiaries except with reference to that property There is no ground, therefore, for saying that, if a creditor has re covered judgment against one ancillary administrator, that judg ment is binding upon another or upon the principal administrator By its very nature that judgment determines and can determin nothing except the right of the plaintiff as to the particular property in the hands of the defendant as administrator. If a second suit should be brought to recover against the same property, or to recover a specific chattel after that property or chattel had passed into the hands of a different administrator, there might well be ground for saying that the result of the former suit was conclusive but no such case has been referred to.

All the authorities relied on by the petitioner decide only that a judgment in favor of a plaintiff against an administrator in one jurisdiction is not binding in a suit brought against the same or another administrator holding different property under ap pointment in a different jurisdiction.

In *Aspden* v. *Nixon*, 4 How. 467, a suit was brought in Eng land against the executor of a domiciled Englishman to recover property there, the plaintiff claiming to be devisee. That suit was dismissed. Subsequently a suit was brought in Pennsyl vania by the same plaintiff against the same person as admin istrator with the will annexed there, seeking to recover on the same ground property of the testator in Pennsylvania. The court held that the decree dismissing the English suit was not a bar. The court said that the executor resisted the suit in Eng land in a representative capacity, and was restricted to the limit of the county to which his letters extended, that he could not deal with the Pennsylvania assets by virtue of his appointment in Eng land, and that, therefore, the decree in England could not affect the Pennsylvania assets.

In *Stacy* v. *Thrasher*, 6 How. 44, the question presented was, as stated by the court:—

> "Will an action of debt lie against an administrator in one of these United States, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another?" (p. 58.)

The court held that such a judgment would not lie, because, as the administrator represents the intestate only as to the assets within the jurisdiction,—

> "He cannot, therefore, do any act to affect assets in another jurisdiction, as his authority cannot be more extensive than that of the government from whom he received it." (p. 58.)

Again the court said:—

> "The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." (p. 60.)

In *Johnson* v. *Powers*, 139 U. S. 156, the same general rule is laid down by way of dictum on the authority of the two preceding cases.

Carpenter v. *Strange*, 141 U. S. 87, decides nothing of importance in the present connection. This court held in that case that a judgment recovered against an executrix in New York would support an action against the same person as executrix under the same will proved in Tennessee. The court distinguished on the ground that an executor derives his title from the will, and not from his appointment.

The reasoning of the court in each of the foregoing cases is based on the principle contended for; namely, that the distinction between administrators in different jurisdictions is that they represent different assets, and that no act of one can have any effect except upon the assets in his possession, but that full effect is to

be given everywhere to acts done by an administrator in dealing with an asset properly in his possession, although that asset subsequently passes into another jurisdiction. Courts and text-writers have recognized that for this reason a judgment against an administrator may be binding upon an administrator of the same estate in another jurisdiction if the latter holds assets received from the former.

Cherry v. *Speight*, 28 Tex. 503, 516.
Carrigan v. *Semple*, 72 Tex. 306, 308.
Schouler on Executors, 3d ed., Sect. 178.
Black on Judgments, 2d ed., Sect. 922.

The same reasons leading to the conclusion that an administrator cannot affect assets outside his jurisdiction logically lead to the conclusion that whatever acts he has done within his jurisdiction in relation to the assets within the jurisdiction of his appointment should be given full force everywhere. He cannot affect assets outside the jurisdiction because they are not in his control, and as to them he does not represent the estate—that is, the creditors and next of kin—and so can do no act to bind them. His acts are everywhere conclusive as to assets inside the jurisdiction because they are in his control, and as to them he is authorized fully to represent and bind the estate. If, therefore, having the requisite authority, he brings a suit upon a cause of action that existed in favor of his intestate, and fails so that a judgment is rendered against him, that cause of action is extinguished for all purposes and as to all persons who might otherwise as representatives of the same estate be entitled to sue upon it.

IV.

Harris, as administrator in Montana, was entitled to bring the suit.

1. Harris had title to support his action.

It is argued for the petitioner that the judgment of the court in Montana is not a bar because Harris, the administrator appointed there, had no title to the chose in action sued on.

This argument, if it could be supported, would prove too much, for the same defect in title would exist in the present plaintiff's suit as administratrix in Massachusetts. The argument assumes that title to the chose in action is vested in the domiciliary administrator, and that an ancillary administrator can get title on which to support an action only by assignment, and that, as no such assignment was made to Harris, he had no title. It is equally true that, so far as the bill of complaint in the present case shows, no assignment was made to the ancillary administratrix appointed in Massachusetts, and consequently that she cannot recover. It is immaterial that she is the same individual, since the title is in her only in her representative capacity, and that does not extend beyond the jurisdiction of New York.

In fact, however, the argument has no foundation, and rests on a misconception of the nature of an administrator's title and of the *situs* of a debt.

Title to the property of a deceased person vests in an administrator by virtue of his appointment by the Probate Court, and extends to all personal property within the jurisdiction of the court making the appointment. Upon appointment of an ancillary administrator, title within the jurisdiction vests in him, notwithstanding the prior appointment of a domiciliary administrator elsewhere.

Tangible personal property has its *situs* for purposes of administration where it actually is. Intangible personal property, consisting of a debt due from a third person, has its *situs* for pur-

poses of administration where the debtor is. A debt due from a resident of Montana, therefore, has its *situs* in Montana, and title to it vests in an ancillary administrator appointed in Montana, notwithstanding the prior appointment of a domiciliary administrator in New York.

These principles are perfectly well settled.

In *Wyman* v. *Halstead*, 109 U. S. 654, 656, this court said:—

> "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable."

As the debtor in that case was the United States, and as the United States has no domicile in one part of the Union rather than in another, the court was of opinion that an administrator appointed in the District of Columbia had no superior claim to the treasury drafts in question.

In *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, an administrator appointed in Illinois on the estate of a deceased resident of Michigan, brought suit in Illinois against a corporation organized under the laws of Massachusetts to recover upon a policy of life insurance. This court held that the suit could be maintained on the ground that the insurance company, having complied with the laws of Illinois, had for this purpose a domicile in that State, as well as in Massachusetts. The court said:—

> "The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in *Wyman* v. *Halstead*, 109 U. S. 654." (p. 145.)

Referring to the decision in *Wyman* v. *Halstead*, the court said:—

> "In consonance with what was said in that case, payment of this debt to the administrator appointed in Illinois will be good against any administrator appointed elsewhere." (p. 147.)

In *Cunnius* v. *Reading School District*, 198 U. S. 458, 467, this court said as to a debt due to an absentee by a school district in Pennsylvania:—

> "It would undoubtedly have been subject to administration under the laws of Pennsylvania had the absentee been in fact dead."

In *Blackstone* v. *Miller*, 188 U. S. 189, 204, this court pointed out that:—

> "The title of the principal administrator, or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all."

In *Sulz* v. *Mutual Reserve Fund*, 145 N. Y. 563, the action was brought on a policy of insurance upon the life of a man who at his death was a resident of the State of Washington. Dealing with the right of an ancillary administrator appointed in New York to sue upon the policy which was not in his possession, the New York Court of Appeals said:—

> "In this case we do not assert that the courts of this state might not have had jurisdiction to entertain this action, even though the policy were in the state of Washington, provided the courts of that state had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this state. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the courts here." (p. 572.)

In Massachusetts it has always been the rule that residence of

a debtor of the deceased within the Commonwealth was a sufficient foundation for granting ancillary administration.

Stevens v. *Gaylord*, 11 Mass. 256.
Pinney v. *McGregor*, 102 Mass. 186.

In England simple contract debts are *bona notabilia* in the diocese where the debtor resides.

1 Williams on Executors, 279.

It is because a debt has a *situs* at the domicile of the debtor, rendering it assets there and subject to the laws there in force, that an ancillary administrator may be appointed before the appointment of any principal administrator, and may bring suit against a debtor living in the State where the appointment is made.

Stevens v. *Gaylord*, 11 Mass. 256.

The case of *Noonan* v. *Bradley*, 9 Wall. 394, referred to by the petitioner (Petition, p. 43), does not set up any contrary doctrine. In that case an administrator appointed in New York of the estate of a deceased resident of New York brought suit in Wisconsin on a bond made by a resident of Wisconsin, and then in the possession of an ancillary administrator appointed in Wisconsin. This court held that a plea alleging the appointment of the administrator in Wisconsin, and that by reason thereof all effects of deceased in Wisconsin were vested in him, and that the letters issued to the New York administrator were therefore void as to the cause of action stated in the declaration, was a good defence. The petitioner apparently relies upon this decision as an authority to show that a simple contract debt is *bona notabilia* in that place where written evidence of the contract may be at the death of the creditor. The case supports no such doctrine. The bond was a specialty, and therefore not within the statement of the rule as laid down above. See *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, 145. It does not even appear that the place

where the bond itself was at the obligee's death influenced the court. The report only shows that, when the suit was begun, the bond was in possession of the Wisconsin administrator. As the maker of the bond was a resident of Wisconsin, it would equally have been *bona notabilia* in Wisconsin if governed by the same rule as a simple contract debt, or if deemed, because a specialty, to have a *situs* for purposes of administration as for purposes of succession tax based on the actual situation of the paper instrument.

The authorities referred to establish beyond possibility of doubt that in case of a simple contract debt an administrator appointed where the debtor resides has full title for purposes of administration. If, indeed, payment is made to the general administrator, it may, aside from the rights of local creditors, be a sufficient discharge. But, the debt remaining unsatisfied, no transfer is needed to enable the ancillary administrator to maintain an action. The fact that the ancillary administrator can sue, although no general administrator has been appointed, shows that there can be no question of defect of title. The meaning of the statement that the debt is assets at the place of residence of the debtor is that it is under control of the jurisdiction of the courts at that place.

In the present case Root, one of the alleged debtors, was a resident of Montana. No one could recover against him in a suit in Montana except an administrator there appointed. On the other hand, an administrator there appointed could recover if any cause of action existed, notwithstanding the existence of a general administrator and without assistance from the general administrator: if not, the debt was not within the control of the Montana court for administration and was not for purposes of administration assets in Montana,—a conclusion contrary to all the authorities.

2. There was no conflict in the present case between the general administrator and the ancillary administrator in Montana.

Cases may, perhaps, be conceived where a conflict might exist between a general and an ancillary administrator which would

make a court loath to recognize the powers of the latter. No such case exists here.

It appears affirmatively upon the record that Harris was appointed administrator in Montana when objection was taken to the maintenance of the suit already brought by Mrs. Ingersoll, the laws of Montana not permitting the appointment of a non-resident; it further appears that Harris was substituted as plaintiff in that suit on motion of the counsel appearing therein for Mrs. Ingersoll, and that the suit was thereafter prosecuted by the same counsel; finally, in the bill filed in the present suit, Mrs. Ingersoll set out the proceedings taken in Montana, including the unsuccessful prosecution of the suit by Harris, as an excuse for not having taken proceedings sooner, and as an avoidance of a possible charge of laches. (Rec., p. 34 *et seq.* Bill, par. 25.)

It is reasonably clear that the suggestion of lack of title in Harris is an afterthought, and the facts referred to show beyond doubt, what is not even now denied by the petitioner, that Harris in prosecuting the suit in Montana was acting for the petitioner.

V.

The Montana judgment was not void, and it is immaterial whether it was erroneous.

Much space has been devoted by counsel for the petitioner to criticism of the judgment rendered by the Supreme Court of Montana, and the dissenting opinion in the Circuit Court of Appeals is in like manner occupied almost exclusively with a discussion of the propriety of that judgment. All of this criticism is beside the mark. It is absolutely immaterial whether the Supreme Court of Montana reached a correct conclusion or not. That judgment is not open to collateral attack for error. Unless it can be shown that for some reason the judgment of the Supreme Court of Montana is void, full effect must be given to it.

In partial recognition of the principle that a judgment cannot be collaterally attacked for error, counsel for the petitioner and

the dissenting member of the court below charged that the action of the Supreme Court of Montana did not constitute "due process of law." Accepting this vague characterization as describing a defect fatal to the judgment, if supported by any exact specification, it is important to examine the grounds on which the judgment is said to depart from due process of law.

The grounds of complaint, so far as specified, against the Montana judgment appear to be (1) that the court entered judgment against the plaintiff for insufficiency of the complaint after issues had been joined; (2) that, in reaching its conclusion, the court must have given and did give effect to allegations of fact in the answer filed, and based its opinion on the assumption of certain issuable facts.

1. It was due process of law for the court after answer filed and issues joined to give judgment for the defendant for insufficiency of the complaint.

It is difficult to understand a serious contention that a court cannot consistently, with due process of law, dismiss a suit on the ground that no cause of action is set forth in the complaint, as well after issues of fact are joined as before. A plaintiff can hardly have a constitutional right to a jury trial if the result of such a trial must be a judgment against him *non obstante veredicto*.

Due process of law signifies a proceeding in accordance with established practice. It has never before been doubted, either at common law or under the code system of procedure, that a court had full power to consider after issue joined whether the complaint set forth a cause of action so that judgment could be entered on it. Such power existing, it is obvious that the court can determine the question upon an objection to the admission of any evidence.

In *Sanborn* v. *Green*, 150 Mass. 454, 457, the Supreme Judicial Court of Massachusetts, considering the effect of a judgment rendered in a proceeding in which evidence had been excluded on this ground, said:—

> "The rejection of evidence offered, and the ruling that upon the statement of a party his action or defence cannot be sustained, are ordinary incidents of a trial."

Under code procedure the system is the same. The New York Code of Civil Procedure, Section 499, provides that failure to demur or answer is a waiver of any objection to a complaint except an objection for want of jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action. Under this provision it is the ordinary practice for a defendant at the opening of the trial, or even later, to ask that a case be dismissed because the plaintiff has failed to state a cause of action.

In *Coffin* v. *Reynolds*, 37 N. Y. 640, such a motion was held to have been properly made when the case was opened before a referee.

In *Tooker* v. *Arnoux*, 76 N. Y. 397, the defendant moved at the trial, before any evidence was admitted, that the case be dismissed for insufficiency of the complaint. The motion was overruled. The Court of Appeals held that, as the complaint was insufficient, it was error to deny the motion.

In *Pope* v. *Terre Haute Car. & Mfg. Co.*, 107 N. Y. 61, objection to the sufficiency of the complaint was made by motion to dismiss upon the opening of the trial, on the ground that the complaint did not allege when the contract on which recovery was sought was performed, or that an offer was made to perform. It was held that the complaint should have been dismissed.

In *Weeks* v. *O'Brien*, 141 N. Y. 199, such an objection was made at the opening of the defendant's case. The Court of Appeals held that this was allowable.

In *McCook* v. *Crawford*, 114 Ga. 337, the court held an oral motion made at the trial term to dismiss the complaint for insufficiency proper, and said that it was settled that under the Code a motion to dismiss for insufficiency could be made at any time.

The Montana Code of Civil Procedure follows almost word for word the language of the New York Code on this matter. It provides in Section 685 that:—

> "If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

It is the settled law of the State that, under this provision, objection to the sufficiency of the complaint as stating no cause of action is never waived, and can be taken at any time, even on appeal after trial; and in practice the ordinary method of raising the question is by objection to the introduction of any evidence and motion to dismiss.

In *Haupt* v. *Ind. Tel. Messenger Co.*, 25 Mont. 122, an answer was filed, and the case came on for trial by a jury. An objection to the introduction of evidence was made and sustained. On appeal the court considered the sufficiency of the complaint.

In *Wyman* v. *Jensen*, 26 Mont. 227, a like objection was made and overruled. On appeal the Supreme Court reversed the decision below on the ground that the complaint was fatally defective. Chief Justice Brantly said:—

> "In a case in which the complaint wholly fails to state a cause of action, the question of its sufficiency may be presented in this court for the first time by assignment in the brief, even though no attack has been made in the trial court by demurrer or otherwise. . . . In any case the same question may be presented upon appeal from the judgment when timely objection to the introduction of evidence is made in the court below, and exception is reserved and incorporated in a bill as provided by the statute." (pp. 239, 240.)

See also

Haug v. *Great Northern Ry.*, 102 F. R. 74.
In re Reynolds, 133 F. R. 585.

No authority has been referred to in support of the suggestion that the action of the Montana court was not due process of law. No one questions the fundamental right of a litigant to be heard and to introduce evidence in proof of material facts.

But such right does not extend to introducing evidence to prove facts which, however fully proved, do not support the claim to relief put forward. The "fundamental right" is to enable the litigant to establish his case. If the facts alleged, which are the only facts he is entitled to prove, do not establish a case, there is no right of proof. This is fully recognized in the privilege accorded a defendant to demur, and thus cut off all necessity of proof until the question of law is decided. Neither in reason nor in authority is there or can there be any constitutional objection to permitting a defendant to raise the same preliminary question of law after answering, and with the same effect. Whenever the question is raised, it must be decided by the court. The court may err in such a decision as in any other, but error does not show an absence of due process of law. The decision of the court, right or wrong, can prejudice a plaintiff no more if rendered on motion to dismiss after joinder of issue than if rendered on demurrer. Because it is convenient to require certain objections to a complaint to be taken by demurrer does not make it incumbent that all objections should be so taken, and in point of fact, as appears above, where the code has been adopted, such a course has not been followed.

It is said in condemnation of the course pursued by the Montana court that it is one thing to hold against a plaintiff on demurrer and quite a different thing to ignore an answer and the replication, and to deny the plaintiff all opportunity of explaining and sustaining his allegations, and to render judgment against him upon the ground that the complaint in the abstract did not state a cause of action. The difference, however, if any there be, is one of form only. In each case the court decides the same question with the same effect. The Montana court did not deny the plaintiff opportunity to maintain the action. If the plaintiff had evidence of facts not alleged in the complaint which, if proved, would establish a cause of action, he could ask leave to amend in order to introduce those facts. He had no right to insist upon going to a trial on a complaint which did not allege facts sufficient to entitle him to recover.

No shadow of ground has been shown for asserting that there was any lack of due process of law. The attack upon the course of the Montana court is really founded solely on the assertion that the court erred in its decision, and the arguments presented in support of this are in reality arguments only as to the correctness of its decision in point of law, in interpreting the facts alleged.

2. The Montana court did not found its decision on the assumption of any fact alleged in the answer.

The argument of the petitioner that the Montana judgment was not due process of law because based upon assumptions as to facts alleged in the answer is merely a misstatement or misunderstanding of the opinion of the court. Briefly, the Montana court held the complaint insufficient because the complaint alleged facts which, in the opinion of the court, showed that the special contract on which a recovery was sought had not been, and could not have been, performed.

In discussing the opinion of the court, as elsewhere, much is said in the petition as to the value of the services rendered by Colonel Ingersoll, although the value of those services, never denied, is wholly irrelevant. The complaint in the Montana suit alleged the facts as set out in the present suit; namely, that after the trial in the will case, by an agreement with the proponent of the will guaranteeing to him that, in case the will were defeated by some other contestant, he should, at the expense of Colonel Ingersoll's clients, receive more than a distributive share, and by a succession of agreements made with other heirs at law, the contestants ultimately benefited to a greater extent than by a simple defeat of the will. The court held that this did not constitute a defeat of the will and receipt of the contestants' share as stipulated in the special contract, and that it could not constitute a performance of the special contract because under that contract Colonel Ingersoll could not, without some further agreement, have had authority to make the settlement. The court did not say or intimate, as stated by the petitioner (p. 62), that, if ratification

by the clients were shown, there would be an entirely different case. On the contrary, the court did say that without ratification the compromise agreement would have been invalid, so that, to make it valid, there must have been ratification and a departure from the special contract.

The petitioner appears to suppose that the Montana court decided the case before it on the ground of an express rescission of the special contract by the parties, and complains that in doing so the court decided a controverted question of fact; namely, the intention of the parties to abandon that special contract. Even a cursory examination of the opinion of the Supreme Court of Montana will show that the court did no such thing, but decided merely that, consistently with the allegations of the complaint, there could not have been performance of the special contract. The court states as the foundation of its decision that,—

> "The services stipulated for under the contract were therefore never performed, and the contingent fee to be paid for them could not be recovered." (Rec., pp. 16, 23.)

No amount of evidence in support of the allegations of the complaint could have altered this conclusion. Assuming that the plaintiff could have shown an express agreement of the parties by which Colonel Ingersoll might substitute such a settlement as was made for the defeat of the will as contracted, yet the decision was perfectly right, for the plaintiff had not alleged the existence of any such fact, and could not have been permitted to prove it. Offer of such evidence might have been good ground for allowing an amendment, but could be no ground for refusing to find the complaint as it stood defective. A plaintiff has no absolute right to amend. Certainly, he has no right to insist upon trial on an insufficient cause of action before offering to amend, and in order to determine what his amendments shall be.

It appears, therefore, that to support the reasoning on which the Montana court based its decision, no recourse to facts alleged in the answer was necessary, and that none was made. The Montana court did not assume the existence of any facts except

those alleged in the complaint. Certain things the court did assume (see Petition, p. 27). First, it did assume that the agreement alleged by the complaint to have been made for allowance of the will was made. Whether an agreement by which a client undertakes in one alternative to give up part of what he would otherwise receive in return for the opportunity in another alternative to get more than he would otherwise receive is a compromise, is a question of law that need not now be argued. Second, it did assume that Colonel Ingersoll had no authority by virtue merely of his employment to defeat the will to make for his clients such an agreement. Whether right or wrong, this was not the assumption of an issuable fact, but of a proposition of law. The court made no assumption as to whether any special authority to make the agreement was given, or, if given, was accepted, or that Colonel Ingersoll intentionally abandoned all rights under the special contract. None of these facts were necessary to the reasoning of the court, or are stated in its opinion as a foundation for the result reached.

SECOND.

Even if the Montana judgment was not a bar, there were other sufficient grounds for dismissing the bill.

I.

The Plaintiff did not establish the Existence of a Lien on any Interest of any of the defendants in the Estate of Andrew J. Davis.

1. There is no lien unless an equitable lien was created by the acts of the parties.

The bill alleged the existence of a statutory lien under the laws of the State of Montana, and also alleged that certain specified acts of the defendant Root had created an equitable lien. The Circuit Court at the hearing upon demurrer to the bill held that

there could be no statutory lien (Rec., p. 72), did not consider the question of a lien arising from the acts specified in the bill, and decided that the agreement of August 17, 1891, created an equitable lien. Counsel for the plaintiff at the final hearing appeared to urge that there was also some sort of attorney's charging lien upon the property.

(*a*) There is no statutory lien.

It is not necessary to consider whether under the statutes of Montana a lien could exist in the present case or whether, if there was such a lien, it could be enforced by bill in equity. Whatever the rights given by the Montana statutes, those statutes can have no extra-territorial effect. The property on which the lien is now claimed has been in Massachusetts at all times since the testator's death. It has never been subject to the jurisdiction of the courts of Montana in which were rendered the services for which the lien is claimed. The State of Montana by its statutes can no more create a lien on property in Massachusetts for attorneys' fees than for taxes or any other claim. If the statutes of Montana could secure by lien on property in Massachusetts the services of an attorney in recovering a judgment in Montana, such statute could equally make the judgment itself a lien on property in Massachusetts. A judgment recovered in one State can have such effect only on the property of the defendant in another State as the laws of the latter provide.

(*b*) The property is not subject to any attorney's charging lien. Lord Marsfield, in *Welsh* v. *Hole*, 1 Douglas, 238, asserted the existence of a right on the part of an attorney to retain from money coming into his hands the amount of his bill, and said the attorney might stop *in transitu* money recovered in an action brought by him, or even apply to the court for an order to prevent its being paid over. But this lien, if it is to be called a lien, when recognized, is enforceable only in the court by whose judgment the money was recovered. The judgment is under the control of that court, and relief can be granted by its order. The so-called lien

has never been held to give a right to any other than this summary relief. It cannot be made the foundation of a suit in another court.

Goodrich v. *McDonald*, 112 N. Y. 157.

More serious even than this difficulty, however, is the fact that the so-called attorney's charging lien is not recognized in the courts of the United States.

Gregory v. *Pike*, 67 F. R. 837.

2. An equitable lien is not created by a mere promise or agreement to pay a debt from a specified fund.

A lien to which equity will give effect may be created by the acts of the parties without any transfer of possession; but, to create such a lien, there must be the intention to create and the actual creation of a right to the property which is to be the subject of the lien. A promise, however solemn, to make payment of a debt from a particular fund does not evince and does not give effect to any intention to create a right over the fund in favor of the creditor. Such a right can be created only by some act of a debtor giving his creditor some power or control over the designated property. He must be put in such a position that he can require the application of the property to his benefit directly and without the intervention of his debtor. If the property in question is in the hands of a third person, the creditor, in order to establish a lien, must show a right to demand payment from the third person, and an obligation on the part of the third person to comply with such demand.

At law, in absence of express statute, possession of property over which a lien is created must be given to and retained by the person in whose favor the lien is created. Equity permits the creation of liens where a transmutation of possession is impossible; but it requires that the debtor should actually declare, and so far as he can effectually create, the right in property. If the lien is to be created upon a fund in the hands of a third person,

there must be an appropriation of the fund in whole or *pro tanto* by giving an order or otherwise transferring it.

In *Wright* v. *Ellison*, 1 Wall. 16, a suit was brought for services in recovering a claim, and a lien on the sum recovered was alleged. The Supreme Court said the case was a meritorious one for compensation, but that the doctrine of equitable assignments, though comprehensive, was not broad enough to include the case.

> "It is indispensable to a lien thus created, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." 1 Wall. 22.

In *Christmas* v. *Russell*, 14 Wall. 69, one Christmas, having induced one Yerger and another to become sureties on a bond in favor of Russell by promising to give security, and having given such security which Yerger had surrendered, wrote several times declaring that he held and would hold a certain mortgage note "sacred for the payment of" and "subject to" the debt, and would "protect" Yerger with the note. Subsequently he transferred the note to his son, and two suits were brought, of which one had resulted in a judgment, and the other was pending. Russell brought a bill alleging that Christmas had so assigned and set apart the mortgage note as to give Yerger a lien upon the debt, and seeking to restrain the payment of the indebtedness and to have it applied to his claim. The court below made a decree in favor of the complainant. On appeal the Supreme Court held that the citizenship of the parties deprived the court below of jurisdiction, and that in any event there was no lien. The court, after reciting "the evidence relied upon to support the alleged lien," said:—

> "These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold, to Yerger.

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund-holder is bound from the time of notice. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee. But an order to pay out a specified fund has always been held to be a valid assignment in equity and to fulfil all the requirements of the law. These views are fatal to the claim asserted by the complainants in behalf of the sureties on the bond." 14 Wall. 83, 84.

In *Trist* v. *Child*, 21 Wall. 441, an attempt was made to establish equitable lien. Trist having a claim against the United States, made a contract with one Child to prosecute the claim for a contingent fee of twenty-five per cent. of whatever sum Congress might allow in payment of the claim. Child died, but his son and personal representative continued the work, and eventually an act was passed appropriating a sum to pay the claim. Trist refused to pay the stipulated compensation, and Child the younger thereupon brought a bill on which a decree was entered restraining Trist from recovering the fund until he had paid Child, and ordering such payment. On appeal this Court reversed the decree, and ordered the bill dismissed. The court said:—

"The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a

specific equitable lien upon the fund, and binds it in the hands of the drawee. *Yeates* v. *Groves*, 1 Vesey, Jr., 280; *Lett* v. *Morris*, 4 Simons, 607; *Bradley* v. *Root*, 5 Paige, 632; 2 Story's Equity, § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. *Field* v. *The Mayor*, 2 Selden, 179. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. *Wright* v. *Ellison*, 1 Wallace, 16; *Hoyt* v. *Story*, 3 Barbour's Supreme Court, 264; *Malcolm* v. *Scott*, 3 Hare, 39; *Rogers* v. *Hosack*, 18 Wendell, 319.

"Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. *Wright* v. *Ellison*, 1 Wallace, 16. If there was no lien, there was no jurisdiction in equity." 21 Wall. 446, 447.

In *Dillon* v. *Barnard*, 21 Wall. 430, the same rule was laid down. A contract was made between a railroad company and the complainant for constructing part of the road. The work being completed and the corporation in bankruptcy, the complainant sought to establish a lien on the proceeds of certain bonds secured by a mortgage made prior to the construction contract. The mortgage provided that the expenditures of all sums realized from the sale of mortgage bonds should be subject to approval by at least one of the trustees under the mortgage, "whose assent in writing shall be necessary to all contracts made by the company before the same shall be a charge upon any of the sums received from such sales." The construction contract, having been approved as required, was claimed to be a charge upon the proceeds of the bonds. The court said:—

"The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment by the employer of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed." 21 Wall. 439.

In *Removal Cases*, 100 U. S. 457, it was contended that a construction company had received collateral security from a railroad company for the work to be done, and could not claim a mechanic's lien. The contract provided "all the money for the work hereinbefore specified to be paid by the citizens of Delaware County," referring to subscriptions made by such citizens for stock. The court held that this created no lien on the money received from subscriptions, and therefore gave no collateral security.

"The additional clause does not purport to transfer to the construction company the moneys that are due or that may become due from the citizens of Delaware County. No control is given the construction company over these moneys. The most that can be said of the clause is that it contains an implied obligation on the part of the railroad company to use the money which came into its hands from the citizens of Delaware County to discharge its obligations under the contract, and a corresponding obligation on the part of the construction company to wait a reasonable time for the collection of these moneys before putting the railroad company in default for non-payment." 100 U. S. 476.

The rule laid down by this Court in the foregoing cases has been recognized as the established law of the federal courts.

In *Ex parte Tremont Nail Co.*, 24 Fed. Cas. 183, decided in 1877, it was held that a promise, made as part consideration for a loan, to repay the amount from the first money received from a specified debtor did not constitute an equitable assignment or create a lien, and the creditor could not recover the fund from an assignee in bankruptcy. The late Judge Lowell said:—

> "In the United States, it was held many years ago that a mere promise to pay out a particular fund, when received, the promisor retaining control over the fund and no notice being given to the person who is to pay it, would not work an equitable assignment. *Rogers* v. *Hosack*, 18 Wend. 319. This case was remarked upon by the Chancellor in *Richardson* v. *Rust*, 9 Paige, 243; but it has been followed in all the cases which I have seen, and appears to be the settled law of this country." (p. 184.)

In re Butler's Estate, 105 F. R. 549, was a case in which a contractor promised to file a lien, and to pay the appellant from the proceeds. The contractor filed a lien, and a judgment was recovered. The Circuit Court of Appeals for the Second Circuit held that the appellant had no equitable lien on the fund, and could only share as an ordinary creditor. The court said of the transaction:—

> "It was, at most, a promise to pay the four appellants from the proceeds of the judgment their debts against Butler Bros. for work and materials which had been placed upon the hotel. This agreement created no lien upon the fund." (p. 550.)

See also

Strang v. *Richmond P. & C. R. Co.*, 101 F. R. 511.
Columbus, S. & H. R. Co. Appeals, 109 F. R. 177, 197.
Cushing v. *Chapman*, 115 F. R. 237.
Boyle v. *Boyle*, 116 F. R. 764.

The law is the same in other jurisdictions.

As long ago as the time of Lord Hardwicke, it was decided in *Bradley's Case*, Ridgeway's Reports, 194, that a promise to pay a debt out of a specific fund does not create a lien on the fund.

In *Newell* v. *West*, 149 Mass. 520, an agreement was made with an attorney by which a sum as compensation for services in collecting Alabama claims was to "be charged upon or paid out of any sums to be recovered." The attorney as administrator of the other party to this agreement claimed a right to retain the amount from sums so received on the ground of a lien. The court held that no lien was created, saying:—

> "Independently of the statutes of the United States, such an agreement would not authorize a payment to West of any portion of the debt due to Taylor, so as to discharge the debtor. Such a case is quite distinguishable from *Pinch* v. *Anthony*, 8 Allen, 536, relied on by West, where it was expressly agreed, not merely that a party advancing money on lands should have an interest in the proceeds hereof when sold, but that the amount due should be 'a charge on the joint estate of the parties, in proportion to their respective interests.'" (p. 524.)

See also

Elmore v. *Symonds*, 183 Mass. 321, 323, 324.

In New York the question arose in *Rogers* v. *Hosack's Executors*, 18 Wend. 319. In that case an executor claimed a right to retain for his own debt from the proceeds of claims of his testator against France. Certain persons asserted that a lien in their favor had been created by a covenant of the testator to pay from the proceeds of these claims unpaid balances due the claimants from a former firm. The Court of Errors held that no lien was created by the covenant, because it was merely a promise to pay from a particular fund.

The rule thus laid down was expressly approved in the later case of *Williams* v. *Ingersoll*, 89 N. Y. 508, relied upon by the plaintiff, but the court there held that an assignment, and not a mere promise, was shown. In that case one Heath, having various actions

pending, including a suit for malicious prosecution, agreed wi
his attorneys that they should be paid from any moneys recover
in any of the proceedings, and

> "should have a lien for all sums that might be owing or d
> them for their said services, . . . upon any sum he might o
> tain or become entitled to from the said defendants, . . . s
> perior to any right the said Heath might have thereto, a
> which should be paid to them before the said Heath shou
> have or be entitled to receive any part thereof or right thereto
> (89 N. Y. 515, 516.)

The court held that this constituted an effective transfer, a
entitled the attorney as against an attaching creditor to a su
awarded to Heath. Mr. Justice Earl said:—

> "The agreement was not alone that the plaintiffs shou
> be paid out of any sum recovered. Such an agreement,
> I have above shown, would not have been sufficient to gi
> the plaintiffs any claim upon the award. But there w
> also proof tending to show that it was the intention to assig
> to the plaintiffs or to give them a lien upon any sum reco
> ered, and that plaintiffs were to receive the sum recover
> and retain out of it their compensation, and to pay the balan
> if any, to Heath; and for the purpose of upholding the jud
> ment we may assume that the trial judge found any fac
> which the evidence tended to establish." (89 N. Y. 521.)

In *Cameron* v. *Boeger*, 200 Ill. 84, it was held that an agre
ment, by which attorneys were to receive a percentage of wha
ever was recovered in the suit, did not prevent the client fro
making a settlement at pleasure, because the agreement tran
ferred no interest in the subject-matter of the suit. The cou
said that the agreement was to pay compensation out of the pr
ceeds of the litigation, and that this depended for its perform
ance upon the mere personal responsibility of the promiso
and did not operate as an equitable assignment.

See also

Silent Friend Mining Co. v. *Abbot*, 7 Col. App. 73.
Story v. *Hull*, 143 Ill. 506.
Ford v. *Garner*, 15 Ind. 298.
Seymour v. *Aultman*, 109 Iowa, 297.
Phillips v. *Hogue*, 63 Neb. 192.
Thomas v. *N. Y. & G. L. R. Co.*, 139 N. Y. 163.
Christmas's Adm. v. *Griswold*, 8 Oh. St. 558.
Commercial Nat. Bank v. *Portland*, 37 Ore. 33.
Eib v. *Martin*, 5 Leigh, 132.
Hicks v. *Roanoke Brick Co.*, 94 Va. 741.
Hossack v. *Graham*, 20 Wash. 184.

3. In the present case there was not even a promise to pay from a particular fund as a foundation for a lien.

The Circuit Court rested its opinion that there was a lien wholly on the agreement of August 17, 1891, between Colonel Ingersoll and Coram and Root. That agreement contained at most a promise to pay from a particular fund.

The agreement, dated August 7, 1891, provided for two independent matters. First, it fixed the amount of Colonel Ingersoll's fee, which up to that time had been left uncertain, and determined the conditions under which it should become payable. Second, it provided that, under no circumstances, should Coram be under any personal liability.

That part of the agreement dealing with the amount and contingent nature of the fee does not contain any provision whatever as to payment, except the clause that "your expenses and disbursements shall be paid in any event." The situation at the time of this agreement was that Colonel Ingersoll had been employed by Mr. Root as counsel to contest the will. The agreement merely defined the amount of compensation for services rendered and to be rendered, and made the compensation contingent upon success. No additional obligation to pay was created. Colonel Ingersoll retained the same rights he already had

as to the means of recovering his compensation, and this part o the agreement did not suggest that he was to acquire any adde rights. By accepting the agreement he did relinquish his righ to compensation, but not to reimbursement for actual outlay in the event of failure, and in return acquired a right to a fixe high compensation in the event of success.

Unless it can be shown, therefore, that merely making the com pensation contingent amounted to a promise to pay from th property recovered, it is clear that this part of the agreement con tained no promise to pay from the property; for it contained n new promise to pay at all. Such obligation to pay as existed ha already been made.

Before the agreement of August 17, 1891, was made, Root an Coram had employed Colonel Ingersoll to act as counsel. Th agreement was made to define the terms of such employment The second paragraph of the agreement dealt exclusively wit the obligations of Coram. The agreement had already provide for the amount and contingent character of the compensation and the absolute right to reimbursement. It proceeded to define precisely what the obligation of Coram should be in each of the alternatives, of success and failure. The provision made was that Coram should be under no personal obligation in case of failure, thus relieving him from any liability for expenses and disbursements, and that he should in no event be liable, "except to pay such fee out of funds secured from the estate of A. J. Davis, deceased, by" the interests which he represented. This provision was plainly for the protection of Coram, and not for the protection of Colonel Ingersoll. The intention was that Coram should be absolutely relieved from liability, except in the event of success, and then except so far as the successful outcome provided him with funds to make the payment.

Any attempt to construe the agreement as giving Colonel Ingersoll security for his compensation disregards the intention of the parties as well as the natural significance of the language. There is nothing to indicate any dissatisfaction on Colonel Ingersoll's part with his position as having only an unsecured claim for the

payment of his fee and expenses, and nothing even to suggest a purpose to give him security. The instrument contains in neither clause a word of promise to pay from the fund or from any other source, except as to expenses and disbursements payable by Root in any event. Even if there is by implication any recognition of an obligation on the part of Coram to pay in the event of success, and to the extent of what he receives, the obligation so recognized is not one created by the instrument; but is an obligation that existed by reason of the prior employment, and was cut down by the instrument.

Giving the most forced construction to the instrument, it would not show more than a promise to pay from the property when received. To reach the conclusion that there is such a promise, it is necessary to treat the exception by which, in a limited form, any existing obligation of Coram is preserved as the equivalent of a direct undertaking to pay out of the funds secured. Even then there is nothing but a promise to pay from property to be recovered as fruits of the litigation, property to be received by Coram and his associate when recovered. There is nothing in the way of assignment. There is no attempt to transfer an interest in or create a right over the property. On the contrary, the language used shows plainly that the property is to remain subject to the control of the clients. The fee is earned only when the clients get their shares, and the payment to be made by Coram is to be made only out of funds received by those whom he represents. The most forced construction, therefore, results only in a mere promise to pay out of a particular fund, and the insufficiency of such a promise to create a lien is the point decided in the cases already referred to.

It is clear that the plaintiff and her advisers never supposed until after this bill was brought that the letter of August 17, 1891, created a lien. On March 3, 1900, Mr. Farrell, her agent, wrote to Root asking him to make an assignment in order that the plaintiff might have security. (Rec., p. 1097.)

The bill itself did not claim that a lien was created by the letter of August 17, 1891, but rested on certain facts detailed in the

bill as amounting to the creation of such a lien. The facts th
set forth (Rec., pp. 26–28) are, in substance, that after the de
of Colonel Ingersoll both Root and Coram acknowledged th
indebtedness, and expressed their desire that it be paid, and th
on five specified occasions Root by letters made representatio
to the plaintiff or her agent as to the payment of the alleged i
debtedness.

The five alleged representations made by Root thus relied
were as follows:—

(1) In a letter dated September 2, 1899, he wrote to the plainti

> "Now let me say that Davis estate matters though movi
> with criminal delay are still slowly and surely reaching
> conclusion that will bring substantial results to you. I wi
> to assure you that I shall personally look after your interes
> and as faithfully as would have been done by the goo
> Colonel." (Rec., p. 1101.)

(2) In a letter dated September 26, 1899, he wrote to C.
Farrell, the plaintiff's agent:—

> "You may be sure I shall do the very best I can for Mr
> Ingersoll as regards the Davis Estate." (Rec., p. 1096.)

(3) In a letter dated May 7, 1900, he wrote to Farrell:—

> "Since seeing you, I have received your letter of March 3r
> which was sent to me in Montana, and I hasten to reply to i
> "With you I am also desirous that Mrs. Ingersoll shoul
> realize out of the Davis Estate as much as possible, and t
> that end I shall myself bend every effort in my power, regard
> less of any personal interest that I might sacrifice by so doing
> "I want to wait until I see Mr. Coram, in Boston, wher
> I am going the first of next week, before writing the letter t
> Mrs. Ingersoll which you suggested I should do, and whic
> will cover the whole situation." (Rec., p. 1098.)

(4) In a letter dated May 21, 1900, he wrote to the plaintiff a
length, detailing the original agreement and the understandin

arrived at with Colonel Ingersoll before the latter's death for a reduction in his fee. In the course of the letter Root said, referring to the estate in Massachusetts:—

> "I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money." (Rec., p. 1104.)

(5) In a letter dated September 25, 1900, he wrote to Farrell:—

> "I have your letter of September 20th, and hasten to reply.
> "I see I did not make myself understood to you. You say: 'You stated that, if an application was made to the court on Mrs. Ingersoll's behalf at the time of the distribution, there would be no objection raised,' etc.
> "Now what I thought I said to you was this: That I would do everything I could at the time of an actual distribution of the Boston money for Mrs. Ingersoll, and all I can do is to say to you in the first place that she may rely upon it that that money, if distributed to our people, will not be distributed until after she has had an opportunity to have a hearing upon the claim of the Colonel for services rendered, and I will at that hearing do all that I can do which will tend to increase the amount to be paid to her for such services." (Rec., p. 1100.)

These are the only acts alleged in the bill to have been done to create an equitable lien beyond the original contract of employment, and this aspect of the plaintiff's case must depend on their sufficiency to create a lien. The bill contains no allegation of any other promises made or acts done by Root or by Coram, so that evidence, if there were any, of other acts or alleged agreements would not be admissible.

The letter of May 21, 1900, shows affirmatively that Root made no promise even, for that letter contains in addition to the passage set out in the bill the following:—

> "There is now a substantial fund in Boston, amounting to between $400,000 and $500,000 which I am using every

> effort in my power to get. An application to distribute th
> came before the Probate Court in Boston yesterday. I w
> present and urged that the cause be heard, but the other si
> secured a postponement of it until the 5th day of Septembe
> but the Judge said then he surely would dispose of the matte
> and I would suggest to you that you have somebody on yo
> own account take an interest in that and ascertain all of t
> facts in regard to it; ascertain how much money will
> then or whenever it is, distributed to our side; see what t
> claims on it are, and I can assure you now, as I said befor
> I will do everything in my power to see that you receive
> much from that fund as I can. This money is practically a
> the money." (Rec., p. 1104.)

This letter expressly states that the amount payable to the plai tiff for Colonel Ingersoll's services is a matter of uncertainty fo future adjustment, and suggests that a settlement be considered yet in the same letter the writer stated that he had that day urge a hearing of the petition for distribution. Obviously, he did no promise to pay the present claim from that fund, because in th letter he practically stated that the claim was not recognized a binding.

None of these letters contains any suggestion of creating a lie upon the property in Massachusetts. On the contrary, all of them in the expression of a wish to assist Mrs. Ingersoll to get as muc as possible from that fund imply that the writer did not conceiv her to have rights in the property in question, and deemed it matter in which she would require his assistance to get paymen from that property.

While all of these letters evince Root's desire that the plaintif should receive something from the property in Massachusetts none of them contains even a promise to pay her or that she should be paid from the fund, much less do they contain anything creat ing a lien.

In *Christmas* v. *Russell*, 14 Wall. 69, the debtor wrote to hi creditor in reference to a particular fund, the Lyons note:—

> "I have ever held the Lyons note as sacred for the pay ment of this debt. . . . If not sold I will send it to you as soo as I return." (P. 71.)

"I could not safely send you Lyons's note by mail, as it is payable to me or bearer. . . ." (P. 72.)

"You may rest assured I will protect you with the Lyons note." (P. 72.)

This Court said, after quoting these passages:—

"These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold, to Yerger." 14 Wall. 83, 84.

The evidence in *In re Butler's Estate*, 105 F. R. 549, showed a statement by the debtor that

"they would make an effort to get this money for all parties interested; that they would put on a lien to cover the amount, and when they win the case and get the money, he says, you will get your share." 105 F. R. 550.

This was held not to create a lien.

See also

Commercial Bank v. *Ruje*, 92 F. R. 789.

The expressions in the letters from Root to the plaintiff and her agent fall far short of the explicit declarations in the cases referred to, yet in each of those cases it was held no lien was created.

The attempt was made in the present bill of complaint and in the briefs filed in its support to convert simple statements of willingness to help the plaintiff into promises to pay from the fund, and on the strength of such promises to claim a lien; but neither step can be supported. If there had been promises, no lien would have been created, and the letters relied on make no promises.

Even if the language used by Root were susceptible of the meaning that he undertook to pay Mrs. Ingersoll from the fund, there would be no binding promise, and, aside from other difficulties,

could for this reason be no lien. There was obviously no attempt to transfer any interest in the property; no words of grant or assignment passing title are used. At most it could be contended only that there was an agreement to transfer, and that equity would enforce this agreement and perfect the incomplete transfer. But a court of equity never interferes to complete a transfer made to a mere volunteer. An imperfect gift cannot be made perfect at the instance of the donee by asking relief in equity. There must in equity be a completed transfer, so far as a transfer is possible, or an incomplete transfer made for a valuable consideration.

In re Earl of Lucan, L. R. 45 Ch. D. 470.
Addison v. *Enoch*, 48 App. Div. (N. Y.) 111; affirmed 168 N. Y. 658.

In the present case there was no consideration for any promise that may be supposed to have been made by Root. The debt claimed by the plaintiff was for services long since rendered. No action on the part of the plaintiff was requested in return for any supposed promise; and it does not appear that the plaintiff either took or refrained from taking any action because of any such supposed promise. If, therefore, a mere promise could create a lien, and if the letters contained language apt to show such a promise, it would be immaterial because without a consideration there could be no promise binding or effective for any purpose, and no consideration is shown or even alleged to have been given.

Counsel for the plaintiff seemed to suppose that contracts for legal services are different as to their effect in creating a lien from other contracts, and on this ground sought to distinguish some of the authorities that have been cited. There is no ground for such a distinction. By statute a lien may be created for legal services as for other services, and within its scope the statute is decisive. There may also in some jurisdictions exist a common law lien in favor of attorneys, and, so far as it extends, such a lien is decisive. In each case the lien arises, not by contract, but by operation of law. When a lien is claimed, not by operation of law, but by agreement between the parties, it ceases to be a matter

of any concern what the nature of services is for which the lien is claimed. The contract creates the lien, and the proper interpretation and effect of the contract is the only test by which to determine whether there is a lien. The claim which the lien secures may be for legal services or for services of a mechanic or for any other lawful demand. The same language will create a lien to secure one claim as will create a lien to secure another, and the effect of the language can in no way depend on the nature of the claim.

It is a mere confusion of thought to suppose that services of such a nature or so rendered that, without express agreement, they create no lien, yet by their character make good the deficiencies of a contract ineffective otherwise to create a lien. The reasons suggested by counsel in discussing the question were also unfortunate. If the peculiar sanctity to be attached to legal services as creating a lien lies in the preservation or creation of the fund from which he claims payment, it is difficult to see why a lobbyist who by lawful means accomplishes the same results should not have an equally valid claim, or why the same principle should not be extended to mechanical services. The skilled workmanship of the artisan has never been protected by a lien independent of statute, nor has a partner any lien on the profits of the firm in any sense analogous to the present subject of discussion, except in each case so far as a lien may be given by express contract. Whether such a lien has in any particular case been created by a specified contract is a matter to be determined by the legal effect of the contract, and that effect cannot be governed by the nature of the claim that is to be secured.

4. The authorities that were cited in support of the petitioner's case in the court below do not show the existence of an equitable lien.

The authorities cited by counsel for the plaintiff belonged to classes of cases clearly distinguished from those referred to and perfectly consistent with the rule laid down.

(1) Resting in part on the same principle as the so-called attorney's "charging lien," and in part on ordinary rules of administering a trust, are the cases in which a court having a fund in its control for distribution grants an application for the payment of counsel fees from the fund. No question of lien is involved. The court exercises its power over property in its custody for the benefit of its officers, and compels payment of their fees. It may even exercise the same power to vacate a settlement made in fraud of the attorneys employed. To this class of cases belong:—

Cowdrey v. *Galveston, etc., R.R. Co.*, 93 U. S. 352.
Meddaugh v. *Wilson*, 151 U. S. 333, 359.
Frink v. *McComb*, 60 F. R. 486.
United States v. *Boyd*, 79 F. R. 858.
Burden Central S. R. Co. v. *Ferris S. M. Co.*, 87 F. R. 810.
Tuttle v. *Claflin*, 88 F. R. 122.
Elk Fork, O. & G. Co. v. *Foster*, 99 F. R. 495.
Andrews v. *Morse*, 12 Conn. 444.
Abend v. *Endowment Fund Commission*, 174 Ill. 96.
Justice v. *Justice*, 115 Ind. 201.
Weeks v. *Wayne Circuit Judges*, 73 Mich. 256.
McKelvy's and Sterrett's Appeals, 108 Pa. St. 615.
Potter v. *Ajax Mining Co.*, 19 Utah, 421.

In all these cases, relief was sought and granted in the court which had the fund in its possession. No question of lien arose. The action of the court was not based on any right of property existing in the attorney.

(2) A lien may be given by statute enabling an attorney to seize the proceeds of a judgment which he has recovered. Such a lien is an extension of the attorney's charging lien already referred to. But the lien depends upon the statute which creates it. Such a case was

Semmes v. *Whitney*, 50 F. R. 666.

(3) A lien may be effectively created by the actual assignment of the fund or an interest in it to the attorney. In such a case the attorney is given an actual right which he can enforce without the aid of his client. Whenever the property has actually been put out of the control of the client by effectual assignment, or by permitting it to come into the possession of the attorney, or of a third person who is bound to hold it for the attorney or to pay a part of it to him, a lien may be created.

Thus in *In re Paschal*, 10 Wall. 483, the fund had come into the hands of the attorney, and there was an agreement that he should receive a share for his fee.

In *Mackall* v. *Willoughby*, 167 U. S. 681, and *De Chambrun* v. *Cox*, 60 F. R. 471, and *Chester* v. *Jumel*, 125 N. Y. 237, there were express assignments and declarations of a lien.

In *Dowell* v. *Cardwell*, 7 Fed. Cas. 990, and *Commercial Bank of Lynchburg* v. *Ruffe*, 92 F. R. 789, there were irrevocable powers of attorney to collect the claims; and these were rightly held to constitute effective assignments.

In *Holmes* v. *Evans*, 129 N. Y. 140, the court interpreted an agreement by which attorneys were to receive a percentage in kind of any recovery as constituting an equitable assignment of a part of the fund, but held that the right of the assignee had been forfeited. In *Lanigan* v. *Bradley & Currier Co.*, 50 N. J. Eq. 201, the court interpreted an agreement as constituting an equitable assignment, because, as payment was to be made to the assignee independently of any further action by the assignor, there was a final and definite appropriation. Both cases involve only questions of interpretation: in both the courts referred to *Christmas* v. *Russell* as laying down the authoritative rule.

None of the foregoing classes of cases depends upon or supports the existence of a lien arising merely from a promise to pay from a particular fund. The plaintiff, however, strenuously asserted that in three cases in the Supreme Court of the United States an equitable lien was held to be so created, and was enforced. These cases are: *Walker* v. *Brown*, 165 U. S. 654; *McPherson* v. *Cox*, 96 U. S. 404; and *Wylie* v. *Coxe*, 15 How. 415.

In *Walker* v. *Brown*, 165 U. S. 654, the respondent Brown had lent bonds belonging to him to a firm of Lloyd & Co., which had pledged them for a debt. To induce the complainants to sell goods to Lloyd & Co., Brown wrote a letter saying that the bonds should not be returned to him until all liabilities to the complainants were paid, and that the bonds should remain at the risk of the business, so far as claims in favor of the complainants were concerned. The court said that this letter created an equitable lien by providing for keeping the bonds out of the owner's possession till the complainants were paid, and by dedicating the bonds exclusively to the payment of the debt. (165 U. S. at p. 665.) This constituted an effectual transfer. After the letter was written and the advance made in faith of it, the creditor had a right to insist that the bonds should not be returned to the owner until the debt was paid.

McPherson v. *Cox*, 96 U. S. 404, was a suit brought to recover from McPherson, an attorney, a bond in his possession, on which he claimed a lien for services, and to remove him from his position as trustee under the deed securing the bond. The court below removed the trustee, and ordered the bond to be delivered up and held subject to further order. On appeal the Supreme Court reversed the decree, denied the prayer for removal of the trustee, declared that the complainant was entitled to the bond on payment of the sum of $5,000, for which McPherson rightly held it as security, and gave leave to McPherson to file a cross-bill, if so advised to establish his debt and lien, and enforce the same. As to the existence of a lien for services on the bond, which represented the proceeds of a sale of real estate, the court said:—

> "We are also of opinion that this obligation on the part of complainant to pay $5,000 to Carlisle and McPherson was, and is now, a lien on the bond in McPherson's possession. It is so by the express contract of the parties, as admitted by Mrs. Cox. It was to be paid out of the proceeds of the sale of the land recovered by the suit in equity in which they were employed. The first sale of the land was in a lump, and this bond for $38,000 represents the proceeds of that sale. It is

the only proceeds of the sale. It is also a very fair inference, from the fact that the bond was left in McPherson's possession, that it was done as a recognition of the lien. There is no other reason why it should have been left with him. It was no part of his right or his duty as trustee to hold it. Its possession was in no way essential to any of the very few acts which, as trustee, McPherson could be called on to do under the deed of trust. It is, therefore, manifest that it was left with him as her attorney, or as a security for his debt. It is none the less clear to us, that, apart from the express agreement for a lien, the same result follows from his relation to her as attorney, and the possession of this bond as a paper coming to him in the course of his employment in that character. We have decided, in the case of Paschal (10 Wall. 483), that an attorney has a lien by law, under circumstances similar to these, for all that is due him as attorney or counsellor, on the papers of his client in his hands." 96 U. S. 417.

The report does not indicate how or whether any lien was originally created upon the land, and the court did not consider that question. The existence of a lien on the bond in McPherson's possession was the only material question, and the court was satisfied that the bond was left with him "as a recognition of the lien." Even if there were only a promise to pay from the proceeds of the sale of the land and no lien on the land, yet if upon the sale the proceeds represented by securities passed into and were left in the attorney's hands in pursuance of the agreement to pay from the proceeds there was then an effectual transfer, a parting with control over the securities, sufficient to create a lien. The case decides nothing else, and clearly belongs to the class in which the attorney actually has the property in his possession by agreement for a lien and is in a position to claim a lien at law.

Wylie v. *Coxe*, 15 How. 415, was a suit in equity to recover a contingent fee. The main defences were that the contract was illegal, and that the employment had been terminated by death. The court held that the contract was not illegal, and that the plaintiff as legal representative of the attorney was entitled to recover the fee, and incidentally that it could be recovered in that suit on the ground of a lien.

The opinion in *Wylie* v. *Coxe*, and the arguments so far as reported, contain no discussion of the question of a lien, and the case has never been cited by the Supreme Court as an authority on the creation or existence of a lien. The cases of *Wright* v. *Tebbitts*, 91 U. S. 252, *Stanton* v. *Embrey*, 93 U. S. 548, and *Ball* v. *Halsell*, 161 U. S. 72, referred to by the plaintiff as approving the doctrine alleged to be established by *Wylie* v. *Coxe*, were all actions at law to recover contingent fees. In no one of them did any question of lien arise, and in each of them *Wylie* v. *Coxe* was referred to only in support of the legality of a contract for a contingent fee. In *Stanton* v. *Embrey* reference was made in like manner (93 U. S. p. 557) to *Trist* v. *Child* as an example of an illegal contract for fees. There was no occasion in any of these cases to consider the question of lien, and in none of them did the court undertake to do so. In two cases, *Seymour* v. *Freer*, 8 Wall. 202, and *Townsend* v. *Vanderwerker*, 160 U. S. 171, *Wylie* v. *Coxe* was cited in support of claims based upon a trust attached to property, and in three cases, *Reynes* v. *Dumont*, 130 U. S. 354, *Tyler* v. *Savage*, 143 U. S. 79, and *Insley* v. *U. S.*, 150 U. S. 512, it was cited in support of the proposition that a defendant by failing seasonably to raise the objection that there was an adequate remedy at law waived the defence of want of equity.

Wylie v. *Coxe* was not referred to in *McPherson* v. *Cox* or in *Walker* v. *Brown*, and in neither of those cases was the doctrine laid down in *Christmas* v. *Russell* and in *Trist* v. *Child* questioned. On the contrary, in *Peugh* v. *Porter*, 112 U. S. 737, 742, and *Porter* v. *White*, 127 U. S. 235, 245, *Trist* v. *Child* was referred to as giving the established law in respect to equitable liens. From the rule thus laid down this Court has never departed.

II.

The Petitioner did not establish the Existence of any Debt due from the Defendants or any of them.

1. To establish the debt sued for, the plaintiff must show that the will was defeated, and the defendants got their shares.

The bill of complaint is brought to recover the sum of ninety-five thousand dollars, as the balance of the stipulated fee to be paid under the agreement of August 17, 1891, made by the defendants Root and Coram with Colonel Ingersoll. The plaintiff to succeed in this suit must establish a right to recover under that agreement.

The contract of August 17, 1891, was made while the trial of the contest over the will was in progress. That trial resulted about September 3, 1891, in a disagreement of the jury. (Bill, par. 10.) After this negotiations were opened as to settlement, and finally, on April 28, 1893, an agreement was made by which the will was to be admitted to probate with a provision for distribution of the estate as provided in the agreement; namely, two-elevenths to the persons representing John A. Davis, deceased, the residuary legatee in the will, two and a half elevenths to the defendant Root and his associates, one-eleventh to trustees for Root and his associates, and the balance to trustees to be divided equally between the persons representing John A. Davis and Root and his associates. Other contests instituted against the will were subsequently settled, and a complete settlement was finally reached, pursuant to which a decree was entered on August 24, 1897, confirming the probate of the will and directing distribution in specified shares, according to which Root and his associates, some of whom Coram now represents by assignment, became entitled to receive directly and through trustees five hundred and fifteen and one-half eleven hundredths of the estate, and the representatives of John A. Davis two hundred eleven hundredths. (Rec., p. 46.)

The actual result of the proceedings thus was that the wi was admitted to probate, but the defendants by contract with th persons entitled to the residuary legacy and devise made in th will became entitled to a share of the estate somewhat more tha the proportion to which they would have been entitled as heir at law.

All these negotiations and the final settlement were, as it appear from the letters put in evidence by the plaintiff, carried out an made with Colonel Ingersoll's full knowledge and consent, an indeed by his advice. The defendants did not prevent the ser vices contemplated by the original contract from being rendered and they do not undervalue the services that Colonel Ingersol actually did render. The suit cannot be maintained to recove the reasonable value of services actually rendered, for the bil contains no allegations under which the value of the service was put in issue, and no prayer for a determination of their value nor did the Circuit Court attempt to find the value of service rendered as upon a *quantum meruit*.

It is important that the precise issue should be borne in mind because the rules of law which prevent defendants from showing any oral agreement made with Colonel Ingersoll in his lifetime rescinding the express contract, effectually preclude them from establishing a modification of the contract based upon the great shrinkage in the value of the estate, and make it necessary for them to insist that the right to enforce the special contract be clearly established. The question is not whether any compensation is fairly payable, nor as to how much the services were reasonably worth. The sole question is whether the plaintiff has shown such a performance of the written contract as to entitle her to recover on that instrument.

The contract on which the plaintiff seeks to recover provided that Colonel Ingersoll's fee for services rendered and to be rendered "in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will" should be one hundred thousand dollars "in case the will is defeated, and our clients get their shares." (Rec., p. 45, Ex. B.) The payment of this fee was

made contingent upon two events: (1) that the will be defeated; and (2) that the contestants get their shares. Unless these conditions were satisfied or waived, Colonel Ingersoll would not become entitled to recover the fee stipulated under this contract, whatever other rights he might have.

2. The will was not "defeated" either in form or in substance.

The services which Colonel Ingersoll undertook to render were the prosecution of the contest of the will. By defeat of the will was meant the successful prosecution of that contest. The proceeding was one expressly provided for by the laws of Montana. From 1887 to 1895 the Compiled Laws of Montana were in force. The "Probate Practice Act," contained in the Compiled Laws, provided for contesting the probate of a will and for trial of such contests by a jury. Section 22 of this Act provided that

> "The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it."

In the Davis will case the jury disagreed, and there was no second trial. The court did render a judgment, however, on March 27, 1895, admitting the will to probate (Rec., p. 1110), and this was confirmed by the decree of August 24, 1897. (Rec., p. 1116.) Obviously, upon the face of the record, therefore, the will had not been defeated, and the first condition necessary to entitle Colonel Ingersoll to his fee had not been satisfied, and it was so decided by the Supreme Court of Montana in the suit upon the contract brought there. (Rec., p. 1617.)

The plaintiff contends, however, that the result to the defendants was as advantageous as if the will had been disallowed, and that, therefore, the contract has in substance been performed. But it is not a question of the value of the services intrinsically nor of the result to the defendants of the services. The argument would be deserving of much consideration if the issue in the present suit

were whether because Colonel Ingersoll had contracted for pa
ment only in case the will was defeated he should be prevent
from claiming any compensation whatever because the will w
not defeated. But the issue in this case is not whether he is
barred from any compensation. It is whether he is entitled
the particular compensation by the agreement made contingent
an event that has not happened.

It is not true as a matter of law or as a matter of fact that t
agreement was substantially performed. The result of the co
test was not the same as if the will had been defeated, nor we
the services rendered the same contemplated in the contract
necessary for a defeat of the will.

Had the will been defeated, John A. Davis and those claimi
under him would have been entitled to one-eleventh of the estat
In the actual event, John A. Davis or those succeeding to his righ
received two-elevenths. It is undoubtedly immaterial to the d
fendants, so far as their pecuniary interests are concerned, how th
share of the estate not awarded to them is distributed, but th
fact that John A. Davis's representatives obtained two shares i
stead of one indicates clearly that the will was not defeated in th
sense contemplated by the law and by the contract; namely, so
to result in a distribution of the estate as interstate property.

Had the will been defeated, the present defendants would hav
become entitled to three and a half elevenths of the estate, bu
by the agreement actually made, upon which the defendant
contest was withdrawn, the defendants became bound, if the wi
was thereafter defeated by any other contest, and the estate
Andrew J. Davis distributed as intestate property, and no com
promise could be made with the other heirs at law, and each part
was required to pay their own expenses of litigation, to give to th
representatives of John A. Davis one-eleventh out of their thre
and a half elevenths. (Complainant's Exhibit LV., Art. III
Rec., p. 1138.)

Had the will been defeated, it would not have been allowe
in Massachusetts on ancillary proceedings, and the defendant
would have become directly entitled to receive their shares of th

property in Massachusetts instead of getting only derivative rights through their contract.

The services rendered by Colonel Ingersoll were not the same as if the will had been defeated. After the disagreement of the jury on the first trial, the will could be defeated in a legal sense only by a second trial resulting in a favorable verdict or by the proponent of the will submitting to its disallowance. It is immaterial in this connection whether the services of Colonel Ingersoll in conducting a second trial would have been more or less arduous or more or less valuable than his services as a negotiator for a settlement. The record furnishes no means of judging to what extent he contributed towards the final outcome after the disagreement of the jury. His supremacy as an advocate over the numerous other counsel engaged may well not have extended over this field of negotiation.

The real result of the proceedings as to the will was not that the will was defeated, but that the contestants were bought off and in that way a more advantageous result secured for the proponent of the will than would have followed a judgment disallowing the will.

This course was not contemplated when the contract between the parties was made. The agreement of August 17, 1891, provided for two alternatives, but did not take into account the possibility of this third course, which prevented either alternative from happening. The judge of the Circuit Court recognized that in making the contract the parties to it did not anticipate "the particular form of result by which the will in this case was defeated." But the judge apparently thought that in such a case the contract should be made to include the unconsidered result rather than the parties be left to their legal rights outside the contract. Such a course, however, really involves making a new contract. Still other unforeseen contingencies might have arisen preventing performance, as the death of Colonel Ingersoll. The court could hardly assume to provide for all such omitted cases in such manner as it deemed the parties ought to or reasonably might have done.

The plaintiff points to the fact that in the final outcome the defendants became entitled to receive more than they would have received upon a distribution of the estate if the will had been disallowed as conclusive to show that the result has been the same as or better than that upon which the stipulated fee was payable and the Circuit Court appears to have adopted the same view. This involves a serious misconception.

Had the will been defeated by a judgment disallowing it, the estate would have been distributable as intestate property, and the defendants who were contesting it would have become entitled to their shares and the plaintiff's intestate to his fee.

The will was not disallowed, but an agreement was made by which it should be admitted to probate and the contestants should receive more than their shares if there was no further contest but, if by reason of a further contest the estate was distributed as intestate property, then the defendants would receive only two and one-half elevenths instead of three and one-half elevenths. This agreement (Rec., p. 1134) terminated the contest of the defendants, and it is the result secured by this agreement that should determine whether or not the outcome was a defeat of the will upon that contest as contemplated in the agreement with Colonel Ingersoll. The compromise definitely terminated the right of the defendants longer to oppose the probate of the will, at least without the consent of the proponent. For the certainty of receiving in case the will was disallowed three and one-half elevenths of the property the defendants substituted the possibility, in case the will was allowed, of getting more than that share, and the obligation, if the will was disallowed because of other contests, to give up a part of that share and receive only two and one-half elevenths. The agreement terminating their contest did not secure to the defendants, therefore, a result substantially the same as or better than a defeat of the will. It secured to them a result radically different, according to which they might receive either more or less than their shares. The final outcome, by which they eventually obtained more than their shares, resulted not from the defeat of the will, but from successful bargains in dealing with some of

the other next of kin and from the failure of still others to make any contest.

It thus appears that the agreement of April 28, 1893, terminating the contest, was strictly a compromise by which the proponent of the will gave up the possibility of getting the whole estate in exchange for the certainty of getting more than a distributive share in intestacy, and the contestants secured the possibility of getting more than their distributive shares in intestacy or in another contingency of getting less than their shares. After this, after they had given up their right to carry on their contest, events so turned out that, in fact, the defendants received more. This result was embodied in the final decree of the Montana court made in 1897 upon the settlement of the last of the contests instituted after the defendants had compromised. It was the result of the settlement of the subsequent contests, and not of the defendants' contests. The final outcome may have been due to the skill of Colonel Ingersoll as a negotiator, or it may have been due to the skill of one of the other counsel who acted with him for these defendants. As to this there is no evidence, but it certainly was not due to services rendered in defeating the will.

3. The defendants did not "get their shares" within the meaning of the contract.

Obviously, "their shares" meant the shares to which they would be entitled in case of intestacy. The defendants never became entitled to shares as distributees of an intestate estate. They acquired by their compromise agreement a right to a certain part of a testate estate. The result is the same as if the compromise agreement had given them the right to a fixed sum of money. They were bought off for a specified consideration. The consideration happened to be the transfer to them of specific undivided interests in what would be received by the residuary legatee under the will. But, in determining the application of the contract to the facts, the situation is the same as if any other consideration, equal in value to what the contestants would have received in case of intestacy, had been paid.

But, even if the property to be received by the defendants from the result of the compromise can be deemed to satisfy the description of "their shares," still the condition has not been performed because the defendants did not "get" their shares, and have not yet got their shares.

Three possible interpretations of the words "get their shares," used in the agreement with Colonel Ingersoll, may be suggested: (1) that the defendants "get their shares" when by final adjudication they become entitled to their shares; (2) that they "get their shares" when they actually come into possession of property, part of their shares, sufficient to pay Colonel Ingersoll's fee; (3) that they "get their shares" upon a final settlement and distribution of the estate of Andrew J. Davis.

The first interpretation suggested gives no effect to the words "get their shares." If the will was defeated, the defendants would necessarily get their shares in the sense of having a final adjudication establishing their rights to their shares, unless another will was propounded. It is not conceivable that, if in making the agreement there had been in mind the contingency of a second will being propounded which the defendants must contest, it would have been dealt with in such a casual fashion.

The second interpretation of the words is that on which the plaintiff relies. It does violence to the language used. If in the phrase "get their shares" the word "get" means coming into actual possession, there is no justification for saying that coming into actual possession of a part of their shares is sufficient. There is no ground for cutting down the word "shares" so as to mean fractions of shares.

The third interpretation is the only one which gives effect to the language used, and does no violence to the natural meaning of the words. "Get their shares" naturally means to come into actual possession of their entire shares. The only objection to this interpretation arises from reading the agreement in the light of subsequent events. It is objected that the interpretation is unreasonable because it imposed on Colonel Ingersoll the necessity of awaiting a final distribution, and such distribution has not even

yet been made. But the parties to the agreement, when it was made, had no reason to anticipate any such excessive delay in a final settlement of the estate, if the will was defeated. It was perfectly reasonable for them at that time to contemplate an early distribution, and for Colonel Ingersoll to agree that his fee should be payable when the distribution was made.

Even if the second suggested interpretation is adopted, it must at least be shown that the defendants have, by final decree, become definitely entitled to the full shares that they would take upon a distribution of the estate as intestate property, as well as that they have actually received an amount sufficient to pay this claim. But in point of fact it is not shown that the defendants have become so entitled, for as to the property in Massachusetts, which is now in question, there has been no decree of any court establishing the rights of the parties or directing how the property shall be distributed.

4. The conditions not having been satisfied, the plaintiff cannot recover in this suit.

It thus appears that neither of the conditions on which by the agreement of April 28, 1893, payment of the one hundred thousand dollars was made dependent has been performed. Without showing such performance, the plaintiff cannot recover. The law is clearly settled that, to recover upon the express contract, performance of the conditions must be shown. It is not enough to show that the defendants have benefited, even to the fulll extent that the contract anticipated, if in fact the contract has not been performed.

In *Marshall* v. *Baltimore & Ohio R.R. Co.*, 16 How. 314, it was held that an action brought to recover a stipulated sum payable for services in securing the passage by the Legislature of Virginia of an act containing certain provisions could not be maintained upon proof that the law actually passed, though accepted by the defendant, contained different provisions.

See also

Idler v. *Borgmeyer*, 65 F. R. 910.
Western Union Tel. Co. v. *Semmes*, 73 Md. 9.
Hargis v. *Louisville Gas Co.*, 23 S. W. 790.

III.

The petitioner failed to show that there is any Property in Massachusetts that can be subjected to a Lien for the Alleged Debt.

1. There is no property of the defendants in Massachusetts.

Andrew J. Davis died a resident of Montana. At the time of his death he owned property in Massachusetts. On August 24, 1897, pursuant to the agreement to compromise the contest over the probate of the will, all the contests having been finally settled, a decree was entered in Montana, confirming the probate of the will and directing the distribution of the estate in accordance with the settlement agreed on. This decree is annexed to the bill of complaint as Exhibit C (Rec., p. 46), and is the foundation of the plaintiff's claim.

On October 8, 1897, Leyson, who had been appointed administrator with the will annexed in Montana, filed a petition in the Probate Court for Suffolk County, Massachusetts, praying that the will of Andrew J. Davis, admitted to probate in Montana, be allowed and recorded, and that letters testamentary issue to him. On December 9, 1897, this petition was granted. On an appeal taken the decree was subsequently affirmed. (Rec., pp. 1269, 1274, 1289.)

The will of Andrew J. Davis, unaffected by any decree carrying out the compromise agreement, was then admitted to probate in Massachusetts, and remains the only authority by which to determine the disposition to be made of the estate of the deceased in Massachusetts. The decree of the court in Montana, giving effect to the compromise agreements made in the contest there, can, of course, have no extra-territorial effect. The court in Montana cannot direct how the estate in Massachusetts shall be disposed of. Whatever the administrator in Massachusetts does as to the estate there under the direction or by authority of the Probate Court, there or of the laws of the State, is binding, and

he cannot be held to account in Montana for the property so disposed of.

Boston v. *Boylston*, 2 Mass. 384.
Clark v. *Blackington*, 110 Mass. 369.
Cowden v. *Jacobson*, 165 Mass. 240, 243.
Holcomb v. *Phelps*, 16 Conn. 127.

If the will had been admitted to probate in Montana, and had not been admitted to probate in Massachusetts, the property in the latter State would be distributed as intestate property, and persons claiming under the will could not have recovered the property so distributable.

Walton v. *Hall*, 66 Vt. 455.

To determine, therefore, who is entitled to the estate in Massachusetts in the present stage of the proceedings, it is necessary to look at the laws of Massachusetts applicable to the facts as they now are and to those laws only.

When the will was admitted to probate in Massachusetts, Public Statutes, c. 138, sects. 1 and 2, were in force, and these sections, re-enacted without substantial change in Revised Laws, c. 143, sects. 1 and 2, are now in force. Those provisions are as follows:—

"SECTION 1. When administration is taken in this commonwealth on the estate of a person who was an inhabitant of any other state or country, his estate found here shall, after payment of his debts, be disposed of according to his last will, if he left any duly executed according to law; otherwise his real property shall descend according to the laws of this commonwealth, and his personal property shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant.

"SECTION 2. Upon the settlement of such estate, and after the payment of all debts for which the same is liable in this commonwealth, the residue of the personal estate may be distributed and disposed of in manner aforesaid by the probate court; or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in

the state or country where the deceased had his domicile, to be there disposed of according to the laws thereof."

According to these provisions the Probate Court in Massachusetts can follow either of two courses, and must follow one or the other. It may either order distribution of the estate to the residuary legatee named in the will or it may order the estate to be transmitted to Montana for distribution. The Probate Court in Massachusetts cannot distribute the estate to the persons and in the shares provided by the Montana decree giving effect to the compromise agreements, because that decree has no effect in Massachusetts, and no similar decree has been, or, without further proceedings, can be, made in Massachusetts. The laws of Massachusetts provide, it is true, for compromise agreements settling disputes over wills; but those provisions at the time the will was proved, Public Statutes, c. 142, sect. 14, gave effect to such agreements only when confirmed by the Supreme Judicial Court. The provisions of the Statute of 1903, c. 222, allowing confirmation by the Probate Court, even if applicable, affords no assistance, because there is no suggestion that any compromise agreement has been made satisfying the Massachusetts statute, and the provisions of that statute are strictly construed.

No part of the property in Massachusetts can therefore in any sense be said to belong to the defendants in this suit. All of it must by law either be paid over according to the will or be transmitted to Montana, to be distributed as the court there may direct.

Upon a distribution according to the will all the property in Massachusetts would go to John A. Davis, the residuary legatee. John A. Davis died in 1893. No administrator of his estate has been appointed in Massachusetts. No administrator appointed elsewhere could act as to his estate in Massachusetts. His next of kin did not acquire any direct right to his property entitling them to collect it. The personal property of a decedent vests in the executor or administrator, and not in the next of kin.

Lawrence v. *Wright*, 23 Pick. 128, 129.

If a legatee dies before receiving his legacy, the next of kin cannot recover it. The legacy belongs to the legal representatives of the deceased legatee.

Clapp v. *Inhabitants of Stoughton*, 10 Pick. 462.

Even if there are no debts, and but a single person entitled as next of kin, such person cannot dispose of any of the property, and, therefore, cannot give a valid receipt for it. The right of the next of kin is absolutely limited to requiring an administrator to collect and account for the property.

Pritchard v. *Norwood*, 155 Mass. 539.
Flynn v. *Flynn*, 183 Mass. 365.

These principles are elementary in the law of administration of decedents' estates, and are universally recognized.

See

Duchesse d'Auxy v. *Soutter*, 35 F. R. 809.
Gardner v. *Gantt*, 19 Ala. 666.
Dugger v. *Taylor*, 60 Ala. 504.
Costephens v. *Dean*, 69 Ala. 385.
Hickox v. *Frank*, 102 Ill. 660.
Alexander v. *Stewart*, 8 Gill & J. 226.
Downing v. *Porter*, 9 Mass. 386.
Stills v. *Harmon*, 7 Cush. 406.
Taylor v. *Brooks*, 3 Dev. & Bat. 139.
Bradford v. *Felder*, 2 McCord, Ch. 168.
Kaminer v. *Hope*, 9 So. Car. 253.
Strickland v. *Bridges*, 21 So. Car. 21.

All property in Massachusetts, therefore, which by the will would go to John A. Davis as residuary legatee, belongs to and is recoverable only by an administrator of John A. Davis's estate in Massachusetts, when one shall be appointed, and the Probate Court in Massachusetts, if it should see fit to distribute according to the will, could distribute only to such an administrator. Any

property in Massachusetts not so distributed can be disposed
only by transmission to Montana, to be distributed as the cou
there shall determine. In neither case is there any property
Massachusetts that can be subjected to a lien in favor of t
creditors of these respondents or upon which they could create
lien.

2. It is immaterial what contractual rights not creating a li
the defendants may have in respect to the estate in Massachusett

The real effect of the compromise agreement made April 2
1893 (Rec., p. 1134), upon the estate in Massachusetts, unless an
until it was transmitted to Montana, could only be to give th
defendants a contractual right as against the next of kin of Joh
A. Davis to receive from them what they might receive from th
administrator of John A. Davis. The next of kin could not, a
has been shown, transfer any title to the specific property, becaus
they had none. The administrator could not transfer any title t
the estate which he, being administrator in Montana only, woul
never receive if the Massachusetts court saw fit itself to distribut
the estate of Andrew J. Davis within its jurisdiction. The next o
kin could and did bind themselves by the compromise agreemen
to pay over what they might receive out of the Massachusett
property of Andrew J. Davis to the contestants, but no propert
has as yet been so received.

That contractual right is immaterial in the present suit, how
ever. The plaintiff has not sought to enforce any such contract
and has not even alleged its existence. The bill relies upon th
supposed title acquired by the defendants in the property nov
in Massachusetts by virtue of the decree of the Montana court
entered on August 24, 1897. (Par. 11, Rec., p. 14; Par. 15, Rec.
p. 19.) The bill nowhere alleges the contents of the compromis
agreement of April 28, 1893, but expressly declares that the de
fendants are entitled to shares of the fund in Massachusetts "by
virtue of said decree of said District Court in the State of Mon
tana determining said will contests." (Par. 23, Rec., p. 29.

The prayer of the bill (Rec., p. 39) in like manner asks for satisfaction from the shares acquired by the decree.

The plaintiff has founded her case upon rights assumed to have been acquired by the defendants to share directly in the fund in Massachusetts. She cannot now ask relief upon the basis of an indirect right in the defendants to receive from the next of kin of John A. Davis what the latter may get, either from an administrator of John A. Davis's estate appointed in Massachusetts or from a distribution by the Montana court in case the fund is transmitted. There are no allegations in the bill to support such a claim, and her right to relief must be determined by the case she has stated.

See

Eyre v. *Potter*, 15 How. 42.
Grosholz v. *Newman*, 21 Wall. 481.
Andrews v. *Farnham*, 2 Stockton, 91.
Stucky v. *Stucky*, 30 N. J. Eq. 546, 554.

But, if the bill stated such a case, it would not avail. To a bill seeking relief by way of specific performance of the compromise agreement for the benefit of the plaintiff, the parties to perform the agreement would obviously be necessary parties, and none of the next of kin of John A. Davis are joined as defendants. Moreover, the Circuit Court would have no jurisdiction of such a suit. Only on the ground of enforcing a lien on property within the jurisdiction of the court can the suit be maintained. If the suit were converted into an attempt to obtain satisfaction out of the obligations of third persons toward the defendants, it would be no more than an equitable trustee process, which, of course, would not be within the equity jurisdiction of the Circuit Court.

The objection to the maintenance of the plaintiff's bill that there is no property in Massachusetts subject to the lien does not rest upon any strained or technical construction of the facts. It really arises because the plaintiff is making an attempt so to interpret the past transactions relating to the Davis estate as to enable

her to maintain a suit in the Circuit Court, and seize funds
Massachusetts when the transactions, in fact, are not such as
warrant the procedure. It is not a matter of form to be brush
aside as one with which equity does not seriously concern itse
The rights and disabilities of next of kin as to property of
decedent have been long established. It is not possible to gra
the plaintiff the relief asked without deliberately violating t
rules that have been laid down and have become rules of pro
erty. To grant the relief asked, this court must declare the exi
ence in the defendants of an actual title in the property in que
tion, although it is clear that any direct proceeding by t
defendants founded on the assertion of such a title would fa
The whole legal and orderly course of administration should n
be set at naught merely to enable the plaintiff to maintain this su

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,

of Counse

DECEMBER, 1906.

JAN 25 1908
JAMES H. McKENNEY,

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 1007

EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,
Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Brief on behalf of Petitioner.

E. N. HARWOOD,
HOLLIS R. BAILEY,
JOHN H. HAZELTON,
Counsel for Petitioner.

HANNIS TAYLOR,
Of Counsel.

Supreme Court of the United States.

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JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,
Respondents.

BRIEF ON BEHALF OF PETITIONER, COMPLAINANT AND APPELLEE IN THE COURTS BELOW.

This case was brought into this court by writ of certiorari to the United States Circuit Court of Appeals for the first circuit, to review a decree of that court which reversed a decree rendered by the United States Circuit Court for the district of Massachusetts, in favor of complainant, the petitioner herein.

STATEMENT OF THE CASE.

It is an action in equity brought in said Circuit Court in June, 1903, by Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, complainant, against Joseph A. Coram, Henry A. Root and others, to foreclose a lien existing in favor of complainant upon certain interests

owned by said Coram and Root in certain money and bond of the value of about five hundred thousand dollars, lyin in safe deposit in Boston, Massachusetts, in the custody defendant, John H. Leyson, as administrator of the estat of Andrew J. Davis, deceased; to enforce payment of a deb in the sum of ninety-five thousand dollars and interes owing and due complainant from said defendants, Coran and Root, upon their promise in writing to pay one hundre thousand dollars out of the shares acquired from the estat of said Andrew J. Davis, deceased, for five of his heirs, fo services rendered by said Robert G. Ingersoll in the prose cution of certain contests of an alleged will of said Andrew propounded for admission to probate in the District Court of the State of Montana, within and for the County o Silver Bow, where said Andrew was domiciled when he died; and for such incidental relief as may be necessary to protect said lien and effectuate the rights of complainant in the premises, as prayed for in her bill (see bill, Record pages 1–48).

First. The Facts Whereby Complainant's Rights Accrued, and the Defenses Whereby Defendants Seek to Avoid and Defeat the Enforcement Thereof, as Shown by the Record, are as follows:

Andrew J. Davis, native of the state of Connecticut, one of a family of twelve brothers and sisters, commenced his business career in Van Buren County, Iowa, where he engaged in merchandising and farming until about the year 1866. Thence he removed to the Territory of Montana, and there pursued the business of merchandising, mining, milling and banking, whereby he acquired a large fortune amounting to many millions of dollars in value when he died, on March 11, 1890. He died at his domicile in the City of Butte, Montana, where he was then a citizen and resident, and where the greater part of his estate was situate.

The estate of said Andrew consisted of real property, principally mines, bearing gold, silver, and copper, situate in the County of Silver Bow, State of Montana, of the value,

according to undisputed testimony adduced in this case, of five million dollars; personal property in Montana, consisting of money and bank stock of the value of about one million dollars; and said money and bonds in Boston, Massachusetts, of the value of about five hundred thousand dollars. The value of said estate is alleged in complainant's bill to be "from two to five million dollars" (R. page 3), and it was shown by undisputed proofs to be about six and a half million dollars. But it was not necessary in this case to show the exact value of said estate (see proofs, R. pages 300–303, 338–339, 356–360, 412–413).

The next of kin and heirs of said Andrew entitled by law to succeed to his estate, if it were not disposed of by a will, were his surviving brothers, sisters, and the children of his deceased brothers or sisters. Some of his brothers and sisters were deceased, but children survived them. Consequently if the estate passed by the law of inheritance, it must be divided into eleven parts—each living brother and sister being entitled to one-eleventh, and the children of each deceased brother or sister being entitled to a like share by representation.

But soon after the decease of Andrew, one of his brothers, namely, John A. Davis, then residing at the City of Butte, Silver Bow County, Montana, there propounded for admission to probate in said District Court, a writing purporting and alleged to be the last will and testament of Andrew, made at Van Buren County, Iowa, in the year 1866. By the terms of that alleged will all of said estate, except bequests of maintenance for three persons, two of whom had died since 1866, was devised and bequeathed to said John A., who offered said will for probate. And thereupon said John A. Davis and his legal representative and heirs prosecuted for many years proceedings in said District Court of Montana to cause said alleged will to be admitted to probate, until certain contests thereof interposed and prosecuted in behalf of other heirs of Andrew, were determined as hereinafter shown (see bill, par. 2, record page 4, and *admission* in Answer *Ib.* 100.)

Among the heirs of Andrew there were five living in the eastern part of the United States, namely, Henry A. Root and his sister, Ellen S. Cornue, who represented their mother, Anna C. Root, a deceased sister of Andrew; Sarah Maria Cummings and Elizabeth S. Ladd, two surviving sisters of Andrew; and Mary Louise Dunbar, a niece who represented half of the share of one of Andrew's deceased sisters. These five heirs, being entitled to three and a half elevenths, or three hundred and fifty eleven-hundredths, of Andrew's estate as his heirs-at-law, associated themselves together to protect and secure their inheritance by contesting said will; and caused two contests thereof to be instituted in said District Court of Montana, by filing in the time and manner provided by law objections to the admission of said will to probate—one of which contests was brought in the name of said Henry A. Root, and the other in the name of said Sarah Maria Cummings (see bill, par. 4, R. page 5, and admissions in Answer *Ib.* 101).

About the time of the institution of said will contests, in order to aid in the prosecution thereof, and in procuring attorneys and counsellors-at-law for that purpose, and in consideration of the undertaking and promise of said Henry A. Root to procure the services of attorneys and counsel therein and prosecute said contests, four of said associate heirs assigned and transferred one-third of each of their shares and interests in said estate to said Henry A. Root and one Gideon Wells, by formal assignment in writing; and in that writing provided and agreed that any portion of the one-third of the shares so assigned, which might *not be expended* for the purpose aforesaid, should be the property of said Henry A. Root. In the same instrument said four associate heirs also authorized and empowered said Henry A. Root, by irrevocable authority, to represent them in the prosecution of said will contests, and to demand, sue for, collect, receive and receipt for their shares and interests in said estate; and he has ever since so represented them (see bill, par. 5, R. page 7; "Exhibit A" to the bill, R. page 43; and *admissions* in Answer *Ib.* 101).

Joseph A. Coram of Lowell, Mass., who had been engaged in mining operations in Montana, came into interest with said contestants by acquiring the remaining interests of two of said associate heirs, namely, that of Elizabeth S. Ladd and Mary L. Dunbar (see bill, par. 6, R. page 8; and *admissions* in Answer *Ib.* 102).

In answer to paragraph 6 of the bill defendants *admit* that said claims, rights and interests of said contesting heirs, "were dependent upon the prosecution of said objections to and contests of the validity of said alleged last will and testament of said Andrew J. Davis, deceased, in opposition to the admission thereof to probate, instituted in the names of Henry A. Root and Sarah Maria Cummings, until said shares of said estate to which said five heirs were entitled as heirs-at-law of Andrew J. Davis, deceased, were secured to them by grant and assignment from the proponent of said alleged will, or by decree of said District Court of the State of Montana having jurisdiction of said estate and contests, in the determination of said contests" (see Answer, R. page 102).

Before any trial of either of said contests was had, said Joseph A. Coram and Henry A. Root, who owned a large part of the interests of said *five* associate heirs in said estate, employed Col. Robert G. Ingersoll (who is hereinafter mentioned as Colonel Ingersoll) to prosecute said will contests as counsel and attorney for said associate heirs and Coram, upon a promise of compensation for his services therein, to be paid out of the shares of said estate acquired for said five heirs if they succeeded in getting their shares. The undisputed evidence presented in the record shows that when arrangements were being made to engage the services of Colonel Ingersoll on behalf of said contestants, he was informed and understood that they were unable to pay compensation therefor in any other way than out of their shares of said estate, in case they succeeded in getting their shares (Exhibit xxxii, R. page 509½). The evidence also shows that the assistance of Colonel Ingersoll was sought and rendered in behalf of said five

heirs to raise funds to pay the expenses of defending their inheritance through the prosecution of said will contests (see Exhibit xxxii, R. page 509½).

Colonel Ingersoll accepted said employment, and entered upon the prosecution of said contests; and said Coram and Root made and delivered to him a promise in writing as follows:

"BUTTE CITY, MONT., *August* 17, 1891.

"R. G. INGERSOLL, ESQ., BUTTE CITY, MONT:

SIR: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred thousand ($100,000) dollars, and that your expenses and disbursements shall be paid in any event.

"There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

HENRY A. ROOT,
J. A. CORAM."

(See bill, R. page 9, also "Exhibit B" *Ib.* 45 and 467, and admissions in Answer *Ib.* 103.)

In fulfillment of said engagement on his part, Colonel Ingersoll during many years, commencing early in 1891, devoted much of his time and services to the prosecution of said will contests, and therein rendered the full measure of services agreed or contemplated by the terms of said agreement to be done on his part. And he effectuated a result in favor of his clients greatly exceeding that expressed or contemplated in said agreement, by the prosecution of said will contests, and the decree finally rendered and entered by said District Court of Montana, on August

24, 1897, determining said contests, and awarding and decreeing to his clients all the shares of said estate to which they were entitled as heirs-at-law of Andrew, and a large portion in addition thereto.

In the course of said litigation there was a trial of the will contest brought in the name of Henry A. Root, which lasted about seven weeks, before said District Court of Montana. At this trial Colonel Ingersoll constantly attended and took an active part in all its details as leading attorney and counsel in behalf of said five heirs and Coram, being opposed therein by eminent counsel for the proponent of said will (Record pages 331–332, 511–513). And at the conclusion of said trial, Colonel Ingersoll addressed to the court and jury the argument in behalf of said contestants in opposition to the admission of said will to probate—a verified stenographic report of which argument was proved and received in evidence in the case at bar (Record pages 511 *et seq.*).

The result of said trial was a defeat of the proponent of said alleged will in his efforts to establish and procure its admission to probate. Seven members of the jury impaneled therein refused to return a verdict affirming the validity of said writing propounded as the last will and testament of Andrew J. Davis, deceased (see bill, par. 10, R. page 11; Testimony *Ib.* 345, 371, 380). Moreover, it is clearly shown by undisputed evidence presented in the case at bar, that the proponent of said will was not only defeated in his effort, at great expense, to establish said writing as the will of his brother Andrew, but the hopes of himself and those connected with him in that undertaking, of ever accomplishing the admission of said alleged will to probate, were extinguished by the presentation of the evidence against the validity thereof, by Colonel Ingersoll at said trial and in the argument which he delivered in behalf of said contestants. Evidence to that effect, which is not controverted, was given in the case at bar by the son and legal representative of John A. Davis, who succeeded him as proponent of said will (see testimony, R. pages 343, 347, 361–362, 716 and 721, 722).

The undisputed proofs and *admissions* of said defendants in answer to paragraph 11 of the bill, also show that following said trial Colonel Ingersoll "continued without remission to make preparation for another trial of said contests in opposition to the admission of said will to probate, and to counsel, advise, and aid said contestants in relation thereto" (*see bill, par.* 11, *R. page* 12, *admitted in Answer Ib. page* 104). That said contestants depended upon Colonel Ingersoll to prosecute said contests on their behalf, appears by correspondent in reference thereto, written in 1892 after said first trial, by Henry A. Root, who had charge of the interests of said contestants, in which he says to Colonel Ingersoll: "I bank on what you said the other day to me, and always have said, which was that you were at our service any time and place" (Exhibit xvi, R. page 488). Showing to the same effect appears in other letters in evidence written by Messrs. Coram and Root (see Exhibits, iv, v, vi, vii, viii, ix, x, xi, xii, xiii, xiv, xv, xvi, R. pages 469–490). And Colonel Ingersoll said in correspondence with Mr. Root concerning the prosecution of said contests: "You know I am always ready to do my part in any and every way, and at all times and places" (Exhibit xxxiv, R. page 509½).

It also appears from undisputed proof and *admissions* of defendants in answer to the bill in the case at bar: That following said trial Colonel Ingersoll insisted that another trial of said contest be had at an early date (Record pages 489 and 716); that said District Court of Montana set said contest for another trial to commence on a certain day (Exhibit xvii, R. page 490); that on April 28, 1893, while preparation was being made for another trial of said contest, and shortly before the time fixed for the same to commence, "by reason and in consideration of the prosecution of said contests, and the force, effect and stress thereof, as against the proponent of said alleged will, in preventing the admission thereof to probate, and in consideration of the determination of said controversy and litigation, and for no other consideration or reason, the legal representative, heirs,

and successors in interest of said John A. Davis, the proponent of said alleged will who had departed this life prior to the date last aforesaid, were constrained to yield and did yield consent to the making and entry of a decree by said District Court of the State of Montana, in said proceedings for the admission of said will to probate and said contests thereof, granting, awarding and decreeing to said five heirs associated in said contests and represented by said Robert G. Ingersoll in the prosecution thereof, as aforesaid, certain parts, parcels, shares and interests, of, in and to, the entire estate of said Andrew J. Davis, deceased, both real and personal, greatly exceeding the shares, parts and parcels of said estate to which said five heirs, for whom said Robert G. Ingersoll prosecuted said contests, were entitled to have or receive of said estate as heirs-at-law of said Andrew J. Davis, deceased, as an intestate" (see bill, par. 11, R. page 12); that "accordingly in order to provide for the successful determination of said contests and litigation in favor of said five contesting heirs and Joseph A. Coram," stipulations were made by the proponents of said will and said contestants thereof providing for the entry of a decree by said District Court in the State of Montana determining said will contests and decreeing the division and distribution of said estate (see bill, par. 11, R. pages 12–13); that said stipulations were made and so executed in writing as to have the effect of an assignment and grant to said five heirs of the interests in said estate therein allotted to them, even though said will should be admitted to probate, and said stipulations provided that the shares of said estate thereby allotted to said five heirs represented by Colonel Ingersoll, should be, by the decree of said District Court of Montana, determining said will contests, awarded and decreed to them, to be distributed directly from said estate *in kind* (see bill, par. 11, R. pages 12–14).

It appears from the testimony of John E. Davis, the substituted proponent of said will after the decease of his father, John A. Davis, against whom Colonel Ingersoll prosecuted

said contests, that "by reason and in consideration of the prosecution of said will contests involving said estate of Andrew and preventing the distribution, use, or enjoyment of any part thereof by any of his heirs or by the legatee and devisee named in said will, and in consideration of the fact that said Robert G. Ingersoll, who was prosecuting said will contests on behalf of said Henry A. Root and other heirs, was then insisting on another trial thereof at an early date, and in consideration of the force, effect and stress of said contests prosecuted by said Robert G. Ingersoll in preventing the admission of said writing to probate as the last will and testament of said Andrew J. Davis, deceased, and for the purpose of terminating said contests over said will and estate and for no other consideration whatever, ... the legal representative of John A. Davis, the deceased proponent of said will and legatee and devisee thereunder, and his heirs, on or about April 28, 1893, were constrained to consent to, and did consent to, and make, stipulations in writing of that date, to and with the said heirs of Andrew represented by said Robert G. Ingersoll in the prosecution of said will contests, namely, ... stipulating and providing to the effect that decree of said District Court of Montana should be entered in said will contests determining the same, and dividing said estate of Andrew J. Davis, deceased," among his heirs as provided in said stipulations (Record 716). That "by reason of the prosecution of said will contests by said Robert G. Ingersoll the said stipulations and decree were made and entered determining said contests, and said will was in fact and in law superseded and defeated thereby so that the administrator, legal representative and heirs of John A. Davis, deceased, cannot lawfully claim, demand, take or hold, and they do not claim or demand, any part of the property of said estate of Andrew J. Davis, deceased, situate in Massachusetts or in Montana, save and except" the portion awarded them by said stipulations and decree determining said will contests; and that "thereby said five heirs represented by Robert G. Ingersoll in the prosecution of said will contests, namely, Henry A. Root,

Sarah Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, and Mary L. Dunbar, and their legal representatives, assigns, or those claiming under or through them, became and are entitled to 250–1100 directly, and also 265½–1100 through said trustees, aggregating 515½–1100 of all said estate of Andrew J. Davis, deceased, both real and personal, *in kind* situate in Montana and Massachusetts" (R. 721–722).

The facts above stated are established without dispute by the testimony of John E. Davis, who was conversant with all said litigation and was appointed administrator of the estate of his father, John A. Davis, deceased, and substituted as proponent of said will (R. 346–353); the same is also shown by said stipulations ("Exhibit LV," R. page 598); by the verified petition of John E. Davis as such administrator, joined in by Andrew J. Davis, Jr., as trustee, one of the defendants in this action, filed in the probate Court of Suffolk County, Mass. (see "Exhibit LXIII," R. pages 688–730); by letters of said Henry A. Root (R. pages 470–509); and by admissions of defendants in their answer in the case at bar, hereinafter cited.

Defendants Coram, Root, and others answering with them, *admit* that "before any trial of either of said contests was had, the said Henry A. Root and Joseph A. Coram employed Robert G. Ingersoll to act as counsel in the prosecution of said contests in opposition to the admission of said alleged will to probate, for and on behalf of said five heirs associated in said contests with said Joseph A. Coram" (R. 102); "admit that the said Robert G. Ingersoll accepted said employment and in fulfillment thereof rendered valuable services and counsel in the prosecution of said objections and contests" (R. 103); admit that "said Henry A. Root and Joseph A. Coram signed and delivered to said Robert G. Ingersoll an instrument in writing," copy of which is annexed to the bill marked "Exhibit B," promising him said stipulated fee for said services (R. 103); "admit that said Robert G. Ingersoll rendered services in the prosecution of said contests mentioned in said writing, both before and after said writing was made and delivered" (R. 103); admit

that Colonel Ingersoll attended and "took an active part in said trial" and "that said trial lasted about seven consecutive weeks" (R. 103); "admit that thereafter said Ingersoll continued to make preparation for another trial of said contests in opposition to the admission of said will to probate and counselled, advised and aided said contestants in relation thereto" (R. 104); and "admit that said Ingersoll not only rendered services and counsel in the prosecution of said contests for and on behalf of said five heirs mentioned in said agreement and promise made to and with him as aforesaid, in fulfillment thereof on his part, but he also advised, counselled, and aided in consummating and effectuating said arrangements and proceedings by which said decree of August 24, 1897, was obtained" (R. 107)—that is, the decree finally determining said will contests and awarding to said five heirs represented by Colonel Ingersoll, 515½–1100 of all said estate of Andrew.

Afterward other stipulations were made with *other heirs* of said Andrew who had filed in said District Court of Montana, but never prosecuted to trial, objections to the admission of said alleged will to probate, whereby it was stipulated and agreed that said *other heirs* should be awarded in the decree finally determining all said will contests, a certain *fractional* part of the share of said estate to which they were each entitled, *i. e.*, about *one-half* of the share of said estate to which each of said *other heirs* were entitled respectively as heirs-at-law of Andrew (see bill, par. 13, R. page 15, and admissions in Answer *Ib.* 105).

A final decree was rendered and entered in said District Court of Montana, on August 24, 1897, determining said will contests prosecuted by Colonel Ingersoll on behalf of said five heirs and Coram, by the terms and effect of which decree said five heirs who as heirs-at-law of Andrew were entitled to only 350–1100 of said estate, got absolute right and title to 515½–1100 thereof, "in kind," both real and personal and wheresoever situate (see decree, "Exhibit C," R. pages 46 and 467). This decree awards to said five heirs represented by Colonel Ingersoll in said will contests,

250–1100 of said estate to be distributed to them directly *in kind*; and awards to Charles H. Palmer and Andrew J. Davis, Jr., as trustees, 431–1100 of said estate in trust, of which said five heirs represented by Colonel Ingersoll in said will contests are, by the terms of said trust entitled to 265½–1100; which portions amount to 515½–1100 of all said estate ("Exhibit C," R. 46).

The Supreme Court of Montana, its highest judicial tribunal, in deciding an appeal which drew in question the validity of said decree determining said will contests and parcelling and ordering said estate to be distributed as therein provided, and the *jurisdiction of said District Court* to render that decree, ruled, held and decided that said decree of August 24, 1897, determining said will contests, is valid and in effect superseded and took the place of said will, and "*itself became the basis of administration and controlling as to the devolution of the property*" of said estate. It was so ruled and decided, *In re Davis Estate*, reported in 27 Montana Report, page 497.

Distributions of property of said estate in Montana were made from time to time following the entry of said decree, and in accordance therewith, by order of said District Court of Montana. Through said distributions money and its equivalent in bank stock to the amount of over $374,900 and 515½–1100 of all said real estate left by Andrew in the State of Montana, of the value of *five million* dollars according to the undisputed proofs cited above, has already been distributed and delivered to Colonel Ingersoll's clients (see bill, par. 16, R. page 19, also par. 18 *Ib.* 21; and admissions in Answer, *Ib.* 108, 109). By said distributions all property of said estate in Montana was exhausted prior to the commencement of this action in Massachusetts, as admitted by defendants (see bill, par. 18, R. page 21, and admissions in Answer *Ib.* 109)

It is shown by averments of the bill, admissions and proofs, that Robert G. Ingersoll died intestate on July 21, 1899, at Dobbs Ferry in Westchester County, State of New York, where he was then and had been for many years a resident

and citizen (see bill, par. 21, R. page 25, admissions in answer *Ib.* 111); that he had with him there among his effects at the time of his decease, the said contract in writing made and delivered to him by said Coram and Root, a copy of which is annexed to complainant's bill marked "Exhibit B," whereby they promised to pay said stipulated compensation for his services rendered in the prosecution of said will contests (see Testimony, R. pages 130, 131, 161, 163, 181, 215, 287, 289). That thereafter on August 21, 1899, complainant was appointed administratrix of the estate of Robert G. Ingersoll, deceased, and letters of administration were duly issued to her, by the Surrogate's Court of said County of Westchester, State of New York; that she duly qualified and has ever since been such administratrix, and in her capacity as such administratrix she then and there came into possession of, and title to, said contract or chose in action, whereby said Coram and Root promised to pay for said services rendered by Colonel Ingersoll in the prosecution of said will contests (see bill, par. 21, R. page 25; admissions of Answer *Ib.* 111; and Testimony, R. pages 130, 131, 161, 181, 215, 287, 289). Defendants affirmatively admit Colonel Ingersoll's decease at Westchester County, New York, where he "resided and was domiciled," and the appointment and continuance of complainant as his administratrix (Answer, R. 115, at bottom of page).

A question as to who was invested with, and continued during all the time since the decease of Colonel Ingersoll to hold, title to said chose in action as his legal representative, is raised for consideration of this court, by reason of the rulings of said Circuit Court of Appeals hereinafter more fully shown.

Complainant was also appointed administratrix of the estate of Robert G. Ingersoll, deceased, by the Probate Court of Suffolk County, Massachusetts, and duly qualified as such, before the commencement of this action in said United States Circuit Court, as alleged in the bill and admitted in the answers (see bill, R. page 25, and admissions in Answer *Ib.* 111).

Upon the afore-mentioned facts shown in her bill, complainant alleges therein: "that by virtue of said employment of Robert G. Ingersoll and said agreement and promise to and with him made and delivered as aforesaid by said Coram and Root, and the services and counsel by him rendered in the prosecution of said will contests in fulfillment of said employment mentioned in said agreement and promise, and the happening of said contingent event mentioned therein," namely, that in case said will be defeated and said five heirs get their shares, "which event matured by the entry of said decree determining said will contests, and by virtue of the facts herein set forth, the said Robert G. Ingersoll became entitled to the payment of said compensation of $100,000, promised for his services as aforesaid, together with interest thereon from August 26, 1897" (R. page 22), when as shown in the bill, and admitted by answer (R. page 108), *over three hundred thousand dollars in money* was actually distributed from said estate and delivered to said five heirs and Coram (R. 19, 20, and admission *Ib.* 108).

The compensation promised Colonel Ingersoll in said agreement has not been paid, except $5,000 paid on account thereof out of the first distribution of money of said estate to said five heirs and Coram; although said balance of $95,000 thereof and interest has been often demanded as shown by the bill admissions and proofs (see letter of Henry A. Root, R. page 156; Testimony *Ib.* 268-270; 213, 254). Defendants admit they have not paid said balance, and that it has been demanded (see bill, par. 20, R. page 24, Answer *Ib.* 111).

A *lien* is asserted by averments of the bill, "that by virtue of said services rendered by said Robert G. Ingersoll in the prosecution of said cause on behalf of said five heirs and Coram, and the determination thereof in their favor as aforesaid, and said contract and promise to and with said Robert G. Ingersoll as aforesaid, and the provisions of the laws and statutes of the State of Montana, in force during all the times herein mentioned, an attorney's lien accrued

in favor of said Robert G. Ingersoll and his legal representative, and is existing and in force and effect upon the portions, parcels and interests of, in, and to the funds and other property of said estate of Andrew J. Davis, deceased, so acquired for said five heirs as the fruits of the labor and services rendered by said Robert G. Ingersoll in the prosecution of said will contests 'in whose ever hands' the same may be, out of which to enforce payment of said compensation owing and due for said services rendered by said Robert G. Ingersoll, as aforesaid" (see bill, R. page 22).

The statutes of Montana providing a lien in favor of attorneys and counsellors-at-law, in force when Colonel Ingersoll rendered said services and counsel in the prosecution of said will contests, are correctly set forth in the bill as defendants admit (see bill, R. pages 23, 24 and admissions *Ib.* 110).

An *equitable lien* upon the interests owned by said Coram and Root in said money and bonds situate in Boston, Massachusetts, in the custody of John H. Leyson, administrator of said estate, acquired for said five heirs and Coram, through said labors of Colonel Ingersoll as attorney and counsel for said contestants in the prosecution of said will contests, is also set up and claimed in the bill. This *equitable lien*, on the *interests of said Coram and Root* in said money and bonds in Boston, Mass., *is founded upon said contract* made and delivered by them, promising Colonel Ingersoll payment of said compensation "out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar, and Mrs. Ellen S. Cornue, and Henry A. Root," and upon other promises and pledges made by said Coram and Root to pay said compensation out of said funds and effects situate in Boston, Mass.; which contract promises and pledges are set forth in the bill (see "Exhibit B" annexed to the bill, R. page 45, and other promises R. pages 25–28—shown by letter exhibits, *Ib.* 156, Exhibits xxxvii, xxxviii, xxxix, xli, xliii, R. pp. 56–565). And thereupon complainant avers:

"That by reason of said employment of Robert G. Inger-

soll, and the services rendered by him in the prosecution of said will contests, and the successful determination thereof as aforesaid, whereby said shares, parts, and parcels of said estate were acquired for said five heirs and Coram as fruits of said labor of Robert G. Ingersoll, and the promises of payment of said stipulated compensation for said services out of said funds and effects so acquired for said five heirs and Coram, . . . an equitable lien exists upon said funds and effects situate in Boston, Mass., in favor of your orator as administratrix and legal representative of Robert G. Ingersoll, deceased;" and that "said funds and effects situate in Boston, Massachusetts, to which said Root and Coram became entitled as aforesaid, directly and through said trustees are equitably pledged to secure payment of said indebtedness owing by said Root and Coram to your orator as legal representative of Robert G. Ingersoll, deceased" (see bill, R. pages 28, 29).

The said money and bonds in Boston, Massachusetts, in the custody of defendant John H. Leyson as administrator, are described in the bill (R. page 29), and it is shown, that of said $515\frac{1}{2}$–1100 thereof acquired for said five heirs as part of the fruits of Colonel Ingersoll's labors in the prosecution of said will contests, said *Coram and Root own* $415\frac{1}{2}$–1100 subject to said lien existing in favor of complainant as the legal representative of Colonel Ingersoll.

Prior to the commencement of this action in Massachusetts, attempt was made by one John S. Harris as administrator of Robert G. Ingersoll, deceased, appointed in the State of Montana, to prosecute an action in said District Court of that State, against said Coram and Root to enforce payment of their said indebtedness, but that action was *nonsuited* without hearing any evidence or any trial thereof. In her bill in the case at bar, complainant sets forth the facts as to said attempted action in the State of Montana, and the *nonsuit* thereof (R. pages 34–37). In answer thereto defendants *admit* that "when said cause came on to be heard in said District Court of the State of Montana, said Root and Coram, by their attorneys, made objection to the

introduction of any evidence whatever in said cause on the ground that the plaintiff's complaint therein did not state facts sufficient to constitute a cause of action; that said District Court sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint, and then and there nonsuited said plaintiff and dismissed said complaint" (R. page 114).

It is further alleged in the bill in the case at bar, that complainant "has herein averred, and can aver, prove and establish, other and further facts in addition to the facts set forth in said former complaint, which cover and supply each and every insufficiency mentioned in objections to said former complaint brought in said District Court in the State of Montana, and your orator can prove and establish each and all facts set forth in this bill of complaint and that she is advised and verily believes that the same entitled your orator to the relief herein prayed" (R. page 37). And thereupon complainant prays for proper relief (R. page 38 *et seq*).

Inasmuch as the commencement and *nonsuit* of said action of Harris as administrator appointed in Montana, is set up as an alleged bar to the present action, and the *effect of that nonsuit* being the principal question for consideration by this court, on review of the ruling of said Circuit Court of Appeals, the proceedings in said Harris case, and the additional material facts shown in the bill admissions and proofs in the case at bar, which were *not alleged in the complaint of said Harris*, will be fully set forth a little further along in this brief.

Defendants demurred to the bill in the case at bar on the alleged ground, among others, that complainant is estopped from prosecuting this action in equity in said United States Circuit Court, by reason of the commencement and nonsuit of said attempted action in Montana, as shown in her bill (R. page 50). Such demurrers were presented to said United States Circuit Court, Honorable William L. Putnam, Circuit Judge, presiding, and after due consideration thereof, the Court overruled them, except as to the portion of the

bill making said Mary Louise Dunbar and the legal representatives of Sarah Maria Cummings and Elizabeth S. Ladd parties to the action. The Court ruled that they were not necessary parties and dismissed them (R. pages 93–94).

In the meantime, upon application, notice and showing of cause, said Circuit Court issued an order of injunction restraining defendants as prayed in the bill, from removing out of Massachusetts, or distributing, taking, carrying away, or disposing of, said money and bonds upon which said lien existing in favor of complainant rests. Defendants appealed from that order to the United States Circuit Court of Appeals, and that Court affirmed said order of injunction without discussing any question urged on that appeal (*R. page 139, Ingersoll* v. *Coram, 132 Fed. R. 168*).

Answers to the bill were filed, and notwithstanding the court had ruled that said Mary Louise Dunbar and the legal representatives of Sarah Maria Cummings and Elizabeth S. Ladd were not necessary parties, they remained and joined in the answer of Coram, Root and other defendants (R. page 99).

In their answers to the bill defendants set up the same alleged estoppel claimed to have been created by the commencement and nonsuit of said action which Harris as administrator attempted to prosecute in Montana, although in the same answer defendants admit that said District Court of Montana "refused to permit any evidence to be introduced in support of the allegations of said complaint" of Harris as administrator in Montana, "and then and there nonsuited said plaintiff and dismissed said complaint" (Answer R. page 114).

Proofs were then presented by complainant and taken by the special examiner appointed by said Circuit Court, as the same appear of record at pages 127 to 464, and documentary exhibits recorded at pages 467 to 754 inclusive.

By admissions which defendants were obliged to make in their answers, and by abundance of undisputed evidence touching every fact denied, or as to which defendants alleged "ignorance," complainant established all the material averments of the bill.

Defendants offered no proof in attempt to controvert any averment of the bill, or in attempt to contradict any evidence offered by complainant. But said Coram and Root made vigorous opposition to complainant at all stages of the case by all manner of technical objections and contentions.

Admissions which Defendants were Obliged to Make in Answer to the Bill.—To Show that there is not and Cannot be any Dispute upon the Merits as to any Essential Facts Alleged in the Bill, we will here Briefly Point to Some of the Admissions which Defendants were Obliged to Make in their Answers as Follows:

a. Defendants *admit* in answer to paragraph 1 of the bill, the share to which each of said five heirs, for whom Colonel Ingersoll prosecuted said will contests, were entitled, and that they were entitled altogether to only 350-1100 of said estate as heirs-at-law of Andrew (R. page 99).

b. They *admit* in answer to paragraphs 2 and 3 of the bill that said alleged will was offered for probate, and proceedings were "prosecuted for a long period of time" to cause its admission to probate as alleged in the bill (R. page 100).

c. They *admit* that neither of said five heirs were mentioned in, or given anything by, said alleged will, and that if it had been admitted to probate as the will of Andrew J. Davis, said five heirs would have been thereby cut off and got nothing from said estate (R. 100).

d. They "admit that for the purpose of opposing the admission of said alleged will to probate and securing and getting the shares of said estate" to which said five heirs, naming them, "were entitled as next of kin and heirs-at-law of said Andrew J. Davis, deceased," they "associated themselves together" and instituted contests of said alleged will "for the purpose as alleged" in the bill; and that said contests "were pending and were prosecuted in said District Court of Montana from the time of the institution thereof until the same were finally determined as *thereinafter* set forth," *i. e.*, as set forth in the bill (R. 101).

e. They *admit* that four of said heirs associated in said contests assigned one-third of each of their shares or interests in said estate, "out of the avails thereof" (R. 44), to aid in the prosecution of said will contests; and that "Exhibit A" annexed to the bill is a true copy of said assignment (R. 101).

f. They "*admit* that Joseph A. Coram acquired and still has, owns and holds all remaining interests and shares" of said "Elizabeth S. Ladd and Mary L. Dunbar in and to said estate" (R. 102).

g. They *admit* that the claims, rights and interests of said heirs, "were dependent upon the prosecution of said objections to and contests of the validity of said all and last will and testament of said Andrew J. Davis, deceased, in opposition to the admission thereof to probate instituted in the names of Henry A. Root and Sarah Maria Cummings until said shares of said estate to which said five heirs were entitled as heirs-at-law of Andrew J. Davis, deceased, were secured to them by grant and assignment from the proponent of said alleged will or by decree of said District Court of the State of Montana, having jurisdiction of said estate and contests in the determination of said contests" (R. 102).

h. They *admit* that "before any trial of either of said contests was had the said Henry A. Root and Joseph A. Coram employed Robert G. Ingersoll to act as counsel in the prosecution of said contests in opposition to the admission of said alleged will to probate for and on behalf of said five heirs associated in said contests with said Joseph A. Coram" (R. 102).

i. They "also admit that said Robert G. Ingersoll accepted said employment and in fulfillment thereof rendered valuable services and counsel in the prosecution of said objections and contests" (R. 103).

j. They *admit* that "said Henry A. Root and Joseph A. Coram signed and delivered to said Robert G. Ingersoll an instrument in writing, and these defendants believe that the copy thereof annexed to the bill of complaint and marked 'Exhibit B' is an accurate copy"—that is the writ-

ing wherein said Coram and Root promised to pay Colonel Ingersoll said stipulated fee for prosecuting said contests, and "to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root" (R. 103, and "Exhibit B," *Ib.* 45).

k. They "admit that said Robert G. Ingersoll rendered services in the prosecution of said contests mentioned in said writing both before and after said writing was made and delivered" (R. 103).

l. They "admit that a trial of the objections filed by said Henry A. Root in opposition to the admission of said alleged will to probate was had in 1891, by said court and a jury; that said trial lasted about seven consecutive weeks; that said Robert G. Ingersoll attended" and "took an active part in said trial" (R. 103).

m. They "admit that thereafter said Ingersoll continued to make preparation for another trial of said contests in opposition to the admission of said will to probate, and counselled, advised and aided said contestants in relation thereto" (R. 104).

n. They "admit that said Ingersoll not only rendered services and counsel in the prosecution of said contests for and on behalf of said five heirs mentioned in said agreement and promise made to and with him as aforesaid, in fulfillment thereof on his part, but also advised, counselled and aided in consummating and effectuating said arrangements and proceedings by which the said decree of August 24, 1897, was obtained"t—hat is the decree determining said will contests prosecuted by Colonel Ingersoll and awarding to his clients 515½–1100 of all said estate (R. 107).

o. They *admit* that on or about April 28, 1893, stipulations were made between the heirs and legal representative of John A. Davis, deceased, proponents of said will on the one part, and said five heirs and Coram, represented by Robert G. Ingersoll in said contests, on the other part, providing for the entry of a decree determining said contests and parcelling and ordering said estate distributed to the heirs of said Andrew, as alleged in the bill (R. 104).

p. They *admit* that thereafter other stipulations were made by the proponents of said will and contestants thereof, represented by Robert G. Ingersoll, on the one part, and "each and all *other heirs* of said Andrew" who had filed, but never prosecuted to trial, contests of said will, "by which it was stipulated and agreed that there should be allotted, by decree of said District Court in determining said litigation and contests in respect to said alleged will, and estate, to said *other contesting heirs*, severally or in groups, a certain *fractional part* of the shares or interests of, in and to said estate to which they were entitled as heirs-at-law of Andrew J. Davis, deceased" (R. page 106), the fractional portions allotted to said *other heirs* being about *one-half* of the shares to which they were entitled as heirs-at-law of said Andrew, as appears by said stipulations and decree.

q. Defendants further "admit that said District Court, by its order duly made and entered on or about August 24, 1897, sanctioned and approved the action of John E. Davis as administrator of the estate of John A. Davis, deceased, in consenting and entering into" said stipulations (R. 106).

r. They "admit that said Henry A. Root and Joseph A. Coram and their associates in said will contests agreed to, *sanctioned*, *approved* and *acquiesced* in each and all of said stipulations, arrangements and proceedings," providing for the entry of decree by said District Court determining said will contests, and awarding to said five heirs represented by Colonel Ingersoll in said contests, said portions amounting to $515\frac{1}{2}$–1100 of all said estate (R. 107).

s. They "admit that on August 24, 1897, said District Court of Montana made a decree and these defendants believe that a copy of said decree is annexed to the bill of complainant, marked 'Exhibit C'"—that is the decree determining said will contests prosecuted by Colonel Ingersoll and awarding to his clients $515\frac{1}{2}$–1100 of said estate (R. 107).

t. They "*admit* that said five heirs and Coram have *participated* in and have had and received and had the use and benefit of $515\frac{1}{2}$–1100 of each and all distributions

heretofore made of funds and other property of said estate of Andrew J. Davis, deceased, both real and personal" (R. 107).

u. They "admit that on August 26, 1897, said District Court of Montana ordered and directed Leyson as administrator of said estate of Andrew J. Davis, deceased, to distribute out of the funds of said estate" and "deliver to said five heirs directly" and also "to said trustees Palmer and Davis, Jr.," for said five heirs, certain specified sums of money, "that said sums of money aggregate $313,986.12," and "that said sums were distributed and paid over to said five heirs and Coram and for their use and benefit to said trustees in accordance with said decree of August 24, 1897" (R. 108).

v. They "admit that by another order made by said District Court of Montana," certain other sums of money and bank stock were distributed from said estate, and that "five hundred fifteen and a half eleven-hundredths" thereof "have been distributed to said Root, and Coram as grantee and assignee of interests in said estate acquired *as aforesaid* by said Elizabeth S. Ladd and Mary L. Dunbar, and to the others of said five heirs and for their use and benefit to said trustees according to said decree of August 24, 1897, and that the same has been heretofore distributed, paid over and delivered according to the direction of said order" (R. 109).

w. These admissions show that over $374,900 has been distributed from said estate in Montana "and paid over to said five heirs and Coram, and for their use and benefit to said trustees in accordance with said decree of August 24, 1897," determining said will contests (R. 108–109).

x. Defendants "admit that all real estate belonging to the estate of Andrew J. Davis, deceased, at his death, situate in the State of Montana, was, on February 8, 1898, by order of said District Court, distributed and delivered to the persons and in the undivided shares and interests *as mentioned and provided in said decree of said District Court of Montana, of August* 24, 1897, and that said five

heirs and Coram as assignee of some of them received 515½–1100 undivided parts, parcels and interests in and to said real estate" (R. 108–109).

y. They "admit that said distribution has practically exhausted the property and funds of said estate in the State of Montana" (R. 109).

z. They "admit that Henry A. Root and Joseph A. Coram and their associates in said will contests have heretofore, by deeds of conveyance, conveyed away and devested themselves of all right, title and interest in and to said real estate" (R. 109).

The defendants, moreover, declare in a petition joined in by all of them, filed in the Probate Court of Suffolk County, Mass., verified by the oath of said Henry A. Root, "that said decree of said Montana District Court" attached to their said petition as "Exhibit B, dated August 24, 1897, is in full force and effect, is final and cannot in any respect be modified or changed, and sets forth the shares or interests of said estate of Andrew J. Davis to which the persons therein mentioned are entitled, which shares and interests are as follows:" Then follows a showing in said petition of the respective shares and interests of said petitioners and others in the property of said estate situate in Massachusetts, exactly as provided in said decree, a copy of which is attached to their said petition marked "Exhibit B" (see R. 674). That is the same decree determining the will contests mentioned in said contract promising payment for Colonel Ingersoll's services in prosecuting the said contests, a copy of which is annexed to complainant's bill as "Exhibit C" (R. 46).

In their verified petition last above mentioned, filed in the Probate Court of Suffolk County, Mass., defendants further affirm: "that the interests of said Mary L. Dunbar, Elizabeth S. Ladd, and Charles H. Ladd, in and to the estate of Andrew J. Davis, under said decree, have been assigned and transferred to Joseph A. Coram of Lowell, Mass." (R. 675).

In answer to the bill in the case at bar, defendants also

"*admit* that there is in the City of Boston," Mass., said money and bonds of the estate of Andrew J. Davis, deceased, described in the bill, "of the value of four hundred and fifty thousand dollars after paying all expenses of administration thereof, in the custody of John H. Leyson as administrator in Massachusetts" (R. 112).

Other admissions which defendants were obliged to make in answering the bill, will be mentioned in the ensuing pages where reference thereto is especially pertinent.

The only defense which defendants attempted to support by proof was said alleged estoppel. The principal question for determination by this court is raised by that alleged defense, and the ruling of said Circuit Court of Appeals thereon: *i. e.*, the question whether the order of nonsuit of said action which Harris as administrator appointed in Montana, attempted to prosecute there, is a bar to this action in said United States Circuit Court. It is therefore necessary to bring to view the proceedings in that attempted action, as the same appear in the record.

Second. Proceedings in the Action of Harris as Administrator Commenced and Nonsuited in Montana, set up as an Alleged Bar to this Action, as shown by the Record:

In the year 1901, complainant Eva A. Ingersoll, having been informed that said five heirs and Coram had conveyed away and devested themselves of all interests in said real estate acquired for them through the prosecution of said will contests and decree determining the same, and being further informed that said Coram and Root were seeking and attempting to get possession of all remaining funds and effects acquired for said heirs through the prosecution of said will contests, and desiring to obtain such relief as might be available to enforce payment of said indebtedness out of the fruits of said labors of Colonel Ingersoll, before the same were all placed beyond the reach of legal process, she caused an action to be commenced by attorneys in said District Court of Montana in her name as administratrix of the estate of Robert G. Ingersoll, deceased, appointed

by said Surrogate's Court of Westchester County, State of New York, setting up in the complaint in that action the claim of said indebtedness against said Coram and Root for services of Colonel Ingersoll, and claiming a statutory lien on interests in property of said estate situate in Montana, acquired through said contests for said five heirs and Coram. That claim of lien was founded entirely upon said statute of Montana providing a lien in favor of attorneys-at-law for services rendered in actions and proceedings in courts of that State. No equitable lien was set up or claimed in that action.

When said action was commenced in Montana in the name of Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in the state of New York, she had not been, nor has she ever been, appointed administratrix of the estate of Robert G. Ingersoll, deceased, by any court or proceeding in the State of Montana, nor has she ever been in the State of Montana since the decease of Colonel Ingersoll. The laws of Montana in force when said action was commenced, and ever since, in effect forbid the appointment of a non-resident of that State as administrator of the estate of a decedent (Section 2434, Code, Civil Proc.). It was expressly alleged in the complaint in said action that Eva A. Ingersoll, the plaintiff named therein, was appointed administratrix of the estate of Robert G. Ingersoll, deceased, by the Surrogate's Court of Westchester County in the State of New York; and there was no averment therein of her appointment as such administratrix elsewhere (see R. page 913). Demurrer to that complaint was interposed by said Coram and Root, but said complaint was never answered by any defendant named therein (see R. 35).

Thereafter in certain proceedings in regard to said estate of Andrew J. Davis, deceased, in said District Court of Montana, attempt was made to introduce and use said complaint brought therein in the name of Eva A. Ingersoll as said administratrix, appointed in New York, but on objection interposed by said Coram and Root, said District

Court of Montana ruled, held and decided that it would *not hear or consider* the claim set up in said complaint in the name of said plaintiff, Eva A. Ingersoll, as said administratrix appointed in the State of New York (R. page 34 *et seq.*, also page 114).

Shortly after that ruling John S. Harris was by order of said District Court of Montana appointed administrator of Robert G. Ingersoll, deceased, and he was by order of that court substituted as plaintiff in said action in place of Eva A. Ingersoll, as administratrix appointed in New York, whose name was stricken from said complaint by order of said District Court of Montana (R. 931).

Then John S. Harris as said administrator appointed in Montana, brought in and filed in said District Court his amended complaint setting up said indebtedness of Coram and Root for services rendered by Colonel Ingersoll in the prosecution of said will contests, and asserting a statutory lien, under the statute of Montana, on certain interests in the property of said estate situate in Montana, acquired for said five heirs through the prosecution of said will contests. But said Harris *did not* assert in his complaint any equitable lien at all. The statement in the majority opinion of the Circuit Court of Appeals, in the case at bar, that "an equitable lien on the defendants' interest in the estate" was set up or claimed in the complaint in Montana, is an error (R. 981).

Nor did said Harris allege or show in his complaint, or in any other pleading or proceeding in said attempted action in Montana, that he had title or even possession of said contract or chose in action whereby Coram and Root promised to pay for services rendered by Colonel Ingersoll in the prosecution of said will contests; nor did said Harris allege in his complaint, or any pleading in that action, that anything whatever had been done to vest in him, or in attempt to vest in him, title to said chose in action; nor did he allege any act, facts, or proceedings whereby he claimed to have been invested with title to said chose in action. But said Harris did allege in

his complaint that Robert G. Ingersoll died *intestate* on July 21, 1899, at Dobbs Ferry, in the County of Westchester, State of New York, where he was "then a resident and citizen;" and that on August 21, 1899, his widow, Eva A. Ingersoll, was by the Surrogate's Court of said Westchester County appointed administratrix of the estate of Robert G. Ingersoll, deceased (R. page 799); that Eva A. Ingersoll duly qualified as such administratrix, and letters of administration were duly issued to her by said Surrogate's Court attested by its seal, appointing and commissioning her as administratrix of the estate of Robert G. Ingersoll, deceased (R. page 799); and those averments were admitted in the answer of Coram and Root to the complaint of Harris as administrator, in said action (R. page 843).

The defendants, Coram, Root, and others demurred to said complaint of Harris as administrator appointed in Montana, on the ground, among others, that it did not state facts sufficient to constitute a cause of action; and having filed their demurrer in said District Court of Montana, by leave of that court withdrew it, and filed their answer to said complaint of Harris as administrator appointed in Montana (R. pages 35, 36 and 837 *et seq*).

In that answer Coram and Root *denied the indebtedness* alleged in said complaint of Harris as administrator; *denied the fulfillment of the contract* therein mentioned, on the part of Robert G. Ingersoll; *denied* "that by reason or in consideration of the prosecution of said contests or force, effect or stress thereof," the proponents of said alleged will entered into the stipulations mentioned in said complaint of Harris providing for the determination of said will contests; *denied* "that by reason of the prosecution of said contests, said will was defeated or in effect annulled in so far as it could affect the rights, interests or claims of said persons for whom said Robert G. Ingersoll performed said services" (R. 854); *denied* that Robert G. Ingersoll counseled, advised, or aided in making or effectuating the agreements and arrangements whereby said five heirs

for whom Robert G. Ingersoll prosecuted said will contests were granted and decreed the shares of said estate of Andrew awarded to them by the decree finally determining said contests; and *denied* all vital facts which were alleged in said complaint of Harris as administrator in Montana to show liability of defendants Coram and Root for the indebtedness therein mentioned. Those denials appear in said answer exhibited on pages 839, 842, 843, and in the *answer to amendments* on page 854 of the record in the case at bar.

But there was *no allegation or defense of abandonment* by Colonel Ingersoll, of said contract, whereby he was promised payment for his services rendered in the prosecution of said will contests, or of his rights thereunder, or anything of that nature or effect, set up in any answer or in any other pleading in said action which Harris as administrator attempted to prosecute in Montana. *Nor is the word abandon, or abandoned, or abandonment, or any words of like effect used in any pleading in that action.* The question of a pretended *abandonment* comes in for consideration by this court as shown further along in this brief.

After the issues were so made by the pleadings in said action it was called for trial in said District Court of Montana sitting with a jury, and said Harris, as administrator plaintiff, attempted to introduce the testimony of a witness called on his part; whereupon before said witness had answered the first question put to him (R. pages 336, 337), and before any evidence whatever was introduced at said attempted trial, said Coram and Root by their attorneys "objected to the introduction of any and all testimony on behalf of plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action;" and the court then and there sustained said objection, and refused to permit any evidence to be introduced; and then and there in the same ruling, on motion of counsel for said defendants Coram and Root, said District Court of Montana ordered said complaint of Harris as administrator dismissed (R. 867). That order, omitting the title of the cause, reads as follows:

"This day the parties hereto being present in court as on Wednesday, December 10, 1902, and the jury being present and answering to their names, and further trial herein is by the court resumed, now, the opening statement on behalf of plaintiff is resumed, and being concluded the introduction of testimony on behalf of the plaintiff is commenced. Come now defendants and object to the introduction of any and all testimony on behalf of plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. After argument of counsel the motion to exclude testimony is by the court sustained, to which ruling of the court plaintiff by counsel duly excepts and is by the court granted thirty days' additional time to prepare and serve bill of exceptions herein, and upon motion of defendants the complaint herein is by the court ordered dismissed, and the motion to discharge receiver herein is by the court reserved for further consideration. Whereupon the jury herein is discharged from further attendance of this cause and this term of court" (R. pages 866, 867).

The court also entered judgment for costs in said action, which after reciting the title is in words and figures as follows:

"This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the court and sustained—Now, therefore, in consideration of the premises and the law, it is ordered, adjudged, and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $12.50. Done in open court this twelfth day of December, 1902" (R. page, 868).

The statute of Montana—Code of Civil Procedure in the

Chapter entitled "Judgment in general," section 1004, in force during all the times mentioned—provides that:

"An action may be dismissed or a judgment of nonsuit entered in the following cases:"

"5. By the court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." And also provides in section 1005 of the same chapter that such judgments are not judgments on the merits.

Section 1007 of said chapter further provides that:

"A final judgment dismissing the complaint either before or after a trial does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll that it is rendered upon the merits" (Montana Code Civ. Proc. Secs., 1004, 1007).

Section 1008 of the same code provides that "upon the dismissal" of an action, "it is the duty of the court to render judgment for costs."

The Montana Code of Civil Procedure further provides in Section 1151 that "the final decision in an action or proceeding" or an order striking out a pleading or a portion thereof is "deemed to have been excepted to and no bill of exceptions is required."

From said judgment of nonsuit said Harris as administrator plaintiff therein appealed to the Supreme Court of Montana, and asked that court to reverse or set aside said judgment of nonsuit or dismissal.

The rule of law in Montana as declared by the highest court thereof is to the same effect as held by the United States Supreme Court in the case of *Nash* v. *Town*, 5 *Wallace* 689, and many other cases, that:

"Courts in the construction of contracts look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed

them, and so to judge the meaning of the words and of the correct application of the language to the things described" (5 Wall. 689).

And that: "Instruments are to be interpreted according to their subject matter, and parol evidence may be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Whatever indicates the nature of the subject is a just medium of interpretation of the language of the parties, and is also a just foundation for giving the instrument an interpretation when considered relatively, different from that which it would receive if considered in the abstract" (1 Mont. 526).

It is so declared by the Supreme Court of Montana in the case of *Donnell* v. *Humphreys, reported in* 1 *Montana R.* 518; in *Shrieve* v. *Copper Bell Mining Co.*, 11 *Mont. R.* 323, 324; and in *Ming* v. *Woolfolk*, 3 *Montana R.* 384—citing and quoting from *Noonan* v. *Bradley*, 9 *Wall.* 409, and other decisions of the United States Supreme Court. And there is no rule of law to the contrary in the State of Montana.

The question of *abandonment* of a right has also been held in a long line of decisions by the highest court of Montana to be *a matter of intention*, and a *question of fact*, and that if *abandonment* is to be relied on, asserted or used, in litigation in attempt to defeat a right claimed by a party, such alleged *abandonment must be set up in pleading*, so that issue may be raised thereon, and *tried* and determined upon the *proofs* submitted to the trial court. It is so held in *Atchison* v. *Peterson*, 1 *Montana R.* 561, *affirmed* 20 *Wall.* 507; *Tucker* v. *Jones*, 8 *Montana R.* 225, 230; *McCauley* v. *McKeig*, *Ib.* 389, 392; *Middle Creek Ditch Co.* v. *Henry*, 15 *Ib.* 558, 576; *Beatty* v. *Murray P. M. Co.*, *Ib.* 314, 316; *Smith* v. *Hope M. Co.*, 18 *Ib.* 432, 438; *Wood* v. *Lowney*, 20 *Ib.* 273, 278 (see R. pages 395–397).

Nevertheless, in passing upon said appeal of Harris as administrator in Montana—notwithstanding the rule of law governing the courts of that State in respect to the *interpretation of contracts*, and in respect to setting up the

claim of *abandonment* in a pleading if it is to be asserted in an action, has always been held and decided by the courts of Montana as above stated; and notwithstanding *abandonment* by Robert G. Ingersoll of his rights under said contract was *not set up* in any answer in said action which Harris as administrator attempted to prosecute in Montana, nor was anything of that nature or effect set up in any pleading therein; and notwithstanding the Supreme Court of Montana had ruled, held and decided that said alleged will of Andrew J. Davis *was set aside and superseded* by said decree of August 24, 1897, determining the contests thereof prosecuted by Robert G. Ingersoll, mentioned in said promise of Coram and Root to pay for his said services, and had also held and declared that the decree rendered by said District Court of Montana, determining said will contests, was valid and "itself became the basis of administration and controlling as to the devolution of the property," of said estate (27 *Mont.* 497); and notwithstanding it was shown in said complaint of Harris as administrator that by the decree determining said will contests prosecuted by Colonel Ingersoll, his said clients got absolute right and title to 515½-1100 of all property of said estate of Andrew, both real and personal in kind; and notwithstanding it was alleged in said complaint of Harris as administrator, in the manner and form prescribed by section 746 of the Code of Civil Procedure of Montana, that Colonel Ingersoll duly performed all services mentioned, implied or contemplated, in said agreement to pay therefor (R. page 791), and "that by reason and in consideration of the prosecution of said contests and the force, effect and stress thereof" the proponents of said will, "were constrained to yield consent, and did yield consent to" said stipulations providing for the entry of a decree determining said will contests and awarding to the clients of Colonel Ingersoll larger shares of said estate than they could claim as heirs-at-law, of said Andrew, and also alleged that, "by reason of said prosecution of said contests, said will was defeated and in effect annulled in so far as it could affect the rights, interests or

claims of said persons, for whom Robert G. Ingersoll performed said services, in said estate as heirs-at-law of Andrew" (R. page 833); and notwithstanding all said allegations as well as all other vital allegations of said complaint of Harris as administrator, were put in issue by denials in the answer thereto made and filed by said Coram and Root (R. pages 839–840 *and answer to amendments*, page 854); and notwithstanding the light of evidence had been shut out by the rulings of said trial court excluding all evidence and dismissing said complaint—the Supreme Court of Montana, in passing upon the question whether it would reverse or set aside said judgment of nonsuit as prayed in the appeal of said Harris as administrator, in its opinion made certain observations touching the subject of said action, wherein there was inadvertently *assumed* as the basis of its conclusion certain *issuable facts which were not before that court upon the record for its consideration at all.*

In its opinion, after mentioning the claim set up in the complaint of said Harris as administrator in Montana, and the ruling of the lower court refusing to permit any evidence whatever to be introduced and ordering nonsuit of that action, the Supreme Court of Montana says: "Counsel for defendants *contended*," that because a successful termination of said will contests was reached "by means of a compromise of the litigation in the negotiation of which Mr. Ingersoll took part" (although defendants had expressly denied in their answer in said action that he took any part therein, and all evidence had been excluded), "instead of by means of a contest which Mr. Ingersoll did not conduct to a successful termination, the contract for the contingent fee was abandoned by the parties, and that a recovery against the defendants, if any may be had at all, must be upon a *quantum meruit* for services other than those provided for by the contract." And after reciting the *contentions of defendants*, the Montana Supreme Court further says in its opinion: "We agree with the *contention* of defendants. An attorney as such has no authority to compromise a controversy of his clients," and that "if a

compromise of the controversy be made it must be made under special authority delegated for that purpose, otherwise in the absence of a ratification by the client" such compromise would be void. "Mr. Ingersoll could not therefore under the contract assume the authority to make any compromise of the contest." That "additional authority was therefore necessary to this end, and when this was conferred by his clients and accepted by him, there was a mutual abandonment of the contract" (see R. *pages* 877, 878, *Harris* v. *Root*, 28 *Mont.* 167, 168).

In that *dicta* the Montana Supreme Court, being misled by *contention* of counsel for said defendants Coram and Root, *assumed* and attributed to Colonel Ingersoll, without pleading or proof, these *issuable* facts: (1) that he made a compromise of his clients' interests; (2) that he had no authority so to do; (3) that special authority to make a compromise of his clients' interests was conferred on him; (4) that such special authority was accepted; and (5) that Colonel Ingersoll *abandoned* all his rights to compensation for his labors in said will contests under the contract promising payment therefor.

On the assumption of those issuable facts the entire theory and conclusion announced by the Supreme Court of Montana, in said Harris case, is based; but no such facts were set up in any pleading in that case and all evidence was excluded. Nor did Colonel Ingersoll or either of his clients make any compromise whatever in respect to their rights and interests in said estate. Certain *other heirs* who joined in said stipulations providing for entry of decree determining said will contests (who had simply filed contests which lay dormant while Colonel Ingersoll was prosecuting the contests interposed in behalf of his clients) did make a compromise—that is, said *other heirs* made concession and relinquishment of a portion of their shares. And because those *other heirs made such concession and compromise*, the said stipulations providing for the entry of a decree determining all said will contests were *called compromise agreements*. But only as applicable to said *other heirs*

were they compromise agreements. *No compromise, concession or relinquishment* was made by Colonel Ingersoll or either of his clients of so much as a farthing of the shares of said estate to which they were entitled as heirs of Andrew. On the contrary Colonel Ingersoll demanded for his clients, and they got, through his prosecution of said contests and the decree determining the same, the full measure of their shares and a large portion in addition.

There was no allegation in the complaint of said Harris, or in any other pleading in that case, that "additional authority" to make compromise was "conferred by his clients" upon Colonel Ingersoll, or "accepted by him," or that he made any compromise of his clients' interests in said estate, or anything to that effect. The forcing of stipulations from the other parties through the prosecution of said contests was a great victory achieved by Colonel Ingersoll for his clients, and his clients in person joined in, signed and executed said stipulations as shown by the evidence where the presentation of evidence was permitted. But the introduction of evidence was not permitted in that case which Harris as administrator attempted to prosecute in Montana. In the face of the evidence where its exhibition was permitted, there was no attempt even to *contend* that "additional authority" to make a compromise "was conferred" upon Colonel Ingersoll "by his clients," or "accepted by him," or that he made any compromise for his clients, or *abandoned* his right to compensation under said contract with Coram and Root for services rendered in the prosecution of said will contests.

In its opinion in said Harris case the Supreme Court of Montana also says: "Counsel for defendants contended" that "this is the only construction of which the contract is susceptible" (R. page 877, *Harris* v. *Root*, 28 *Mont.* 167). But the facts asserted in that *contention* and *assumed* by the Supreme Court of Montana in expressing its opinion on the appeal of said Harris, *do not relate at all to the construction* of said contract of Coram and Root with Colonel Ingersoll. Those facts *assumed without pleading or proof*,

are *issuable facts* as to things which might or might not have been done in relation to the prosecution and determination of said contests, the truth or falsity of which *contentions* and *assumptions* could be shown only by evidence outside of the contract; and they have no relation to the construction of the contract.

In connection with, and as part of the theory of *assumed abandonment*, it was suggested in said opinion of the Supreme Court of Montana, "that a recovery against defendants, if any may be had at all, must be upon *quantum meruit* for services other than those provided for by the contract." If services were performed for Coram and Root by Colonel Ingersoll "*other than those provided for by the contract*," and a claim therefor were not barred by the statute of limitations, of course suit might be brought to recover therefor. But whether such a suit, for services "other than those provided for by the contract," if there were any, should be upon *quantum meruit*, or otherwise, would depend upon whether such *services*—"other than those *provided for by the contract*" —were employed, and fully, or only in part, performed.

But the suggestion "that a recovery against defendants, *if any may be had at all*, must be upon *quantum meruit* for services *other than those provided for by the contract*," if allowed to prevail, would deprive the legal representative of Colonel Ingersoll, *without due process of law*, of all compensation for his services rendered in the prosecution of said will contests, for there was no trial or opportunity of trial, of his rights under said contract, permitted. It would, moreover, deny all relief and all hope of relief, for no proof could be made of employment of Colonel Ingersoll by said defendants to render "*services other than those provided for by the contract*," or that Colonel Ingersoll performed other services of consequence. All services rendered by Colonel Ingersoll for said defendants, Coram and Root, known and susceptible of proof, are services rendered in the prosecution of said will contests under said contract. And he fully performed all services expressed or implied in said contract, and achieved a result not only fulfilling, but

over-reaching that mentioned therein as the event upon which payment of his stipulated compensation should be made. All which was shown by undisputed evidence, where the presentation of evidence was permitted, as well as by the admissions which defendants were obliged to make, where equity requires full and specific answers.

The contract with Colonel Ingersoll does not provide that the result therein mentioned must be accomplished by a verdict or in any specified manner. It could be accomplished under his contract by forcing from his adversaries through the prosecution of said contests, stipulations which as evidence authorized the entry of a decree defeating the will and awarding his clients their shares, as well as by any other method. The contract simply provides that for his services in prosecuting the contests Colonel Ingersoll should be paid the stipulated fee, "in case the will is defeated and our clients get their shares" (see "Exhibit B," R. page 45). The will was *broken* and *defeated* through the prosecution of said contests by Colonel Ingersoll, and the decree determining the same, and his clients got their shares.

Upon said *dicta* of issuable facts *assumed* by the Supreme Court of Montana, from mere *contention* outside of the record, without pleading or proof, it refused to reverse or set aside said order and judgment of nonsuit of said action which Harris as administrator attempted to prosecute.

But that case was not such as could be properly brought to the United States Supreme Court for review, by writ of error, because the determination of that case in Montana was merely a *nonsuit* and by the rule of law prescribed by statute, and decisions of the highest court of Montana, made in conformity with the law as defined by this Court, such a dismissal or nonsuit "does not prevent a new action for the same cause of action" (*Section* 1007, *Montana Code Civ. Proc.*). Moreover, according to the law as affirmed by this court in the case of *Wilkins* v. *Ellett*, 9 *Wall* 740, *also* 108 *U. S.* 256, *Wyman* v. *Halstead*, 109 *U. S.* 654, *Noonan* v. *Bradley*, 9 *Wall.* 405, and in many other decisions, said Harris as administrator appointed in Montana had no

title to said contract or chose in action, whereby Coram and Root promised to pay for said services rendered by Colonel Ingersoll. For which reasons said Harris as administrator appointed in Montana could not successfully maintain an action to recover said indebtedness; nor could he successfully prosecute a writ of error from this court, to the Supreme Court of Montana, to reverse its said decision on the ground that said Harris as such administrator was thereby deprived of his property without due process of law.

Prior to the commencement of this action in Massachusetts, all the property of said estate situate in Montana acquired for his clients by said labors of Colonel Ingersoll, had been distributed to them in accordance with the decree determining said will contests, and they had conveyed to a stranger all the interests in said real estate so acquired for them (*see admission, R. page* 109).

Third. Additional Material Facts Alleged in the Bill and Established by Admissions and Proofs in the Case at Bar, which were not Alleged in the Complaint of said Harris as Administrator in his Attempted Action in Montana:

There are additional material and important facts alleged in the bill and established by admissions and proofs in the case at bar which silence all objections and contentions urged against said complaint of Harris as administrator in Montana, so that no such contention is even attempted in the case at bar.

In the first place it should be observed that all facts required by law to vest in complainant, Eva A. Ingersoll, in her representative capacity, title to, and right of action upon, said chose in action, are shown in the case at bar, as set forth above with citations to the record; so there can be no dispute raised as to the representative character of this complainant. Whereas the complaint of Harris as administrator in Montana shows *no facts* which under the law vested in him, title to said chose in action; but he did allege facts which could be construed as showing the contrary, as mentioned above with citations to the record.

In addition to showing complainant's title, there are many other material and important facts alleged in her bill and established by admissions and undisputed proofs, in the case at bar, which were not averred at all in the complaint of said Harris as administrator in Montana, among which are the following:

"That said Henry A. Root, Joseph A. Coram and their associates in said will contests agreed to, sanctioned, approved and acquiesced in each and all of said stipulations, arrangements and proceedings" whereby said will contests were determined in their favor, and whereby they "got their shares and largely more than their shares of said estate of Andrew J. Davis, deceased" (*see bill, record pages* 18, 19, and *admission* in answer *Ib.* 107). There was *no such averment in said complaint of Harris as administrator in Montana.*

It is further alleged in the bill in the case at bar, that: "There was no compromise, concession or relinquishment by either of said five heirs represented by Robert G. Ingersoll in the prosecution of said contests, of any part or item of the shares or interests to which they, or either of them, were entitled of, in and to said estate as heirs-at-law of Andrew J. Davis, deceased" (*see bill, R. page* 18). That averment is proved by abundance of evidence and admissions by defendants, in the case at bar, cited above. There was *no such averment in said complaint of Harris which was nonsuited in Montana.*

All the allegations in paragraph 22 of the bill in the case at bar, setting forth acknowledgments of said indebtedness under said contract, and promises and pledges to pay the same, made by said Coram and Root, since the decease of Colonel Ingersoll, are also new and additional averments not appearing at all in said complaint of Harris as administrator in Montana; among which are the following:

That said Henry A. Root in a letter dated September 2, 1899, stated to complainant: "'Now let me say that Davis estate matters are reaching a conclusion that will bring substantial results to you' meaning thereby to assure your

orator," etc. (see bill, R. page 26, and "Exhibit XLIII" *Ib.* 565).

That in another letter dated September 26, 1899, replying to a letter sent by complainant's representative to said Henry A. Root on the subject of said indebtedness, he said: "I have yours of the 24th. You may be sure I shall do the very best I can for Mrs. Ingersoll as regards the Davis estate" (see bill, R. page 27 and "Exhibit XXXVII," *Ib.* 560).

That by letter dated March 3, 1900, written and sent to Henry A. Root in regard to said indebtedness, complainant's agent stated to him as follows:

"As you know I am very anxious that Mrs. Ingersoll should realize out of the Davis will case; and I am very sorry not to have seen you when you were in New York, so that I might have talked the matter over with you fully. As I understand Colonel Ingersoll was to have all his expenses paid and to have $100,000 as his fee" (see bill, R. page 27 and "Exhibit XXXVIII" *Ib.* 561).

That in reply thereto, by letter dated May 7, 1900, said Henry A. Root stated in part as follows:

"Since seeing you I have received your letter of March 3, which was sent to me in Montana, and I hasten to reply to it. With you I am also desirous that Mrs. Ingersoll should realize out of the Davis estate as much as possible, and to that end I shall myself bend every effort in my power, regardless of any personal interests that I might sacrifice by so doing. I want to wait until I see Mr. Coram in Boston where I am going the first of next week, before writing the letter to Mrs. Ingersoll which you suggested I should do, and which will cover the whole situation" (see bill, R. page 27, and "Exhibit XXXIX" *Ib.* 562).

That in another letter dated May 21, 1900, referring to said contract whereby said Coram and Root promised to pay for said services of Colonel Ingersoll, said Henry A. Root stated to complainant that: "the agreement with Colonel Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis estate for his services." And in the same letter, referring to the money and

bonds of said estate in Boston, Massachusetts, he said to complainant: "I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can" (see bill, R. page 27, and letter *Ib.* 156).

That again said Henry A. Root stated in a letter signed and sent by him to the representative of complainant, in regard to said indebtedness, as follows:

"Now what I thought I said was this: That I would do everything I could at the time of an actual distribution of the Boston money for Mrs. Ingersoll, and all I can do is to say to you in the first place that she may reply upon it that that money, if distributed to our people, will not be distributed until she has had an opportunity to have a hearing upon the claim of the Colonel for services rendered, and I will at that hearing do all that I can do, which will tend to increase the amount to be paid her for such services" (see bill, R. page 28, and "Exhibit XLI" *Ib.* 564).

It is also shown in the case at bar by averments of the bill and undisputed proofs that said Coram and Root at divers other times, since the decease of Colonel Ingersoll, in interviews with representatives of complainant, acknowledged and promised to pay their said indebtedness owing and due her on said contract; none of which were alleged in the complaint of said Harris as administrator in Montana (see bill, R. pages 25, 26; and proofs *Ib.* 210–213, 282, 283, 284, 286, 287).

Neither did said complaint of Harris in Montana contain any such or similar allegations as those set forth in paragraph 24 of complainant's bill in the case at bar (R. pages 31–34). Nor did the complaint of Harris in said Montana Court set up or claim any equitable lien at all.

Fourth. Final Hearing of the Case and Entry of Decree by said United States Circuit Court:

The cause was submitted to said Circuit Court on the part of complainant, upon the pleadings and proofs shown by the record. The defendants in attempt to support said

alleged estoppel, claimed to have been created by the commencement and nonsuit of said Harris case, presented in the record a certified transcript of the pleadings in, and order of nonsuit of that action, together with a certified copy of said opinion of the Montana Supreme Court (Exhibits 5 and 6, R. pages 784 to 881). But said opinion is no part of the judgment roll in said action. The statute of Montana prescribes what shall constitute the judgment roll, and does not include any opinion (Sec. 1196, Montana Code Civil Proc.). Objection was made by complainant to said copies of Montana records on the ground that the same are "irrelevant, immaterial, and incompetent to prove or tend to prove any estoppel or any other defense," set up in the case at bar; and on the further ground that said opinion of the Montana Supreme Court "is no part of any judgment roll," in said action (R. 759).

Thereupon the cause was submitted to said Circuit Court for final decision, and after due consideration, the Court, on the 3d of May, 1905, rendered its decree foreclosing said lien in favor of complainant upon the interests of Coram and Root in said money and bonds situate in Boston, Mass.; and providing for the subjection thereof to the payment of said indebtedness in the sum of ninety-five thousand dollars, with simple interest thereon at the rate of 6 per cent. per annum from the date when over three hundred thousand dollars was distributed from said estate and delivered to Colonel Ingersoll's clients pursuant to the decree determining said will contests; such rate of interest being considerably lower than that allowed by law, where said contract was made and performed (see decree, R. page 944 *et seq.*, also the law prescribing rate of interest, *Ib.* 397).

Fifth. Appeal from said Circuit Court to the United States Circuit Court of Appeals, for the First Circuit, to Review said Decree, and Proceedings Therein:

Appeal as aforesaid was prosecuted by defendants Coram, Root and Palmer, respondents herein; and was heard in December, 1905, by the Honorable Judges, Colt, Lowell

and Aldrich, of said Circuit Court of Appeals, and thereafter in October, 1906, by concurrence of two of said judges, it was ordered and decreed by said Court of Appeals that: "The decree of the Circuit Court is reversed and the case remanded to that Court with directions to dismiss the bill, with costs; and the appellants recover costs of appeal" (see Order, R. 1001). That reversal is predicated upon the sole proposition that the nonsuit of said Harris case in Montana is a bar to this action. The majority of said Circuit Court of Appeals held as stated at the close of their opinion: "That the matter herein litigated was adjudicated in Montana, inasmuch as the cause of action in the two proceedings was the same, the Montana judgment was rendered on the merits, and was so far between privies that the administrator in Massachusetts is bound by the judgment against the administrator in Montana" (R. 980).

In respect to said alleged estoppel, Circuit Judge Putnam, who tried the cause, said in his opinion:

"But in no aspect can it operate as an estoppel. The law is settled beyond question that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction; so that no judgment by, or against Harris as ancillary administrator in Montana could avail for or against an ancillary administrator appointed by the Courts of Massachusetts, bringing a suit in that State or in this District, although the cause of action was identically the same. This rule is so thoroughly established that we need not dwell upon it, only to say that it has been fully recognized and enforced by the Supreme Court, in *Aspden* v. *Nixon*, 4 *How.* 467, 497; *Stacy* v. *Thresher*, 6 *How.* 44, 58 *and sequence*; *Johnson* v. *Powers*, 139 *U. S.* 156, 159; *Carpenter* v. *Strange*, 141 *U. S.* 87, 104" (*R. pages* 86–87. *Ingersoll* v. *Coram*, 127 *Fed. R.* 432).

Likewise Judge Aldrich of said Circuit Court of Appeals, dissenting from the ruling of his associates, held with Judge Putnam, that this action is not barred by reason of the nonsuit of said action which Harris as administrator attempted to prosecute in Montana; and that complainant in the case

at bar having established her cause in every particular is entitled to recover. He also insisted in his dissenting opinion that to give said order or judgment of nonsuit, the effect given thereto by the decision of the majority of said Circuit Court of Appeals, *deprives* the legal representative of Colonel Ingersoll *of property without due process of law* (R. 991 *et seq.*).

ASSIGNMENT OF ERRORS.

I.

The ruling and decision of said Circuit Court of Appeals that said order or judgment of nonsuit of said action which Harris as administrator attempted to prosecute in Montana is a bar to this suit of Eva A. Ingersoll as said administratrix appointed in New York and Massachusetts, brought in said United States Circuit Court, is manifestly erroneous:

1. Because the *rule of decision* established by *statute* and *decisions* of the highest Court of Montana, in conformity with the law as defined by the United States Supreme Court, and other courts, everywhere in this country, is that such an order or judgment of nonsuit or dismissal does not create an estoppel or bar to another action brought to enforce the same right, or, as declared in the Montana statute, "does not prevent a new action for the same cause of action;" which rule of decision should have been applied, in the case at bar, by said Circuit Court of Appeals.

2. The said ruling and decision of said Circuit Court of Appeals is erroneous, because Harris as said administrator appointed in Montana never had any title to said chose in action, and being without title thereto, he could not set up the same cause of action in Montana, upon which complainant, Eva A. Ingersoll, as administratrix of the estate of Robert G. Ingersoll, deceased, appointed and invested with title to, and put in possession of, said chose in action by the Surrogate's Court of New York, at the domicile of said decedent where he died having in his possession said chose in action, brought her suit in said United

States Circuit Court; by reason of which facts and the law, said Montana Court never had jurisdiction of the subject matter of the action upon which this suit in said United States Circuit Court is founded.

In this connection said Circuit Court of Appeals erred in assuming that Harris as said administrator appointed in Montana, became invested with title to said chose in action simply by being substituted, by order of said District Court of Montana, as plaintiff in said action commenced therein in the name of Eva A. Ingersoll as said administratrix appointed in the State of New York, whom said District Court had refused to hear, and whose attempted acts, in Montana, said District Court had refused to recognize, and ordered her name stricken from said action. That assumption and ruling of said Circuit Court of Appeals is manifestly erroneous and unwarranted in law for these reasons:

(*a*) That said Eva A. Ingersoll having been appointed and invested with title to said chose in action as administratrix of the estate of Robert G. Ingersoll, deceased, by the Surrogate's Court at the domicile of said decedent, in New York, and never having been appointed as such administratrix in Montana, could not legally say or do anything in her said representative capacity in Montana, hence she could not, by any act in Montana, have transferred the title to said chose in action held by her as such administratrix appointed in New York, over to said Harris as administrator appointed in Montana, even if said Eva A. Ingersoll had been in Montana, but she was never there since the decease of Colonel Ingersoll.

(*b*) An administrator, even when acting within the jurisdiction where appointed, cannot empower an attorney in fact or substitute to exercise his or her powers as such administrator—not even within that jurisdiction; moreover an administrator cannot act at all in such representative capacity outside of the State where appointed, though personally present, unless the law of the foreign state especially permits it, but the law of Montana forbade it in the case of Eva A. Ingersoll as said administratrix appointed in

New York; so that she could do nothing whatever in her representative character in Montana, even if she had been there; nor was the motion of attorneys for Eva A. Ingersoll in said Montana Court, that said Harris be substituted as plaintiff in said attempted action in Montana, the act of Eva A. Ingersoll, as said administratrix appointed in New York, because the law of Montana and its Court, on objection of defendants, forbade her saying or doing anything in her representative capacity in Montana.

(c) Furthermore, the mere fact of substitution of one person for another as a party to an action, does not, and cannot, devest title to property held by one of them and invest the title thereto in the other; much less can it have any such operation with respect to the title to property held by an administratrix in a State foreign to that wherein such motion and substitution were made and wherein the Court had refused to recognize, hear, or permit said foreign administratrix to do any act in her representative capacity.

3. The said ruling and decision of said Circuit Court of Appeals that said order or judgment of nonsuit of the action which Harris as administrator attempted to prosecute in Montana, is a bar to this action of Eva A. Ingersoll as said administratrix appointed in New York, and Massachusetts, brought in said United States Circuit Court, is erroneous: because there is no identity of party plaintiff in said actions; nor is said Eva A. Ingersoll as such administratrix appointed and invested with title to said chose in action, by said Surrogate's Court in New York, at the domicile of Robert G. Ingersoll, where he died having in his possession said chose in action, or as such administratrix appointed in Massachusetts, complainant in the case at bar, in *privity* with said Harris as said administrator appointed in the State of Montana, who as plaintiff attempted to prosecute said action in Montana. "They have no privity with each other in law or in estate" (6 How. 59).

4. The said ruling and decision of the Circuit Court of Appeals is erroneous on the further ground that the effect thereby given to the nonsuit of said Harris case, deprives

the legal representative of Robert G. Ingersoll of property without due process of law: because the rights set up and claimed under said contract and the facts on which said rights depend, alleged in the complaint in said Montana action, were in issue by denials in the answer of defendants, and all affirmative matter of defense set up in their answer to defeat those rights were put in issue by reply, but no trial was permitted and no evidence was heard, although plaintiff sought and offered to introduce evidence to establish the complaint; so that if said order or judgment of nonsuit be given the effect of a judgment on the merits determining said property rights, the result is, that all facts in issue necessary to support a judgment on the merits depriving the plaintiff of said property were assumed in favor of defendants without trial or proof, and against plaintiff without trial or proof and while denying plaintiff opportunity to prove the contrary; moreover, other facts which were not pleaded at all, *such as the issuable fact of abandonment*, were also assumed against plaintiff without pleading, proof or trial, and while denying plaintiff opportunity to show the contrary, in the ordinary course prescribed by law; all which is contrary to due process of law, and the effect thereof, if said judgment of nonsuit be given the force of a judgment on the merits, is to deprive the legal representative of Colonel Ingersoll of said property in question without due process of law, and of the equal protection of the law. Furthermore, said Montana Court had no jurisdiction to enter a judgment on the merits affecting the rights of complainant in the case at bar, because said Harris as said administrator had no title to said chose in action.

II.

Respondents claim that there are other grounds for denying complainant relief, "even if the Montana judgment was not a bar."

In opposition to the petition for writ of certiorari to review said decision of the Circuit Court of Appeals, re-

spondents, apparently conscious that said decision cannot be maintained on the ground upon which it is rested, undertook to present *other points* not noticed by said Circuit Court of Appeals, on which they contend that complainant should be denied all relief, "even if the Montana judgment was not a bar." We presume like course will be pursued on final hearing of this case. Therefore, after discussing the errors assigned above, we shall examine the other points raised by respondents and cite such showing of the record and authorities, as we believe entirely confutes them.

Those other points are asserted in respondents' brief in opposition to complainant's petition for certiorari as follows:

1. That complainant did not establish the existence of a lien on any interests of defendants in the property acquired for said five heirs and Coram through the prosecution of said will contests.

2. That complainant did not establish the existence of any debt due from defendants or any of them.

3. That complainant failed to show that there was any property in Massachusetts which could be subjected to the payment of said indebtedness.

ARGUMENT AND AUTHORITIES.

I.

The first inquiry is whether the law sanctions or warrants the ruling of the majority of the Circuit Court of Appeals that the nonsuit or dismissal of said action which Harris as administrator attempted to prosecute in Montana, is a judgment on the merits, or an adjudication of the rights of Eva A. Ingersoll as administratrix of the estate of Robert G. Ingersoll, deceased, appointed in New York, and in Massachusetts, set up in her bill in said United States Circuit Court.

1. Herein we purpose to first inquire whether the commencement and nonsuit or dismissal of an action in Montana, by such proceedings as were had in said Harris case—even if the plaintiff had title to, and right of action upon, the claim which he attempted to prosecute—would, under the rules of law governing the effect of such proceeding, create or constitute a bar to another action for the same cause? In other words—if a suit were brought in said District Court of Montana, even by a party entitled to sue on the claim set up, and defendant by answer put in issue the material and vital facts alleged in the complaint to show his liability on the claim which plaintiff attempted to prosecute, and plaintiff by replication denied every affirmative allegation of new matter of defense asserted in the answer, and thereafter when the case was called for trial upon such pleadings, defendant objected to the introduction of any evidence on the ground that the complaint was deficient in statement of facts, and the "Court sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint, and then and there nonsuited said plaintiff and dismissed said complaint," as shown by the record and admitted in defendants' answer in case at bar (R. 114)—are the rules

of law so made and provided that such proceeding constitutes an adjudication of the rights or cause attempted to be set up, and forever bars the assertion of those rights by a complaint that unquestionably states a good cause of action, brought by the proper plaintiff, in a court of competent jurisdiction?

There can be no dispute as to what proceedings were had in said Harris case in Montana. The record thereof introduced in the case at bar shows the complaint of said Harris as administrator, the answer of defendants Coram, Root and others, raising issue upon all material and vital facts alleged in said complaint, and the reply denying every averment of new matter set up in the answer, as particularly pointed out under the *second* head of the foregoing statement of the case. The order of said District Court of Montana, also in the record, shows exactly as alleged in the bill and *admitted* by defendants' answer in the case at bar: that when said case of Harris as administrator came on to be heard in the Montana Court, and he attempted to introduce evidence in support of his complaint, said defendants, Coram and Root, by their attorneys, "made objection to the introduction of any evidence whatever in said cause," and the Court "sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint, *and then and there nonsuited said plaintiff and dismissed said complaint*" (*Quoting from defendants' Answer in case at bar, R.* 114). The record of that proceeding also shows that the ruling which sustained said objection and ordered said nonsuit, was one ruling and order expressed in a single sentence (R. 867).

The plain and indisputable fact appears that when said case of Harris as administrator was called for trial, the Montana Court refused to hear or consider any evidence on the issues raised by the pleadings therein, refused to inquire into, consider, or adjudicate, the merits of the claim alleged by Harris as administrator appointed in Montana, and "*then and there*" by the same ruling nonsuited said case.

The statutes of Montana regulating such proceedings

and the effect thereof, uses the terms "*dismissal*" and "*nonsuit*" synonymously, as the Court will observe when the statutes are examined *infra* (*Section* 1004, *Montana Code Civ. Proc.*).

On the other hand, the bill of complaint in the case at bar is brought by the legal representative of Colonel Ingersoll, whose title to, and right of action upon, said chose in action, cannot be controverted, and her bill of complaint unquestionably states a good cause of action. It has been sustained against attack by demurrer. And its averments show many additional material and important facts not alleged in said complaint of Harris as administrator brought in the Montana Court, as pointed out under the *third* head of the foregoing statement of the case—in view of which additional averments, none of the objections urged against said complaint of Harris, are even contended for as applicable to complainant's bill in the case at bar.

The rule of law declared by the courts everywhere in this country, is that an order or judgment of *nonsuit* is no bar to another action between the same parties to enforce the same right or cause which plaintiff attempted to set up and prosecute in the former action.

Homer v. *Brown*, 16 *How.* 354.
Manhattan Ins. Co. v. *Broughton*, 109 *U. S.* 121.
Gardner v. *Mich. Cent. R. Co.*, 150 *U. S.* 349.
McComb v. *Frink*, 149 *U. S.* 629.
Hughes v. *United States*, 4 *Wall.* 232.
Canal Co. v. *Gordan*, 73 *U. S.* 561.
Keller v. *Stolzenbach*, 20 *Fed. R.* 47.
Montana Statutes and Cases, infra.
Wilbur v. *Gilmore*, 21 *Pick.* 252.
Bridge v. *Sumner*, 1 *Pick.* 370.
Clapp v. *Thomas*, 5 *Allen* 158.
Borden v. *Thomas*, 99 *Mass.* 200.
Hubbard v. *Hooker*, 102 *Mass.* 202.
Fleming v. *Hadley*, 65 *Cal.* 492.
Gummer v. *Trustees, etc.*, 50 *Wis.* 247, 6 *N. W.* 885.
Note on nonsuit and cases, 49 *Am. St. R.* 831.
Freeman on Judgments, Sec. 264.

The provisions of the Montana Code of Civil Procedure, moreover, expressly denies to such an order or judgment of nonsuit or dismissal as that entered in said Harris case, the force or effect of an estoppel. The code provisions to which we refer, regulate the procedure in all civil actions at law or in equity in the State Courts, and were all in force in the year 1902 when said Harris complaint was brought and nonsuited. The Codes of Montana herein cited became the law on July 1, 1895 (*see Political Code, Sec.* 5182, *Civil Code, Sec.* 4690, *Code Civil Procedure, Sec.* 3450), and have ever since continued to be the law of that State.

Touching the subject of *nonsuit* or *dismissal*, the Montana Code of Civil Procedure in section 1004 of the chapter on "Judgments in General," provides that: "An action may be dismissed or a judgment of nonsuit entered in the following cases:" and proceeds in seven subdivisions thereof to provide for the *dismissal or nonsuit* of an action in the events therein mentioned. The fifth provides as follows:

"5. By the Court, upon motion of defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury."

Section 1005 of said chapter provides that such judgments of nonsuit or dismissal are not judgments on the merits. And section 1008 of the same chapter provides that, "upon the dismissal or disposition of an action," it is the duty of the Court to render "judgment for costs."

In said Harris case, it was apparent to the Court when sustaining defendants' objection to the introduction of any evidence, that by reason thereof, no evidence could be presented to the jury on the issues raised by the pleadings; and of course in that situation adjudication of the rights set up or attempted to be set up in the complaint and traversed by answer, could not be had. But it was a situation to which the statute providing for a nonsuit applied, and the Court "then and there" as part of the same ruling, "upon motion of counsel for defendants," nonsuited the case, as shown by the record and *admitted* by answer of defendants, in the case at bar (*see Answer, R.* 114, *and order of nonsuit Ib.* 867).

How could a court by such proceedings adjudicate the rights set up in the complaint and traversed by answer? Where the facts alleged in complaint as the foundation of plaintiff's demand, are put in issue by answer, the next requirement, if there is to be an adjudication, is a trial, and from the proofs find the facts at issue, according to the ordinary course of procedure prescribed by law. The Code of Montana provides for trial of the issues by the Court, with or without the aid of a jury, and the manner by which the facts shall be found and made part of the judgment roll (*Code Civ. Proc., Secs.* 1080–1118). A jury had been empaneled in said Harris case, but was discharged by the same order that nonsuited the case (R. 867). Where the issues raised by the pleadings are tried by the Court, the Montana Code requires the Court to make findings of fact and conclusions of law *in writing* (*Code Civ. Proc., Secs.* 1111, 1112); and incorporate the same in the judgment roll (*Code Civil Proc., Sec.* 1196). The vital facts alleged in the complaint of Harris in Montana were traversed by defendants' answer. But no trial was had, plaintiff was not permitted to introduce any evidence, and of course, no findings were made by Court or jury. There was simply an order of nonsuit as shown by the record of that proceeding, and confessed by defendants' answer in the case at bar (*Order of nonsuit*, R. 867, *Answer Ib.* 114).

The Montana Code of Civil Procedure in section 1005 of said chapter on "Judgments in General," provides that the *dismissal* or *nonsuit* of an action under the provisions of said section 1004, is *not* a judgment on the merits, and does not constitute any bar to another action for the same cause. And the same Code declares in section 3453 that its provisions must be "liberally construed" and administered "with a view to effect its objects and to promote justice." That section reads as follows:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions, and all proceedings under it, are to be liberally construed with a view to effect its objects and to promote justice."

Green v. *Montana Brew. Co.*, 32 *Mont.* 110.

It will be observed that the Montana statute provides for both *voluntary and involuntary nonsuits*, and that neither constitutes a judgment on the merits. The fifth subdivision of section 1004 quoted above applies directly to said Harris case. The plaintiff "failed to prove a sufficient case for the jury," and was nonsuited, "by the Court upon motion of defendants." That proceeding falls directly and entirely within the provisions of said fifth subdivision of section 1004 (*see Answer, R.* 114, *and order of nonsuit Ib.* 867).

Gummer v. *Trustees, etc.*, 50 *Wis.* 247, 6 *N. W.* 885.

But the Montana Code of Civil Procedure does not stop with the provisions of section 1004 and 1005 on the subject of the *dismissal* or *nonsuit* of civil actions, or the effect thereof. There may be dismissal of an action under various other circumstances not mentioned in section 1004. For instance, a demurrer may be sustained and the complaint dismissed on the ruling that it does not state facts sufficient to constitute a cause of action; and thereafter another action may be brought to enforce the same right by a complainant which unquestionably states a good cause of action. In such case it seems plain that the good and sufficient cause of action set up in the second complaint, although it asserts the same right, claim or demand, was not adjudicated on the merits by a ruling on demurrer in the former case, simply holding that the complaint then before the Court did not state facts sufficient to constitute a cause of action. In such case, should the former ruling and dismissal of the complaint because it is held defective be construed or held an adjudication on the merits, or a bar to a subsequent action asserting the same cause or claim, by a complaint which is, without doubt, good and sufficient?

The United States Supreme Court in opinion delivered by Mr. Justice Story, in *Gilman* v. *Rives*, 10 *Pet.* 301, held that: "A judgment that a declaration is had in substance (which alone and not matter of form is the ground of a general demurrer) can never be pleaded as a bar to a good

declaration for the same cause of action. The judgment is in no just sense a judgment on the merits."

That ruling has been followed in a great number of decisions in the Federal and State Courts, without the aid of statute, as will be seen by reference to the notes thereto by Mr. Rose, Vol. 3, p. 572.

But in view of certain provisions of Montana Code of Civil Procedure, *as formerly enacted* in the "Compiled statutes of 1887," it was insisted that all such dismissals or nonsuits, made for reasons not specifically mentioned in the statute on that subject as then existing, were, by force of the terms of the statute itself, judgments on the merits and barred another action for the same cause. That contention was overruled in the case of *Kleindschmidt* v. *Binzel*, decided in 1893, reported in 14 Mont. 31, and 43 Am. St. Rep. 606, *approved* in 18 Mont. R. pages 42 and 400, and again in 34 Mont. R. 88. The statutes upon which that contention was based, as then existing provide as follows:

"Sec. 242. An action may be dismissed or a judgment of nonsuit entered in the following cases:" There follows five subdivisions of that section, as then enacted, providing for "dismissal" or "judgment of nonsuit" in certain events. And following them section 243 of the same Code of 1887 provided as follows:

"Sec. 243. In every case other than those mentioned in the last section, the judgments shall be rendered upon the merits."

Section 244 of the same Code provides that upon the dismissal of an action, it shall be the duty of the Court to enter "judgment for costs" (Montana "*Compiled Statutes*" of 1887, pages 118, 119).

The case of *Kleindschmidt* v. *Binzel*, *supra*, combined both legal and equitable features. It was commenced as an ejectment action; but defendants set up an equitable defense and prayed equitable relief, as permitted by the Montana Code. There had been a former action wherein the same equitable rights were set up in the complaint and similar relief prayed. Demurrer to the former complaint on the ground, among others, that it did not state

facts sufficient to constitute a cause of action, was sustained, and leave given to amend the complaint, but no amendment was made. Thereafter as the record shows: "In this action plaintiff abiding his complaint, judgment is rendered in favor of defendants." It appeared that judgment was rendered in favor of defendants for costs, and the case went no further (14 Mont. 39). That judgment was pleaded in bar of the assertion of the same equitable rights in the subsequent action of *Kleindschmidt* v. *Binzel, supra.* It was plain, and was conceded, that said former judgment was not within any provision of either of the five subdivisions of section 242 of the statute relating to "*nonsuit*" or "*dismissal*" of an action as it then existed. Hence the insistence that, by force of section 243 of the same Code quoted above, said judgment must be on the merits.

In that case the Supreme Court of Montana deciding as to the effect of a judgment on demurrer said: The authorities support the proposition urged by respondent, that if a cause of action is submitted on the merits by demurrer admitting the facts alleged, "and upon due weighing of the law and the facts, those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand, those facts thereby pass under the rule of *things adjudicated*"—citing *Gould* v. *Evansville, etc., R.R. Co.,* 91 *U. S.* 526, and some other cases. But immediately following that observation the Court further said: "But this rule should always be stated and applied with due regard to some modifying conditions, which it is not permitted to violate. Thus when the pleader has submitted to the ruling of the Court on demurrer, against the sufficiency of the cause of action, or defense, as stated, that ruling would not bar him or those in privity with him from again asserting the same facts accompanied by additional allegations which complete the statement of a good cause of action or defense (*Gould* v. *Evansville, etc., R.R. Co.,* 91 *U. S.* 520)." (14 Mont. 53.) The Montana Court there points to the exception to the rule stated in *Gould* v. *Evansville, etc., R.R. Co., supra,* as follows:

"But it is equally well settled that if the plaintiff fails on demurrer in the first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration, were not heard and decided in the first action" (91 U. S. 526, cited in 14 Mont. 53).

Then the Montana opinion, after pointing to other exceptions to the rule, quotes the law as laid down in *Packet Co.* v. *Sickles*, 5 *Wall.* 592, that: "when the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive, *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined," or "where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issues controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." And quoted further from *Russel* v. *Place*, 94 *U. S.* 608, the law as there stated, that to give a judgment the operation of estoppel, "it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence," etc. (14 Mont. 55, 56). And in the same opinion the Montana Supreme

Court quotes from the opinion of United States Supreme Court delivered in *Hughes* v. *United States*, 4 *Wall.* 232, as follows:

"If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment will prove no bar to another suit" (14 Mont. 54).

By reference to the latter part of that opinion in *Kleindschmidt* v. *Binzel* (14 Mont. 60, 61), it will be seen that counsel insisted that because the statute of Montana in said section 243 provides that: "In every case other than those mentioned in the last section, the judgments shall be rendered upon the merits;" and because "the last section" did not provide for cases where judgment was entered on sustaining a demurrer, therefore by force of the statute, all judgments, except those specially mentioned in the five subdivisions of said section 242, as the statute then stood, are judgments on the merits and estoppels. The Court considered that contention, and expressly held that said section 243 *did not apply to an order or judgment rendered on demurrer.*

The Montana Court also held in that case, that the ruling in a Massachusetts case in point, cited and urged as authority for the contention of respondent, was not applicable to define the effect of rulings, orders, or judgments made under the Montana Code—although the Massachusetts decisions are held in great respect and frequently cited by the Montana Court. Moreover the Massachusetts cases on the subject of *res judicata* do not support the contention made by respondent, in *Kleindschmidt* v. *Binzel*, *supra*, or in the case at bar, as clearly shown by Mr. Justice Brewer in *Smith* v. *Auld*, 31 Kan. 262; 1 Pac. R. 626, cited in 14 Mont. 60, 61; and in the review of cases on the subject in *Oakland* v. *Oakland*, 118 Cal. 217 *et seq.*

The judgment set up as an alleged bar in the case of *Kleindschmidt* v. *Binzel*, *supra*, was not an affirmative judgment determining rights at all; the Court, by its ruling

and judgment in the former case, had simply declined to adjudicate the rights which plaintiff attempted to set up, as it did in said Harris case. The reason given for deciding the merits of a case is one thing and the reason stated for declining to adjudicate the case at all, is quite a different thing, as remarked by Mr. Justice Brewer in *Smith* v. *Auld, supra.* The reason for not adjudicating a case or rendering any affirmative judgment determining the rights which plaintiff attempted to set up, may be, and frequently is, expressed by an order sustaining a demurrer that the complaint does not state facts sufficient to constitute a cause of action.

So as a result of the consideration of the case of *Kleindschmidt* v. *Binzel, supra*, the Montana Supreme Court refused to allow the former judgment on demurrer, the operation of a judgment on the merits or an estoppel.

Soon after the decision of that case wherein it was insisted, although without success in that particular instance, that the Court was obliged by provisions of the Montana Code, as then existing, to hold that all such judgments on demurrer, and other dismissals or nonsuits, not falling within the terms of the statute on that subject, were judgments on the merits, the legislature of Montana—manifestly to set at rest those disputed questions, and to deny to all such judgments on demurrer, and nonsuits or dismissals without demurrer, like that in said Harris case set up against complainant here, the force or effect of a judgment on the merits, or a bar to another action for the same cause—inserted in said chapter on "Judgments in General," a new provision as follows:

"Sec. 1007. A final judgment dismissing the complaint either before or after a trial does not prevent a new action for the same cause of action unless it expressly declares or it appears by the judgment roll, that it is rendered upon the merits" (*Sec. 1007, Montana Code Civ. Proc.*).

The Code of California contains no such provision as that just quoted, although the Montana Codes are to a great extent borrowed from California. But without the aid of

such statutory provision, the Supreme Court of California denies to such dismissals as that in said Harris case the force or effect of *res judicata*, as appears by cases directly in point, hereinafter cited.

Nor was there any such, or similar, provision as last above quoted from the Montana Code, in the *Nevada statute* mentioned in the case of *United States* v. *Parker*, 120 *U. S.* 89, relied upon in the majority opinion of the Circuit Court of Appeals, in the case at bar (R. 984). The Nevada statute there mentioned is like the former statute of Montana prior to the insertion of said section 1007, *supra*, therein. But the Circuit Court of Appeals, in considering the case at bar, overlooked the important additional provision contained in section 1007, recently inserted in the Montana Code bearing upon the subject of "*nonsuit or dismissal*" of civil actions; and fell into error in assuming and saying in the majority opinion that the Montana statute *is similar* to that of Nevada mentioned in *United States* v. *Parker*, *supra*. That case was not cited in any brief or argument of counsel before the Circuit Court of Appeals, in the case at bar; so that counsel for appellee had no opportunity to point out and emphasize the difference in the statutory provisions to be applied to the case at bar, from those mentioned in 120 U. S. 89. However, the Montana statutes on the subject under consideration, as existing when said Harris case was brought and nonsuited, were presented and urged upon the attention of said Circuit Court of Appeals.

But there are other important differences in the two cases last mentioned. The judgment set up as a bar and considered in said case from Nevada was rendered *upon the evidence presented at the trial in* the Federal Circuit Court for Nevada, which *evidence* was "*passed upon judicially by the Court*" (120 U. S. 97). Whereas in said Harris case the essential facts upon which depended the claim therein asserted, *were in issue* by denials in the answer; and no evidence whatever was heard, but the case was nonsuited without trial. We submit, moreover, that the opinion of

this Court in said Nevada case reported in 120 U. S. 89, *defining nonsuit* and its effect, when properly considered in connection with the existing provisions of the Montana statute and the facts shown by the record and admitted in the case at bar, is decisive authority to the effect that the nonsuit of said Harris case in Montana is no bar, either at common law or under the Montana Code, to the present action, even if it had been between the same parties or privies, which is not the case here.

Recently, since the submission of the case at bar to the Circuit Court of Appeals, the Montana Supreme Court had occasion to consider whether the ruling in said case of *United States* v. *Parker*, 120 U. S. 89, based upon the statute of Nevada, is applicable to a case in Montana Courts; and held that it was not, because of the radical difference in the statutory provisions governing the subject under consideration.

Glass v. *Basin & Bay St. M. Co.*, 34 *Mont.* 88.

In that case, a former judgment in an action between the same parties, founded upon the same alleged wrong, was set up as a bar to its prosecution. The former judgment was rendered on the pleadings, and affirmed on appeal, reported in 31 Montana 21, 77 Pac. 302. There was neither leave to amend, nor dismissal without prejudice, nor any other saving clause or provision. The former judgment rendered on the pleadings was affirmed absolutely when reviewed on appeal. In passing upon the question of *res judicata* based on the judgment rendered *on the pleadings* in the first action, the Supreme Court of Montana said:

"The argument of respondent is that section 1004 of the Code of Civil Procedure enumerates the cases in which an action may be dismissed or judgment of nonsuit entered; that section 1005 declares that in all other cases than those mentioned in section 1004 the judgment must be rendered on the merits; and that, since the judgment in controversy does not fall within the cases enumerated in section 1004, the presumption must be indulged that it was rendered on

the merits. Hence it is said that the judgment of the District Court, since it is aided by this presumption, must be deemed correct. In this contention we think respondent is in error. The rule contended for by respondent is recognized by the Supreme Court of the United States, in *United States* v. *Parker*, 120 *U. S.* 89. In that case the Court had under consideration the statutes of Nevada, which are nearly identical with section 1004 and 1005, *supra*; but that decision has no application to this case, for the reason that the Code of Nevada contains no such provision as section 1007. Furthermore, this Court in *Kleindschmidt* v. *Binzel*, 14 *Mont.* 31, 35 *Pac.* 460, 43 *Am. St. Rep.* 604, held under an identical statute (Comp. St. 1887, Div. I, Sec. 243) that a judgment rendered on demurrer did not estop the plaintiff in the action from asserting his claim in a subsequent action; nothing appearing upon the face of the pleadings to show that the judgment went to the merits, rather than to some defect of form." And in the same opinion referring further to the case of *Kleindschmidt* v. *Binzel*, *supra*, it is said: "That case declared the rule which controlled in this State until the adoption of the Code in 1895, which, besides bringing forward in sections 1004 and 1005 the provisions of the Compiled Statutes, *supra*, *added section* 1007. This provision construed with the others, means nothing more nor less than that judgments of dismissal, whether included in the enumeration in 1004 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment roll" (34 Mont. 94, 95—see section 1007 quoted above).

To aid the Federal Court in refreshing its judicial knowledge of the laws of Montana, on the subject under consideration, a statement thereof verified by the deposition of two former Chief Justices of the Supreme Court of Montana, was presented in the record. In that statement, reciting the statutes and pointing to the *decisions* of that State's highest Court, they say: it is "settled law" of Montana, "that such a dismissal or judgment of nonsuit"

as that entered in said Harris case, referring to it as an exhibit, "is not a bar to another action for the same cause of action" (*see R.* 394). It is true the Federal Court, taking judicial knowledge thereof, was at liberty to investigate and decide for itself what the law of the State is, on the subject under consideration. But it was thought a recital of the law with such care as would be observed to verify it by deposition, affording opportunity to question the correctness of such statement, if deemed erroneous in any respect, might be of some aid to the investigation of the Federal Courts. Now that statement of the law, as we have seen, has been further corroborated by the recent decision of the Montana Supreme Court last above cited, clearly showing that the majority of the Circuit Court of Appeals erred in their conclusion as to the effect of the nonsuit of said Harris case under the law of Montana.

Another section of the Montana Code of Civil Procedure adopted in 1895, *not in the former statutes of Montana*, provides, like the California Code, as follows:

"Sec. 3199. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged or which was actually and necessarily included therein or necessary thereto."

It certainly is not necessary to a judgment of dismissal, based on a ruling that no cause of action was stated, for the Court to adjudge that the plaintiff has no right in the subject matter.

Rosenthal v. *McMann*, 93 *Cal.* 509.

The rule of law is also declared to the same effect, without the aid of statute, by the Supreme Court of Massachusetts, in a recent decision.

Watts v. *Watts*, 160 *Mass.* 464.

The doctrine of *res judicata* defined in decisions of the Federal Supreme Court as applicable to cases *actually adjudicated on the merits*, may be somewhat broader (in the point of holding that all matters which could have been reasonably brought forward in the former suit will be deemed

to have been adjudicated), than allowed by the statutes and decisions of the highest Court of Montana, and the decisions of Massachusetts, California, and other State Courts, in respect to judgments of the State Courts. *Cromwell* v. *Sac. County*, 94 *U. S.* 351; *Stout* v. *Lye*, 103 *U. S.* 66; *The Johnson Co.* v. *Wharton*, 152 *U. S.* 256; *United States* v. *Cal. & Or. Land Co.*, 192 *U. S.* 355; *Gunter* v. *Atl. Coast L. R. Co.*, 200 *U. S.* 290; *Fayerweather* v. *Ritch*, 195 *U. S.* 276.

But the rule of law applied by the United States Supreme Court, to orders or judgments of *nonsuit*, denies to them, in much stronger cases than that of Harris in Montana, the force or effect of *res judicata*.

Homer v. *Brown*, 16 *How.* 354.
Manhattan L. Ins. Co. v. *Broughton*, 109 *U. S.* 121.
Gardner v. *Mich. Cent. R. Co.*, 150 *U. S.* 349.
McComb v. *Frink*, 149 *U. S.* 629.

In addition to that general rule of law, there are the *statutes* and *decisions* of the highest Court of Montana, set forth above, denying to the judgment of nonsuit or dismissal of said Harris case the force or effect of a judgment on the merits, or an estoppel.

The Supreme Court of California, without a statutory provision such as that contained in section 1007 of the Montana Code above quoted, denies to an order or judgment of nonsuit or dismissal like that in said Harris case, the force or effect of a judgment on the merits or an estoppel. The California decisions have always been relied on as authority in Montana because of the similarity of their Codes.

Wood v. *Raymond*, 42 *Cal.* 644.
Davenport v. *Turpin*, 43 *Cal.* 597.
Rosenthal v. *McMann*, 93 *Cal.* 505.
Oakland v. *Oakland*, 118 *Cal.* 160.
McCreary v. *Casey*, 45 *Cal.* 128.
Hardenburg v. *Bacon*, 33 *Cal.* 356.

In *Wood* v. *Raymond, supra*, the Court says: If the defendant "move for a nonsuit and the nonsuit be granted, he cannot proceed to have judgment on the merits; because by reason of the nonsuit, the plaintiff is virtually out of Court. A nonsuit granted on the motion of the defendant is equivalent in its operation on the action to a dismissal with the consent of the defendant" (42 Cal. 645). The statutes of California and of Montana provide that: "An action may be dismissed or a judgment of nonsuit entered:" "2. By either party upon the written consent of the other" (*Mont. Code Civ. Proc., Sec.* 1004).

So in *Davenport* v. *Turpin, supra*, the Court said: "It must be conceded that an action merely commenced and then dismissed without trial determines nothing, and concludes no one" (43 Cal. 602).

It is likewise affirmed in *Rosenthal* v. *McMann*, 93 *Cal.* 505, that: "A judgment that a party cannot be heard can only conclude as to that question. It could not determine the merits of the action which the Court refused to consider at all."

The recent case of *Oakland* v. *Oakland* (1897), 118 *Cal.* 160, presents a very strong decision in point, when considered in connection with the former alleged adjudication set up in bar. The former case is fully explained at pages 217 *et seq.*, of the report. The judgment of dismissal of the former action was not voluntary, but was enforced by ruling of the California Supreme Court that the complaint did not state facts sufficient to constitute a cause of action. It was like the Harris case in Montana, in that there was no demurrer to the complaint at all; the facts alleged in the complaint were in issue by answer. There is a review of authorities at pages 220 *et seq.*, and reference to statutes of California, on the subject of *res judicata*; but California has no such statute as that contained in section 1007 of the Montana Code, above quoted. It was held, in both the prevailing and dissenting opinion, that the judgment of dismissal of the former action was no bar to the subsequent suit upon the same cause. To the same effect are the other California cases cited above.

In the case of *South Fork Canal Co.* v. *Gordon*, 73 U. S. 561, brought in the Federal Circuit Court for California, to foreclose a lien, it was urged as one of the defenses that the case was barred by a judgment dismissing a former action brought in the State Court to enforce the same right. The United States Supreme Court overruled that defense, saying: "The dismissal of that suit can obviously have no effect upon the rights of the parties to this litigation" (73 U. S. 571). It does not appear in the report whether the dismissal of the former action was voluntary on the part of plaintiff, or was enforced by ruling of the State Court.

But respondents' counsel attempt to shift said Harris case into position where, according to their contention, disregarding the law as declared by statute, and the authorities, they claim the doctrine of *res judicata* may be applied thereto. To do this—notwithstanding there was no demurrer before the Montana Court in said Harris case, and defendants' answer was on file traversing the complaint, and notwithstanding defendants *admit* in their answer in case at bar, that the Montana Court "*nonsuited*" said Harris case—respondents' counsel assume that the *parol objection* to the introduction of any evidence in said Harris case, on the ground that the complaint did not state sufficient facts, *was a demurrer.* In their brief presented to the Circuit Court of Appeals, they claimed that such objection was a "*demurrer ore tenus.*" Here, in their brief in opposition to certiorari (page 25), they say: "a motion to exclude evidence" as in said Harris case, "has precisely the same effect in creating an adjudication as a formal demurrer." And on that erroneous premise—assumed without authority, in violence of principle, contrary to statutory provisions and to decisions directly in point—they proceed to construct an argument that a judgment on demurrer is a judgment on the merits.

The majority of the Circuit Court of Appeals, adopting that contention, in their opinion, said: "If we pass to more technical considerations we shall find that the defendants'

objection 'to the introduction of any and all testimony on behalf of plaintiff upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, was in effect a demurrer; and at common law, a judgment upon a demurrer is deemed to be a judgment upon the merits. *Gould* v. *Railroad*, 91 *U. S.* 526, 553; *Bissel* v. *Spring Valley Township*, 124 *U. S.* 225; *Green* v. *Sanborn*, 150 *Mass.* 454. This is also the law of Montana, provided the demurrer goes to the merits. *Kleindschmidt* v. *Binzel*, 14 *Mont.* 31, 52" (R. 984).

Therein the majority of the Circuit Court of Appeals was misled into error. The proposition that an oral objection to the introduction of any evidence offered in support of the averments of a complaint traversed by answer, amounts to a demurrer, cannot be maintained, either upon principle or authority, and is contrary to both. No such point was involved in any case cited in the majority opinion, or in any brief, in the case at bar. Nor is anything said in any of those cases on the subject of *making a demurrer out of an oral objection* interposed at the trial, to the introduction of any evidence offered to support the complaint, or other affirmative pleading, traversed by answer or reply.

In the case under consideration in *Gould* v. *Railroad*, cited in the above extract from the majority opinion, a demurrer had been regularly interposed; and the case was submitted to the court for decision on the facts admitted by such demurrer. There was no question in that case about making a demurrer out of an *oral* objection to the admission of evidence offered to prove facts put in issue by an answer on file.

So in the case of *Bissel* v. *Spring Valley Township*, cited in the majority opinion. Some of the earlier pleadings in the former case which resulted in the judgment there set up in bar, were withdrawn and the pleadings revised in order to bring the conceded facts alleged in defense directly to the consideration of the Court, by formal demurrer regularly interposed admitting those facts. It was *stipulated* that the case should be thus submitted. Nothing

is mentioned in that case about making a demurrer out of an oral objection to the introduction of any evidence offered to prove facts alleged in the complaint and traversed by answer.

In *Green* v. *Sanborn, supra*, cited in the majority opinion, there was no demurrer, or question about a demurrer involved, at all. In the former case, there under consideration, an offset was set up and tried on the evidence, and the party asserting it had opportunity to introduce all admissible evidence he had in support of his offset. Some of the evidence offered was ruled out as incompetent; and the result of the adjudication was that plaintiff defeated the alleged offset and got judgment for his claim.

Nor in the case of *Kleindschmidt* v. *Binzel*, 14 *Mont.* 31, cited in the majority opinion, was there any question, or anything said, about making a demurrer out of a parol objection to the introduction of any evidence offered to support a complaint traversed by answer. The demurrer in the former case there under consideration was a formal written demurrer regularly filed according to the practice under the Montana Code.

There is no such thing as a demurrer *ore tenus*, to a pleading already traversed by answer or reply, known to the common law, or code pleading. At common law, while in its formative state before written pleadings came into use, it is said, all pleadings were oral. But, as shown by the authorities, that system of pleading did not sanction or tolerate such a thing as a demurrer *admitting* the facts alleged in an affirmative pleading, and an answer *traversing* the same facts, all in the case at the same time. Nor was there any such thing known at common law as a demurrer to a declaration, made by way of an objection to the introduction of any evidence offered at the trial to support its averments, traversed by answer. The authorities on common law pleading and practice reveal no such inconsistencies. 1 *Chitty on Pl.*, 16*th Am. Ed.* 693-702; 1 *Steph. on Pl., Tyler Ed.*, 82; *Co. Litt.* (*Butl. & Harg.*) 72*a*; 1 *Tidd's Pr.* 694.

The *demurrer to evidence*, in common law practice, *always came after the evidence was in*. The adversary, if so advised, demurred to its sufficiency. But that practice fell into disuse. *Suydam* v. *Williamson*, 20 *How.* 427; *Stephens on Pl., Tyler Ed.* 121, 122; *Gummer* v. *Trustees*, 50 *Wis.* 247.

Nor is any such *Janus-faced method of pleading* sanctioned or tolerated by the modern codes. The proceedings in said Harris case and the effect thereof were regulated and controlled by the Montana Code of Civil Procedure. Under its provisions there can be no pleading *ore tenus*. It declares that: "The only pleadings allowed," in an action, are: the complaint, demurrer to answer, and reply, on the part of plaintiff; and demurrer to the complaint, the answer, and demurrer to the reply, on the part of defendant (*Sec.* 662). It requires that all these pleadings shall be in writing, "subscribed by the party or his attorney," *filed* with the Clerk of the Court, and a *copy* served (*Mont. Code Civ. Civ. Proc., Secs.* 540, 635, 730 *and* 758). It provides for a demurrer to a complaint on *specified grounds*, but such demurrer, if interposed, must be *filed*, heard and disposed of before answer (*Sec.* 680). The Montana Code does not provide for a demurrer to a complaint to be thrust in after answer is filed and pending. Nor is there any provision in the Montana Code, or the practice thereunder, for a demurrer in the form of an *oral* objection at the trial, to the introduction of any evidence upon the issues presented by the complaint and answer, and if such objection be sustained, then complete this so-called demurrer by a motion to dismiss the complaint.

While a demurrer to the complaint regularly interposed admits its averments; an *objection* to the introduction of any evidence offered by plaintiff upon the issues raised by the complaint and answer, *does not admit anything*. If such objection be overruled, the answer is there denying the complaint, and nothing is admitted, whatever the ruling may be. Nor does a *motion* to dismiss the complaint or nonsuit the action admit anything whatever. If such motion be overruled, the answer is there denying the averments of the complaint. Such objections and motions

have none of the attributes or effects of a demurrer. And when sustained, the ruling, order or judgment thereon does not constitute a judgment on the merits or estoppel, but is a mere *nonsuit.*

Cook v. *Morris*, 166 *Conn.* 196; 33 *Atl.* 994.
Jones v. *Foster*, 67 *Wis.* 296; 30 *N. W.* 697.
Boyer v. *Com. Bld. Inv. Co.*, 110 *Ia.* 491.

In the case of *Jones* v. *Foster*, *supra*, the defendants answered, and among other things inserted therein an objection which under the Code was ground of demurrer. "To make this available upon the last trial," says the Court, "the defendants objected to any evidence being given under the complaint." With reference to that practice the Court further said: "The defendants may demur to one or more of *several* causes of action stated in the complaint and answer as to the residue (Sec. 2650, Rev. St.). This clearly implies that he is not to do both to the same cause of action. The two things are inconsistent. A demurrer admits the existence of every fact that is well pleaded. An answer upon the merits takes issue with the same facts" (30 N. W. 701, 702).

There is a provision in the Montana Code of Civil Procedure similar to that mentioned in the Wisconsin case last cited. It reads as follows:

"Sec. 682. The defendant may demur to the whole complaint or to one or more separate causes of action stated therein. In the latter case he may answer the causes of actions not demurred to."

In the case of *Cook* v. *Morris*, 166 *Conn.* 196, 33 *Atl.* 994, it appears that answer was filed raising issues. At the trial nonsuit of plaintiff's case was ordered on motion of counsel for defendant, *on the same ground upon which nonsuit of said Harris case was ordered in Montana.* On appeal, defendants' counsel contended that said motion amounted to a demurrer. The Connecticut Supreme Court of Errors, in overruling that contention, said: "A party cannot have the benefit of both a traverse and demurrer to the same facts at the same time" (33 Atl. 995).

The Supreme Court of Iowa ruled to the same effect, in *Boyer* v. *Com. Bld. Inv. Co., supra*, saying: "When the cause came on for trial, defendants objected to the introduction of any evidence because no cause of action was stated in the petition." And in passing upon that objection the Court further said: "This sort of oral demurrer has no place in our practice, and we think the trial Court was fully justified in disregarding it" (81 N. W. 720).

It is true the Montana Code, as well as others, provides that if the prescribed grounds of demurrer to a complaint, be not "taken either by demurrer or answer the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action" (*Mont. Code Civ. Proc., Sec.* 685).

To this provision defendants' counsel point in their argument that a judgment on demurrer is a judgment on the merits, as though it gave a defendant the privilege of oral pleading, and of having in the case *at one and the same time* a demurrer *admitting*, and an answer *denying*, the averments of the complaint. Or as though that section permits defendant to disregard all other provisions of the Code and decisions under it, as to the time and manner of pleading in an action and the effect thereof, and to assume impossible positions involving absurd contradictions.

One plain meaning of that provision is that those objections which are *not deemed waived*, may be raised by either *demurrer or answer*. If raised by demurrer, that pleading comes into the case and performs its office, and is attended by its consequences. But if the same objections or either of them were inserted in answer, would anyone contend that such answer was at once a compound demurrer and answer admitting and denying the complaint at the same time, to be used automatically as either, according to defendants' desire? Would it be any more reasonable to claim that a demurrer is injected into a case, *after answer*, by a parol objection to the introduction of evidence?

Another plain meaning of the provision is that those fundamental objections which are not deemed waived, even if not raised by demurrer or answer, may be otherwise raised. The framers of the Code left those essential elements of an action subject to inquiry in the same way they always had been, prior to the Codes. Those questions could be raised at common law by demurrer or other pleading, but if not so raised, they could be presented by motion in arrest of judgment, and be brought up by bill of exceptions, and writ of error, or assignment on appeal. Or the Court of its own motion would take notice of the want of jurisdiction, or that no legal cause of action was shown in the declaration, and order judgment arrested if plaintiff had prevailed at a trial. Where judgment is arrested there is of course no adjudication by the prior proceeding. The Court in such case would award a *repleader*, or nonsuit the action. *Garland* v. *Davis*, 4 *How.* 143, *and authorities cited; Kentucky L. & Ac. Ins. Co.* v. *Hamilton*, 11 *C. C. A.* 42, 63, *Fed.* 99; *Worlds Col. Expos.* v. *Rep. of France*, 91 *Fed.* 69.

The same practice is followed under the Codes. If the question of want of jurisdiction, or that the complaint states no legal cause of action, is not raised by demurrer or answer, it may be under Code Procedure, by motion in arrest of judgment, or by assignment on appeal, or writ of error, or the Court will of its own motion order the judgment arrested or set aside for want of either of those essentials appearing upon the record. Or a judgment may even be assailed collaterally for the same reason if disclosed upon the face of the record. *Freeman on Judgments, Secs.* 116–120; *Russel* v. *Byron*, 2 *Cal.* 86; *Hentsch* v. *Porter*, 10 *Cal.* 555; *Jones* v. *St. P. M. & M. Ry. Co.* (*Wash.*), 47 *Pac.* 226; *Moore* v. *Haliday*, 43 *Ore.* 243; *Saulsburg* v. *Alexander*, 50 *Mo.* 142, 144; *State ex rel.* v. *Thompson*, 149 *Mo.* 441, *s. c.* 51 *S. W.* 98; *Alexander* v. *Grand Lodge*, 119 *Ia.*, 519; *s. c.* 93 *N. W.* 508; *Bolster* v. *Catterlin*, 10 *Ind.* 117; *Blackiege* v. *Benedict*, 12 *Ind.* 389; *Halderman* v. *Birdsall*, 14 *Ind.* 304; *Studer* v. *Manville*, 33 *Ind.* 111; *Ford* v. *Booker*,

53 *Ind.* 395; *Town of Brazil* v. *Kress*, 55 *Ind.* 14; *Thomas* v. *Franklin*, 24 *Neb.* 310, 60 *N. W.* 568.

Under the Montana Code, the question of want of jurisdiction, or that no legal cause of action is stated in the complaint, may be taken up and considered as mentioned above. *Muller* v. *Buyck*, 12 *Mont.* 355, 367. But it has never been held in Montana that the raising of such objection outside of demurrer, or by an *oral* objection at the trial to the introduction of any evidence, constitutes a demurrer. *The Montana practice does not arm one party with a two-edged sword against an adversary with only an insufficient complaint.*

Reference is made, in said majority opinion, to two Montana cases, as if they support the theory asserted in the majority opinion, "that defendants objection above referred to," *i. e.*, the objection to the introduction of any evidence in said Harris case, "is deemed a demurrer in Montana." The first of those cases is *Wilson* v. *Harris*, 21 *Mont.* 374; which was a creditor's bill to invoke the equity jurisdiction of the Court. Answer was filed traversing the complaint. Trial by jury was had, and special findings returned, adopted, and judgment was entered for plaintiffs. On appeal from that judgment, and from an order overruling a motion for new trial, the question whether the complaint stated facts sufficient to bring the case within the equity jurisdiction, was considered in the prevailing opinion, as well as the question whether the evidence was sufficient to justify the decision. One justice concurred in that part of the opinion which held the evidence insufficient, and *refused to concur* in what was said therein as to the effect of proceedings supplemental to execution under the statute, upon which the suit was founded. The other Justice dissented entirely. And the case *was remanded for a new trial, with privilege to amend the complaint* (21 Mont. 413). There is no ruling or intimation anywhere in the report of that case that an objection to the introduction of any evidence at the trial, "is deemed a demurrer in Montana." Indeed no such question was considered or mentioned in the case at all.

The other Montana case is referred to in the majority opinion as "*Hampton* v. *Indian Teleg. Co.*" But evidently it is intended to refer to *Haupt* v. *Independent Tel. & Messenger Co.*, 25 *Mont.* 122. In that case attempt was made to obtain an injunction against supposed threatened interference by defendants, with wires alleged to have been erected by plaintiff for use to call messengers, "if plaintiff attempts to operate said messenger system." After issues were formed by complaint, answer, and reply, the Court at the trial sustained an objection to evidence offered because the complaint was insufficient. Thereafter an amended complaint was presented, but the Court held it insufficient. On appeal each complaint was held insufficient to warrant injunction. But it is nowhere held or intimated in that case, or any other Montana opinion, that an oral objection to evidence after issues are framed by complaint answer and reply, "is deemed a demurrer in Montana." Nor is there any ruling or intimation in that case, or any Montana case, that the sustaining of such objection forever bars the plaintiff from maintaining an action to remedy the same wrong, if brought by a complaint which unquestionably states a good cause of action. No such questions were before the Court or considered at all in either of the Montana cases cited in the majority opinion of the Circuit Court of Appeals in the case at bar. Moreover the ruling in *Kleindschmidt* v. *Binzel*, *supra*, and the *statutes* of Montana *since passed*, and the case of *Glass* v. *Basin & Bay St. M. Co.*, 34 *Mont.* 88, are positively to the contrary.

If such objection raised outside the pleadings and after answer, were held to constitute a demurrer, then in case it be overruled, defendant should be put in judgment, although his answer raises issues; for under that theory he had gone back of his answer, and admitted the averments of the complaint by the so-called oral demurrer thereto. Or if such objection be raised on appeal, and decided against defendant, judgment should be given against him, although the evidence is entirely insufficient to warrant it, or improper

evidence had been received on the trial over defendant's objection and exception; and he had brought up those grievances for review. Because if raising such objection outside of demurrer or answer, and after answer, has the effect of injecting a demurrer into the case at that stage, the defendant would thereby admit the averments of the complaint; and the insufficiency of the evidence to warrant judgment, or the admission of illegal evidence, would be immaterial. Therefore, if such practice obtained, it would be dangerous to raise such objections after answer, and practitioners would be cautious about it. But there is no such practice. The party who raises such objection aside from demurrer puts himself in no peril.

The fatal infirmity of respondents' argument on this point is further illustrated in the maxim, that:

"Estoppel by judgment must be mutual," *i. e.*, "a party cannot claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same matter if adverse to him" (*per Earl J.*, 98 N. Y. 409).

This maxim expresses the reason why a judgment of nonsuit is not *res judicata;* and the authorities in applying it affirm that there is no estoppel unless the case is submitted on the merits by admission of the facts, by default, or by pleadings regularly presented, or by submitting the evidence upon the issues, so that the party claiming the benefit of the estoppel by judgment was also in such position that, if the law and facts warranted, judgment could have been given against him.

Moore v. *City of Albany*, 98 N. Y. 409.
Gummer v. *Trustees, etc.*, 50 *Wis.* 247, 6 N. W. 885.
Myers v. *County of Johnson*, 14 *Iowa* 47.
Goodnow v. *Litchfield*, 63 *Iowa* 275, 281; 19 N. W. 226.
Bradford v. *Bradford*, 5 *Conn.* 127.
Chandler's Appeal, 100 *Pa. St.* 262.

In said Harris case in Montana, defendants were in no such situation when they objected to the introduction of any evidence, and moved for nonsuit. If that objection and

motion had been overruled, defendants had their answer in the case denying all the material averments of the complaint, and setting up other defenses. They were in no peril whatever by an adverse ruling on their objection.

The argument of respondents' counsel also ignores the distinction between a case like that of Harris in Montana, where the Court refused to adjudicate it at all, and dismissed it; and cases which the Court fully adjudicates, and on finding that plaintiff is not entitled to recover, the judgment takes the form of a dismissal. They cite some of the latter class of cases. But none of them are in point. It is significant, as remarked by the Court, in *Gummer* v. *Trustees*, 50 *Wis.* 247, 6 *N. W.* 885 (where the contention was similar to that in the case at bar), that respondents' counsel could find no case supporting their contention.

Consider respondents' strongest case, that of *Green* v. *Sanborn*, 150 *Mass.* 454, which they quote and apparently suppose is in point supporting their contentions. It is also relied upon in the majority opinion in the case at bar. Speaking of it, respondents' counsel say in their brief: "The defendant in that action pleaded a set-off, and offered evidence in support of his plea. The Court *ruled as a matter of law, the facts pleaded in set-off did not establish a claim and excluded the evidence.*" All which, they explain, occurred in the former action in the District of Columbia; that plaintiff having defeated the alleged set-off recovered judgment there, and sued on it in Massachusetts; in which latter case defendant set up the same alleged set-off as a defense. Following that explanation, respondents' counsel assert in their brief, that:

"The Supreme Judicial Court of Massachusetts held that the decision of the Court of the District of Columbia *was a conclusive adjudication that the facts alleged in set-off did not constitute a cause of action*" (brief in opposition to certiorari, 25).

We wish to bring sharply to attention, the interpretation of that decision given by respondents, for it is a very good illustration of an inadvertent, misleading interpretation and misapplication of a decision, although unintentional.

In their search for a case—so extremely hard to find—to support their view, respondents' counsel read the opinion in *Green* v. *Sanborn, supra*, and under their eye, like mirage it seemed to have the appearance of things for which they earnestly sought. So they presented it to the Court prefaced with their positive assertion that the Massachusetts Court therein "*ruled that, as a matter of law, the facts pleaded in set-off did not establish a claim and exclude the evidence,*" and that: "The Supreme Judicial Court of Massachusetts held that the decision of the Court of the District of Columbia was a *conclusive adjudication that the facts alleged in the set-off did not constitute a cause of action.*" But they are mistaken. The language of the Court, we submit, plainly contradicts the assertion of respondents' counsel. The Court in that opinion said:

"The defendant certainly regarded the issue upon the plea of set-off as upon trial, for he offered evidence to prove the plea. The defendant argued that the evidence may have been excluded because issue was not joined on the plea, or because the plea did not set out a demand in its nature a matter of set-off. It seems that issue was joined on the plea, and that a demand for money had and received is matter of set-off. If the Court had excluded the evidence on either ground, it seems that it would have been an erroneous ruling in the course of the trial, for which the defendants' remedy would be by exception. But the natural meaning of the language is that the ruling was upon the merits of the defendants' claim, and that the facts relied upon to prove it would not sustain a claim for money had and received. It is not suggested that the plea was not a valid plea of set-off, and the record shows that the ruling was made in the course of the trial of the issue joined upon it."

Could anything be said which would more plainly contradict what respondents' counsel assert was the ruling of the Massachusetts Court in that case? The Court plainly says, "*the ruling was*" that "*the facts relied upon to prove it, would not sustain a claim for money had and received.*"

And further: "*It is not suggested that the plea was not a valid plea of set-off.*" The Court further remarked that it is an ordinary incident of a trial to exclude evidence as *incompetent* to prove what is alleged.

It is hardly necessary to remark the great difference between that case where the party setting up a claim had his cause regularly tried with unabridged opportunity to submit all competent evidence which he could offer in support of it, and the case of Harris as administrator in Montana, where the Court refused to hear or permit any evidence to be introduced, "and then and there nonsuited the plaintiff," as defendants confess in answer in the case at bar (R. 114).

The majority of the Circuit Court of Appeals in expressing their opinion that an objection at the trial to the introduction of any evidence on the ground that the complaint does not state sufficient facts, "is deemed a demurrer in Montana," said: "So, also, the similar practice by which, after answer the plaintiff prays for judgment on the pleadings." And cite some Montana cases. But there is nothing said in either of those cases which supports the claim that such an objection is deemed a demurrer in Montana. No such question is mentioned therein. Nor is there any such ruling in any Montana case. But those very cases are sufficient to show that the judgment dismissing said Harris case was simply a nonsuit under the law of Montana, for it is declared with emphasis therein, that *no judgment can be rendered on the pleadings*, "if there is an issue framed by the pleadings." *Floyd* v. *Johnson*, 17 *Mont.* 471; *Horsky* v. *Moran*, 13 *Mont.* 267; *Bach Corey & Co.* v. *Mont. L. & P. Co.*, 15 *Mont.* 354.

Where judgment on the pleadings is sought, counsel do not move for dismissal of the complaint, as they did in said Harris case. They move for judgment on the pleadings, where judgment thereon is sought. Nor does the Court dismiss the complaint or nonsuit the case if its purpose is to give judgment on the pleadings. Furthermore, the statute of Montana regulates the motion for

judgment on the pleadings, by a provision that application therefor must be "upon previous notice to the adverse party of not less than five days" (*Mont. Code Civ. Proc., Sec.* 741). No such notice was given, nor was any motion for judgment on the pleadings made in said Harris case, as the record clearly shows (R. 867).

Pursuing the same erroneous theory, it is said in the majority opinion, that the practice in North Dakota "seems to be like that of Montana," and reference is made to the case of *Haug* v. *Great Nor. Ry. Co.*, 102 *Fed.*, 74, as authority for holding that the nonsuit or dismissal of said Harris case under the laws of Montana, is a judgment as on demurrer. In the first place it should be remembered that North Dakota has no statute like, or similar, to that of Montana quoted above on the subject of nonsuits or dismissals and the effect thereof. Moreover, the North Dakota decisions are not looked to for guidance on questions of practice in Montana, as will appear by examination of the annotations of Montana codes, made under direction of the Legislature (*Pol. Code Sec.* 5193). But let us examine the North Dakota case referred to, and the practice of that State, and see what bearing they have upon the question here under consideration. That case, as stated in 102 Fed. 74, was first brought in the State Court to recover damages for death alleged to have resulted from wrongful act. It was "removed by the defendant into the Circuit Court of the United States for the District of North Dakota;" and "in that Court the defendant filed a general demurrer to the complaint, which was sustained." The plaintiff then filed an amended complaint. Thereupon the defendant "filed" a motion "to dismiss and for judgment;" which motion was granted, undoubtedly because the case disclosed by the amended complaint was not different from that shown in the original complaint to which demurrer had been sustained. The facts and circumstances on which the case was founded are not shown in the Federal report; but looking at them as set forth in another report of the same case cited below, it seems altogether unlikely that

a pleader could fail in any pleading to have set up substantially the same facts; for they were few, without complication, and followed one another in natural sequence. And all the facts were admitted by the demurrer regularly filed in the Federal Court. After the proceedings aforesaid, nothing further was done in that case.

Some time afterward another action, founded on the same cause, was brought in the State Court of Trail County, North Dakota. A general demurrer to the complaint in the latter action was sustained by the lower State Court; but on appeal that ruling was reversed by the State Supreme Court (42 L. R. A., 664). It appears that an amended complaint was then filed, whereupon the case was removed into the United States Circuit Court for North Dakota; and "defendant filed its answer in that Court to the complaint and amended complaint, setting up in bar of the action, the judgment of the Circuit Court of the United States, *on the demurrer and motion to dismiss* in the first suit brought by the plaintiff." In reply, plaintiff "admitted the institution and prosecution of the action pleaded in bar in the answer," but claimed that it did not operate as a bar. The United States Circuit Court held that its former judgment was a bar; and the Circuit Court of Appeals affirmed that ruling, as reported in 102 Fed. 74.

In reaching its conclusion in that case, the Federal Court was not obliged to, nor did it, violate the fundamental rules of pleading established by both the common law and Code of North Dakota, by assuming that an *oral objection*, at an attempted trial, to the introduction of any evidence to prove the facts set up in the complaint, and traversed by answer, "is deemed a demurrer." There was no such question or situation in the North Dakota case. Nor is there any case cited therein which sanctions any such ruling. There is an able opinion of the North Dakota Supreme Court cited in 102 Fed. R. 76, but all that is said therein about demurrer is simply the remark that a motion to dismiss the case *after plaintiff has submitted all his evidence*, is "in effect a demurrer to the plaintiff's evidence,

and upon such demurrer the Supreme Court of the United States declares the rule as follows: 'On a demurrer to evidence the Court is substituted in place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted. *Bank* v. *Smith*, 11 *Wheat.* 171'" (77 N. W. 1018).

But it is said in the majority opinion in the case at bar, that by the ruling made in said North Dakota case, the Court "put itself in agreement with the Supreme Court of Montana" . . . and "held that a judgment of dismissal like that rendered by the Court in Montana in the case at bar could be set up as *res judicata* to an action subsequently brought." Therein the majority opinion went so far in error, we believe that observation was inadvertently made; because there has never been a ruling or decision by the *Montana* Supreme Court that such a dismissal as was made in said Harris case is a judgment on the merits, or is *res judicata*, or a bar to another action for the same cause, or anything of like effect. The statutes of Montana forbid such a ruling; and the Courts rule in obedience to the statute. *Glass* v. *Basin & Bay St. M. Co.*, 34 *Mont.* 88, *and other Montana case therein cited.*

It was not even contended by respondents' counsel in the case at bar, before the Circuit Court, or Circuit Court of Appeals, that the Montana Supreme Court has ever made any such ruling as seems to be attributed to it in observation just quoted from the majority opinion (R. 985). Counsel for respondents sought by mere assertion, contrary to reason and authority, to make a demurrer out of an oral objection to the introduction of evidence on the issues raised by the answer, at the attempted trial of said Harris case. That observation in the majority opinion last referred to, is so entirely contrary to anything ever decided, or claimed to have been decided, in Montana, we believe the learned judge who prepared the majority opinion inadvertently inserted "Montana" in place of North Dakota, about the practice of which State he was commenting.

But reverting for a moment to the practice in North Dakota: What would the Supreme Court of that State hold in regard to an objection made at the trial to the introduction of any evidence on the ground that the complaint does not state sufficient facts? It has thrice condemned that objection as improper and worthless when considered as an objection to the introduction of evidence. *Bowman* v. *Eppinger*, 44 *N. W.* 1000; *Chilson* v. *Bank. of Fairmont*, 81 *N. W.* 33; *Schweinber* v. *Great West. El. Co.*, 81 *N. W.* 35. But, it may be further inquired: What would the Supreme Court of North Dakota rule, in a case where such parol objection was made at the trial, and learned counsel contended, as in the case at bar, that notwithstanding there was an answer already in the case traversing the complaint, still such parol objection at the trial was a demurrer; and to support that contention point to the statute of North Dakota which provides, like Montana and other codes, that such objection is not waived by failing to raise it by a demurrer regularly interposed, or by answer? That precise contention, too, has been dealt with by the Supreme Court of North Dakota, in a recent case, wherein it condemned the so-called pretended demurrer, *as no demurrer at all. James River Nat. Bank* v. *Purchase*, (1900) 9 *N. Dak.* 28; 83 *N. W.* 7. Holding the same as other cases cited above on that point.

In *re Reynolds*, reported in 133 Fed. R. 585, and 27 Fed. R. 760, decided by the United States District Court for Montana, is also referred to in the majority opinion in the case at bar, as being "to like effect"—that is, sustaining the theory that a parol objection at the trial to the introduction of any evidence offered to support a complaint traversed by answer, "is deemed a demurrer in Montana." That case involved a dispute as to whether a trustee in bankruptcy was entitled to certain personal property taken by a third person under a chattel mortgage, "conceded to be valid," executed by the bankrupt prior to the proceedings in bankruptcy; which dispute led to an action in the State Court by the trustee, to recover the value of said property.

What occurred at the trial of that action in the State Court, does not appear in the references thereto, made in the Federal reports—whether there was a trial by jury, or by the Court alone, or what evidence was offered, introduced, or excluded, or what other incidents occurred, are not revealed at all by the Federal reports wherein the matter is mentioned. For all that is shown, there may have been a trial on pleadings entirely sufficient, and where opportunity was afforded each litigant to produce all evidence he had, and the same may have been judicially passed upon; and thereby a decision reached that the trustee in bankruptcy was not entitled to recover, and his action dismissed with costs. That would be the form a judgment rendered upon such finding would take; and the judgment roll would show what the issues were, and what sort of trial was had. It is simply shown in the federal reports that such judgment was reached in the State Court.

Thereafter, by a proceeding in the Federal Court, the claimant of those chattels under mortgage, was again called upon by the trustee in bankruptcy to account to him therefor. In the latter proceeding one Federal District Judge held that the State Court *had no jurisdiction* of the subject matter claimed to have been tried in said case; and that its judgment "did not determine which of the parties was entitled to the property" (127 Fed. R. 763). But his successor on further proceedings in the same matter, after an amended answer had been filed by the claimant of the chattels under mortgage, held that the State Court *did have jurisdiction*, and that the trustee was "bound by the adjudication," in the State Court (133 Fed. R. 587).

One thing, however, is certain, namely, that it does not appear that the State Court refused to admit any evidence on objection that the complaint was insufficient, "and then and there *nonsuited* the plaintiff and dismissed the complaint," as defendants admit was done in said Harris case. If any such course had been taken it is fair to presume that some mention of it would have been made by one of the Federal Judges who refers to that action in the

State Court. Nor is anything whatever said in those reports about making a demurrer out of an oral objection at a trial, to the introduction of any evidence offered to support the complaint traversed by answer. There was no mention of any such question.

The majority of the Circuit Court of Appeals not only erred in adopting the theory that such an oral objection constitutes a demurrer, but even assuming that position their ruling in the case at bar is still erroneous. Upon that theory—leaving out of consideration the fact that Harris as administrator in Montana had no title to said chose in action, and that said Montana administrator, and the complainant in the case at bar, as administratrix appointed in New York, "have no privity with each other in law or in estate" (6 How. 59)—the question arises: Is a cause of action presented by a complaint which is unquestionably good and sufficient, barred because a former complaint attempting to assert the same cause was adjudged bad on general demurrer?

"A judgment that a declaration is bad in substance (which alone and not matter of form is the ground of a general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no sense a judgment on the merits" (10 Pet. 301, 302). The rule of law is thus declared by this Court and many others without the aid of statute, and is so declared in Montana according to the general rule and pursuant to statutes cited above.

Gilman v. *Rives*, 10 *Pet.* 301.
Kleindschmidt v. *Binzel*, 14 *Mont.* 31.
Glass v. *Basin & Bay St. M. Co.*, 34 *Mont.* 88.
City of, etc. v. *Clark* (*C. C. A.*), 62 *Fed. R.* 694.
Kirsch v. *Kirsch*, 113 *Cal.* 56.
Hardenburg v. *Bacon*, 33 *Cal.* 356.
Los Angeles v. *Mellus*, 59 *Cal.* 452.
Approved in City, etc. v. *Clark* (*C. C. A.*) 62 *Fed. R.* 697.
Approved in Gilmer v. *Morris*, 30 *Fed. R.* 481.
Lockett v. *Lindsay*, 1 *Idaho*, 324.

Wilbur v. *Gilmore*, 21 *Pick.* 253.
Garrish & Brewster v. *Pratt & Bunker*, 6 *Minn.* 53.
Rodman v. *Mich. Cent. R. Co.*, 59 *Mich.* 395.
Caromy v. *Hoober*, 5 *Pa. St.* 307.
Moore v. *Dunn*, 41 *Ohio St.* 62.
Stevens v. *Dunbar*, 1 *Blackf. (Ind.)* 56.
Estep v. *Larsh*, 21 *Ind.* 190.
Hassell v. *Nutt*, 14 *Tex.* 265.

It is held in some of the cases that where a good and sufficient complaint is before the court, it is immaterial whether the former complaint may possibly have stated a cause of action; for it was adjudged bad, and when that judgment is set up against a good complaint, brought to enforce the same right, the court will presume the former complaint was defective because it was so adjudged. Otherwise the law would be subject to the reproach of absurd contradictions.

The discussion in the Montana opinion in said Harris case is neither a finding of facts nor res judicata.

Respondents do not base their claim of *res judicata* on the *judgment* in said Harris case, which they *admit*, in their answer was a mere nonsuit (R. 114). They rely upon *expressions in the opinion* of the Montana Supreme Court to support their claim of *res judicata*, assuming that all the discussion therein is binding on the federal Courts, if they can make out *privity* of parties plaintiff in the two cases. The same view is manifest in the majority opinion of the Circuit Court of Appeals. But the reasoning or discussion in an opinion is not *rem judicatam*. Nor can the opinion be regarded as a statement of facts. "It is elementary that in a decree rendered, and not in the opinion pronounced, will be found the thing adjudged," says the Supreme Court of Louisiana in overruling a plea of *res judicata*, based, as it says: "not upon the judgment, but merely on expressions contained in the opinion," delivered on a former consideration of the same cause. It was conceded that the expressions in the opinion referred to might warrant such

plea (*Penouihl* v. *Abraham*, 43 *La. Am.* 214; 9 *S. R.* 36). The authorities everywhere affirm the same doctrine.

Louisiana Mut. Ins. Co. v. *Tweed*, 7 *Wall.* 44.
Dickinson v. *Planters Bank*, 16 *Wall.* 250.
Kentucky L. & Ac. Ins. Co. v. *Hamilton*, 11 *C. C. A.* 42.
State ex rel. v. *Dist. Court*, 16 *Mont.* 274.
Burk v. *Table Mt. Co.*, 12 *Cal.* 403.
Robinson N. Y. L. E. & W. R. Co., 64 *Hun.* 41.
Penouihl v. *Abraham*, 43 *L. Ann.* 214; 9 *S. R.* 36.
City Bank of, etc., v. *Brigham*, 61 *Kan.* 727; 60 *Pac.* 754.
State ex rel. v. *Hornaday*, 62 *Kan.* 334; 62 *Pac.* 999.

The statute of Montana provides what shall constitute the judgment roll, *not including*, hence by implication *excluding*, all opinions (*Mont. Code Civ. Proc., Sec.* 1196).

All that was ruled in said Montana opinion, and all it can properly be construed, under the law of Montana, as having ruled, is, that the *nonsuit* of said Harris case might stand. The recital therein of "the contention of defendants," and discussion based on assumption of issuable facts which were not even set up in any pleading, and where all proof was excluded—that Colonel Ingersoll made a "compromise" of his clients' interests, that he had to have "special authority" so to do, that "additional authority" was "conferred by his clients" upon him, "and accepted by him," and thereby he *abandoned* all his rights under said contract, to compensation for years of labor devoted to the prosecution of said contests—does not change the rule of law established by statutes that define the dismissal of said Harris case as a mere nonsuit, and no bar, to another action for the same cause. All the authorities agree that *abandonment* is an issuable fact, and if asserted in an action it must be set up in a pleading so that issue may be joined thereon. Numerous Montana decisions declaring that rule, some of which were affirmed by this Court, are referred to in the deposition of former Chief Justices of Montana, presented in the case at bar (R. 394 *et seq.*). After citing and quoting from the Montana decisions they say:

"That according to the course of jurisprudence of the Territory and now State of Montana, the discussion by a Court or Judge, of the question of *abandonment* of a right or thing in litigation, by a party claiming the same or by his privies or predecessors in interest, in a pending case wherein such proposition or question had not been raised by the pleadings, and no opportunity of taking issue thereon, or presenting proofs touching such issue, and no trial thereof, had ever been had, would be purely and entirely *obiter dicta* on the subject of abandonment, because in such a case no such question could be before the Court for judicial consideration or decision." *See decisions re abandonment set forth in deposition of Chief Justices Pemberton and Blake*, R. 397.

No such thing as abandonment was mentioned in any pleading in said Harris case; but if it had been, and the presentation of evidence had been permitted, such pretension could have been unanswerably refuted. In the light of evidence in the case at bar defendants are silenced on that issuable fact as well as all others assumed and discussed in said Montana opinion. Colonel Ingersoll's letter wherein he congratulates himself and Mr. Root upon success in the will contests and said—"When can I realize? Let me know just how the matter stands. I want it all settled *in accordance with our contract*, and so do you. No doubt about that" (Exhibit xxxvi, R. 510)—shows that Colonel Ingersoll had no *intention* to *abandon* his rights under the contract. So the payment by Mr. Root, of $5,000 to Colonel Ingersoll, out of the "*first distribution*," made to his clients pursuant to the decree determining said will contests, and the conversation between Colonel Ingersoll and Mr. Root when that payment was made as narrated in his letter (R. 156), refutes such pretension. Abundance of other evidence and admissions to the same effect could be cited, but it is unnecessary, because it is not claimed in the case at bar that Colonel Ingersoll *abandoned* his rights under the contract.

Respondents say in their brief opposing petition for certiorari (page 14), that owing to defendants' inability

under the statute to testify to personal transactions with Colonel Ingersoll, they "abandoned" certain defenses. It was not the law, but the indisputable evidence contained in writings which complainant fortunately has, and is allowed to present, that silences *defendants' contentions* and assumptions of issuable facts recited and discussed in said Montana opinion.

It is conclusively shown in the case at bar that there was *no compromise*, relinquishment or concession on the part of Colonel Ingersoll or either of his clients, of so much as a farthing of their shares of said estate. "Their shares," mentioned in the contract with Colonel Ingersoll, amounts to 350-1100, but they got through the decree determining said contests prosecuted by Colonel Ingersoll, absolute right and title to $515\frac{1}{2}$-1100 of the estate (see *admissions* of defendants pointed to under the *first* head of the foregoing statement of the case). Nor was there any "additional authority" needed or "conferred by his clients" upon Colonel Ingersoll, or "accepted by him" in obtaining that decree.

Referring to the nonsuit of said Harris case, respondents say: "plaintiff declining to amend the complaint the Court entered a judgment dismissing the complaint and for costs" (brief opposing certiorari, 22). That statement embraces a mistake of fact. Plaintiff Harris neither declined to amend nor was he offered any opportunity to amend his complaint. The verified bill in the case at bar states the facts as to what occurred when the complaint of Harris was dismissed by the Montana Court (R. 36, 37). In answer thereto defendants *admit* that said Montana Court, "sustained said objection, and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint, and *then and there* nonsuited said plaintiff and dismissed said complaint (Answer, R. 114). The record also shows that it was one ruling pronounced in a single sentence (R. 867). When made, the plaintiff Harris was out of Court, and could not amend his complaint. But it could not have been amended by averment of any

facts showing that he had title to said chose in action, or that any attempt had ever been made to invest him with title thereto.

Respondents also argue that a bill should be framed for recovery of *quantum meruit* instead of the compensation stipulated in the contract for Colonel Ingersoll's services. But a bill to recover *quantum meruit*, upon said contract cannot be drawn and state the truth, because Colonel Ingersoll *fully* performed his engagement under the contract, and achieved a result for his clients, exceeding that provided as the event upon which his stipulated compensation should be paid.

The showing of additional material facts in the bill (pointed out under the *third* head of the foregoing statement of the case), established by admissions and proofs in the case at bar, makes a *different* case than that set up in the complaint of Harris as administrator in Montana. The additional fact of *acquiescence* by all of Colonel Ingersoll's clients "in each and all of said stipulations, arrangements and proceedings whereby said contests were successfully determined in their favor," alleged in the bill (Record 18), and admitted in defendants' answer, in the case at bar (Record 107)—but not alleged in said Harris complaint—is alone sufficient to make out an entirely different case from that discussed in said Montana opinion.

Swain v. *Seamons*, 9 *Wall.* 254.

Scott v. *Jackson*, 89 *Cal.* 258.

The claim of *res judicata* cannot be maintained, aside from the fact that the administrator appointed in Montana had no title to said chose in action, nor privity with the complainant as administratrix in the case at bar. The dismissal of the attempted action in Montana was a mere *nonsuit* under the law established by statutes and decisions of that state, as well as under the general rule of law.

Homer v. *Brown*, 16 *How.* 354.

Manhattan L. Ins. Co. v. *Broughton*, 109 *U. S.* 121.

Gardner v. *Mich. Cent. R. Co.*, 150 *U. S.* 349.
Kleindschmidt v. *Binzel*, 14 *Mont.* 31.
Glas v. *Basin & B. St. M. Co.*, 34 *Mont.* 88.

2. The Administrator Appointed in Montana had no Title to Said Chose in Action. The facts to be considered with the law on this point—that Colonel Ingersoll died intestate in 1899, at the County of Westchester, State of New York, where "at his death he resided and was domiciled" as defendants admit (Answer R. 115, bottom of page); that he had there in his possession among his effects said chose in action on which this suit at bar is founded; that within thirty days thereafter, his widow, complainant here, was duly appointed his administratrix, by the Surrogate's Court of said County in the State of New York, and having qualified as such administratrix, came into possession of said chose in action among the effects left by Colonel Ingersoll at his domicile in the State of New York; that she has ever since continued as such administratrix; that immediately upon her said appointment and qualification she commenced, and has ever since continued, her efforts to collect said indebtedness owing by Coram and Root upon said chose in action, and they have repeatedly acknowledged and promised to pay their said indebtedness to her as legal representative of Colonel Ingersoll—are fully shown in the bill, admissions and proofs in the case at bar, pointed out with reference to the record in the foregoing statement of the case, and there is no dispute as to those facts.

That the law, by virtue of those facts, vested in Eva A. Ingersoll as said administratrix, title to said chose in action, and that the debtors thereon, wheresoever residing, could safely pay said administratrix and her receipt would protect them everywhere, is settled by the authorities beyond dispute.

Wilkins v. *Ellett*, 9 *Wall.* 740.
Same case again, 108 *U. S.* 256.

Harper v. *Butler*, 2 *Pet.* 239.
Wyman v. *United States*, 109 *U. S.* 654.
Thorn v. *Watkins*, 2 *Ves. Sen.* 36.
Eells adm'r v. *Holder*, 12 *Fed. R.* 668.
May v. *County of, etc.*, 30 *Fed.* 250.
Van Bokkelen v. *Cook*, 5 *Saxey.* 591., *F. C.* 16,831.
Rand adm'r v. *Hubbard*, 4 *Met.* 252.
Pinney adm'r v. *McGregory*, 102 *Mass.* 186.
Peterson v. *Chemical Bk.* 32 *N. Y.* 21.
St. John v. *Hodges*, 68 *Tenn.* (9 *Baxt.*) 334.
In re Cape May & D. B. N. Co., 51 *N. J. L.* 82; 16 *Atl.* 191.
Gove v. *Gove*, 64 *N. H.* 503; 15 *Atl.* 121.

The question whether Harris as administrator appointed in Montana had any title to said chose in action, arises in the case at bar, for if he had no title thereto he could not have set up the same cause of action in Montana; nor could any judgment, of whatever character rendered there in said Harris case, affect the rights of complainant in the case at bar. The same question would have been drawn into consideration had Harris, as administrator, attempted to procure a review by the Federal Supreme Court, of said judgment of nonsuit, on the ground that it deprived him of property without due process of law. The Circuit Court of Appeals recognized that question as involved, but passed over it by assuming that, if a foreign administratrix vested with title to a chose in action should in her representative character attempt to sue thereon in a Montana Court, and that Court, on objection of defendants, refused to hear her, or recognize any act attempted by her in Montana, the mere fact that an attorney who acted for her in said attempted suit, moved the Montana Court to substitute as plaintiff in that action another person appointed administrator of said intestate, in Montana, would operate to vest in the latter administrator, title to said chose in action.

The Montana Court on objection of defendants, Coram and Root, in the attempted action there, refused to recog-

nize or hear Eva A. Ingersoll as said administratrix, appointed in New York, and ruled that she had no authority as such administratrix to say or do anything whatever in Montana (*see Bill, R. 34 et seq., and Answer, Ib.* 114). And the statute of Montana prohibited her appointment as administratrix there (*Code Civ. Proc., Sec.* 2434).

On the other hand, the majority of said Circuit Court of Appeals ruled in the case at bar that because an attorney in said attempted action in Montana moved the Court to strike therefrom the name of Eva A. Ingersoll as administratrix, whom that Court refused to recognize or hear, and substitute as plaintiff, said Harris as administrator appointed by the Montana Court, thereby through such motion, said Harris as administrator was given title to said chose in action.

The mere motion of an attorney in an action in the Montana Court, even if made in the name or in behalf of an administratrix appointed in New York, who was not recognized or permitted to do anything in her representative character in Montana, surely could not be the medium of taking the title to property vested in the New York administratrix, away from her, and conveying it to an administrator appointed in Montana. If Eva A. Ingersoll as said administratrix appointed in New York was without power herself to do any act in her representative character in Montana, affecting the property of her intestate, she certainly could not do any such thing through the mere motion of an attorney in Montana.

A motion by an attorney to substitute one person in place of another as a party to an action could not operate to transfer the title to private property of any character, from one of those persons to the other. *A fortiori*, a motion by an attorney in a case in a Montana Court could not have the effect of transferring title to property vested in and held by an administratrix in New York, over to an administrator appointed in Montana.

There was no averment in the complaint of Harris as administrator, or any pleading in said attempted action

in Montana, showing any facts whereby he could claim to have succeeded to title to said chose in action, or that he ever had possession of the written promise of Coram and Root to pay for Colonel Ingersoll's services in said will contests; for which reason the Montana Court could hold his complaint insufficient.

But in the case at bar respondents' counsel assert that "a debt due from a resident of Montana has its *situs* in Montana, and title to it vests in an ancillary administrator appointed in Montana;" that one of the debtors on said chose in action, Mr. Root, resided in Montana; and thereupon they challenge the suggestion that Harris neither had, nor did his complaint show that he had, title to said chose in action, as "having no foundation, and rests on a misconception of the nature of an administrator's title, and the *situs* of a debt" (*Brief opposing certiorari*, 43, 44).

That contention might have been urged with some show of authority in the early part of the last century, based upon what was supposed to have been a rule of the old English ecclesiastical law. Although even before that the English High Court of Chancery by Lord Hardwicke pronounced such contention, "a strange imagination," and held that title to a simple chose in action owned by a resident of England, who died there intestate, vested in his administrator appointed in England, though the debtor resided in Scotland. He said, "the reason is that all debts follow the person, *not of the debtor* in respect to the right of property, but of the creditor to whom due." Nor does he mention any rule of the English law to the contrary, but said the rule would be the same if the debtor resided in France or Holland, as the House of Lords had lately decided; and refers to another case where he had treated a similar question; so it cannot be supposed Lord Hardwicke was speaking unguardedly as to the English rule of law on the subject. It was *not a bond or other specialty* in question in that case (*Thorn* v. *Watkins*, 2 *Ves. Sen.* 36).

In this country, however, two cases were decided early in the last century, which, if they had not been overruled,

would support respondents' position. Those cases are mentioned by Chief Justice Shaw in *Rand* v. *Hubbard*, 4 *Met.* 252, but upon a full examination of the question, he discards the supposed rule of English ecclesiastical law as inapplicable to the states of this Union, and incompatible with international comity. He therefore disapproved the doctrine announced in the two earlier cases: *Thompson* v. *Wilson*, 2 *N. H.* 291, followed by the Supreme Court of Maine in *Stearns* v. *Barnham*, 5 *Greenl.* 261.

A little later Chief Justice Denio, speaking for the New York Court, in *Petersen* v. *Chemical Bank*, 32 *N. Y.* 21, discussed the same question at length, apparently without having his attention called to the treatment of it by Chief Justice Shaw, but reaches the same conclusion. In the latter case, the right and title of an administrator appointed in Connecticut, to a simple contract debt owing to the decedent when he died domiciled there, by a debtor residing in New York, and the validity of an assignment of said chose in action by the Connecticut administrator, were the questions involved. It was held that the title of the administrator appointed at the domicile of the deceased was perfect, though the debtor resided in another State; that payment to the Connecticut administrator would protect the debtor against demand upon the same obligation by an administrator appointed in New York; and that proper assignment of the chose in action made by the Connecticut administrator conveyed good title to the assignee, which the Courts of New York would enforce. The supposed rule of the English ecclesiastical law above mentioned is adverted to in the latter case, and pronounced inapplicable to the States of the American Union.

The ruling made in the early New Hampshire case (followed in the Maine case), above mentioned, has since been reversed in the case of *Gove* v. *Gove*, 64 *N. H.* 563, 15 *Atl.* 121—citing the opinion delivered by Shaw, *C. J.*, *supra*, and cases decided by the United States Supreme Court, determining the same question.

In *St. John* v. *Hodges* (9 *Baxt.*), 68 *Tenn.* 334, it was

decided that the title to choses in action evidenced by simple promissory notes held by the creditor at his domicile in Alabama, where he died, *did not vest* in an administrator appointed in Arkansas, where the debtor resided; but that said choses in action were *bona notabilia* in Alabama, and that title thereto vested in the administrator appointed there. It was ruled to the same affect in the case of *Elles* v. *Holder*, 12 *Fed. R.* 668, and others in the list last above cited.

The United States Supreme Court, in *Wilkins* v. *Ellett*, 9 *Wall.* 740, and *again* in the same case reported in 108 *U. S.* 256, and in *Wyman* v. *Halstead*, 109 *U. S.* 654, has very clearly affirmed the same rule of law, that the *title* to a simple chose in action, *vests* in the administrator appointed *at the domicile of the intestate* creditor when he died, though the debtor resides in another State; that payment to such administrator protects the debtor against a demand or suit on the same obligation, by another administrator appointed at the domicile of the debtor; and that assignment by the administrator appointed at the domicile of his intestate, conveys good title to such simple choses in action.

The distinction between simple contract debts and bonds or other obligations under seal, is not as respondents' counsel argue, *i. e.*, that such simple contract debts as a matter of property follows the debtor, and when the creditor dies intestate those debts have their *situs* where the debtor resides, and title thereto awaits the appointment of an administrator there, in order to vest in a successor, while bonds are governed by another rule. The distinction simply is that title to bonds or other obligations under seal, owned by an intestate when he died, vests in his administrator appointed where the same are found, without reference to the domicile of the intestate. Upon that rule the *title to bonds* might be separated from the administrator appointed where the intestate was domiciled when he died; but if the bonds were at the domicile of the intestate, title thereto vests in his administrator appointed there, though the debtor resides in a foreign State, and in such

case the domiciliary administrator could assign such bonds and his assignee has good title. It will be seen by examination of the authorities that the distinction mentioned is not based at all upon the so-called *situs* of the debt, or the residence of the debtor, but simply upon the rule of law that such weightier obligations under seal are assets where the evidence thereof is found.

Noonan v. *Bradley*, 9 *Wall.* 405.
Grace v. *Hanna* (6 *Jones*), 68 *N. C.* 96.
St. John v. *Hodges* (9 *Baxt.*), 68 *Tenn.* 334.

But as to simple choses in action owing an intestate when he died, the authorities uniformly affirm that *title thereto vests* in his administrator *appointed at the domicile* of the intestate. Thus in *Wilkins* v. *Ellett*, 9 *Wall.*, 740, this Court, speaking of a simple contract debt owing by a resident of Tennessee, to an intestate when he died domiciled in Alabama, and of the fact that his administrator appointed there could not sue in the courts of Tennessee without letters of administration issued there, said: "The difficulty does not lie in any defect of title to the possession, but in the limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of home creditors." And further declared that: "All debts follow the person, *not of the debtor* in respect of the right or property, but of the creditors to whom due (*Thorn* v. *Watkins*, 2 *Ves. Sen.* 36)." Accordingly, it was ruled in that case that the Tennessee debtor could safely pay his debt owing the intestate when he died domiciled in Alabama, to his administrator appointed there; and that such payment was a protection against enforcement of the same obligation by an administrator appointed in Tennessee, *where the debtor resided*.

When the same case was before this Court again (108 U. S. 256), speaking of the title of the administrator appointed at the domicile of the intestate, to simple contract debts, this Court said: "The administrator by virtue of his appoint-

ment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name (*Harper* v. *Butler*, 2 *Pet.* 239; *Shaw, C. J.* in *Rand* v. *Hubbard*, 4 *Met.* 252, 258–260; *Peterson* v. *Chemical Bank*, 32 *N. Y.* 21)." And in the same opinion, speaking of the requirement that to enable an administrator to sue in another State, letters of administration must be procured there, this Court said: "But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him" (108 U. S. 258).

So in the case of *Wyman* v. *Halstead*, 109 *U. S.* 654, notwithstanding the administrator appointed in the District of Columbia had possession of the drafts in question, the United States treasurer "refused to pay them without the indorsement of administrators appointed in the State of Tennessee," where the deceased payees were domiciled when they died; and this Court again held that: "payments to the administrator appointed in the State in which the intestate had his domicile at the time of his death, whether made within or without that State, is good against any administrator appointed elsewhere (*Wilkins* v. *Ellett*, 9 *Wall.* 740)."

In the *Tax case* 15 Wall. 300 the *situs theory* advanced by respondents here, was urged, but refuted by this Court in opinion delivered by Mr. Justice Field, wherein it is said:

"All the property there can be in the nature of things in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile wherever that may

be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth which is recognized upon its simple statement" (15 Wall. 320). And in the same opinion it is further said: "But other personal property consisting of bonds, mortgages and debts generally has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debts, are not separated from the possession of the owners" (15 Wall. 324).

The same principle was applied to property of an estate in the case of *Van Bokkelen* v. *Cook*, 5 *Sacy*. 591, by Mr. Justice Field, sitting in the Circuit Court, and concurring with two other federal judges.

No case has been found wherein the *situs theory*, urged by respondents, and adopted by the majority of the Circuit Court of Appeals in the case at bar, was used as the bases of decision, or was given any such effect as respondents claim. The Courts in cases of this nature *look for the title*, and find, under the settled rule of law, it is vested in the administrator appointed at the domicile of the intestate when he died. It was not a question of *situs*, but a question of title which the Circuit Court of Appeals had to consider in the case at bar.

In the case of *Sultz* v. *Mutual Res. Fund*, 145 *N. Y.* 563, cited and relied upon in the majority opinion in the case at bar, the intestate was domiciled in the State of Washington, died there, having in his possession the policy of insurance in question. It was held, in harmony with all the decisions, that the administrator appointed in the State of Washington at the domicile of his intestate, and as such having possession of said policy, was fully authorized to enforce it. That case is no support whatever for the *situs theory* adopted in the majority opinion in the case at bar.

The case of *Merrill* v. *New England Mut. L. Ins. Co.*,

103 *Mass.* 245, relied on in the majority opinion in the case at bar, is also in harmony with the other cases on this subject. The policy of insurance in question in that case, issued by a Massachusetts corporation, was pledged by the assured, and the possession of it delivered, to a resident of that State, to secure a debt. The Court held that although the assured died domiciled in Illinois, the "equitable assignee of the claim," for the amount of the insurance, "is entitled to control any suit brought for its recovery." That "the policy having been pledged and delivered to another in the lifetime of the intestate was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the Courts of that State, either as assets subject to administration or as a cause of action which the administrator there could maintain." The Court further said: "The pledgee had an independent title, accompanied by possession of the policy, and by bill in equity in his own name, or by suit in the name of the administrator in Massachusetts, could enforce his claim." The plaintiff in that case, a resident of Massachusetts, was not only pledgee but had been appointed administrator there.

What would be the result of the *situs theory* advanced by respondents' counsel, and adopted by the majority of the Circuit Court of Appeals in the case at bar, if established as the rule of law? Besides contravening the settled rule that the domiciliary administrator has title to simple choses in action, belonging to his intestate at the time of his decease, its result would be this: That a debtor to an intestate could take up his residence where he may desire, cause an administrator to be appointed there—perhaps one friendly to the debtor—who would bring suit to enforce payment of the obligation, without having evidence to maintain such suit, or even possession of the contract, if in writing; or the debtor might in such foreign state, after a friendly administrator had been appointed, bring action to cancel the obligation. The administrator appointed at the domicile of the intestate could not be heard in the foreign juris-

diction. Nor could heirs, because they have no title until distribution. They might know nothing of such suit. It is not necessary they should be notified under the *situs theory* of respondents. Nevertheless, under that theory, judgment against the administrator appointed where the debtor resides, would absolutely destroy the obligation, for according to respondents' theory the foreign Court would have complete jurisdiction of parties in interest, and of the subject matter.

The majority of the Circuit Court of Appeals not only adopted that theory, but held that the administrator appointed at the domicile of the intestate, who is denied a hearing in the foreign state, *is in privity with* the administrator appointed in the foreign state. That ruling is in direct conflict with the rule of law established by numerous decisions of the United States Supreme Court, and other Courts, wherever the question has been passed upon in this country, without exception.

3. There is no Privity of Administrators Appointed in Different States either "in Law or in Estate."

This Court and the State Courts of last resort have always held, without exception to the rule, that administrators of an intestate appointed in different States, *"have no privity with each other in law or in estate"* (6 *How.* 59).

Aspden v. *Nixon*, 4 *How.* 467, 497.
Stacy v. *Thresher*, 6 *How.* 44.
Johnson v. *Powers*, 139 *U. S.* 156.
Carpenter v. *Strange*, 141 *U. S.* 87.
Cases cited in Notes to above decisions.
Opinion by Circuit Judge Putnam, in case at bar, R. 86, 87.

So uniform have been the decisions affirming that rule of law, even though the same person be appointed administrator in each State, respondents' counsel were unable to cite any case holding otherwise. The case at bar is not one concerning an *executor* acting in different States under title given by will (*Carpenter* v. *Strange*, 141 *U. S.* 87).

All cases cited in the majority opinion in the case at bar, which touch upon the question of *privity*, hold the same way. In the case of *Merrill* v. *New England L. Ins. Co.*, 103 *Mass.* 245, it is expressly held that there is *no privity* between administrators appointed in different States. So in *Low* v. *Bartlett*, 8 *Allen* 262, where the Massachusetts executor went to Vermont and defended against the claim involved in the Courts there, the Massachusett Court held that he was not bound by the judgment, saying he "had no right to go there and defend it." Again in *Ela* v. *Edwards*, 13 *Allen* 48, the same rule of law is affirmed and applied, although the same person was executor in Massachusetts and ancillary administrator of the same estate in Vermont.

In *Taylor* v. *Barron*, 35 *N. H.* 484, a great many cases on the subject are reviewed, and it is held that *there is no privity* of any character between administrators appointed in different States.

A very recent case is *Brown* v. *Fletcher's Estate*, 109 *N. W.* 686, in which the Michigan Supreme Court by unanimous opinion relying upon the authority of decisions by the United States Supreme Court, held that there is *no such privity*.

Many cases on this subject are referred to in the notes to the decisions of the United States Supreme Court, cited above, showing that they have been followed everywhere in this country. The cases all being one way it is deemed unnecessary to cite more of them here.

Nevertheless the majority of the Circuit Court of Appeals ruled in the case at bar *that there is such privity*. After remarking in their opinion that Harris was "Ingersoll's administrator appointed in Montana," and "the complainant here is Mrs. Ingersoll, his administratrix appointed in Massachusetts," they propound this question: "Is the former in privity with the latter so that a judgment against him binds her?"

In discussing that question, it is said in the majority opinion: "If the Montana administrator had transferred a note due from a resident of Montana, the transfer would be

valid as against all other administrators appointed elsewhere (*Wilkins* v. *Ellett*, 108 *U. S.* 256, 259)." In making such application of that case to the case at bar, the majority of said Circuit Court of Appeals fell into error. When that case of *Wilkins* v. *Ellett* was *first* before this Court—9 Wall 740—it was distinctly held, in reversing the judgment below, that: "The original administrator, therefore, with letters taken out at the place of the domicile is invested with title to all personl property of the deceased," and that payment to the administrator appointed at the domicile, although the debtor resided in another State, discharged the debt, so that the administrator appointed where the debtor resided could not enforce it. And speaking of the fact that the administrator appointed at the domicile of the intestate could not sue in another State without taking out letters there, this Court said: "The difficulty does not lie in any defect of title to the possession." When that case was again before this Court—108 U. S. 256—in speaking of the administrator appointed at the domicile of an intestate, this Court, by Mr. Justice Gray, said: "The administrator by virtue of his appointment and authority as such, obtains title in the promissory notes and other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name (*Harper* v. *Butler*, 2 *Pet.* 239; *Shaw, C. J. in Rand* v. *Hubbard*, 4 *Met.* 252, 258–260; *Peterson* v. *Chemical Bk.* 32 *N. Y.* 21)." In the cases there cited it was also distinctly held that the *administrator appointed at the domicile of the intestate has title to simple choses* in action owned by the intestate when he died, although the debtor is a resident of some other State.

So in the recent case of *Chicago, etc. R. Co.* v. *Strum*, 174 *U. S.* 710, this Court quotes from its opinion in *Wyman* v. *Halstead*, 109 *U. S.* 656, the rule that, "*for the purpose*

of founding administration," simple contract debts are considered assets where the debtor resides, but adds the same declaration made in its former decisions, that " this is not because of defective title in the creditor or his administrator;" and cites *Wilkins* v. *Ellett in* 9 *Wall.* 740 and the same case in 108 U. S., 256. Then this Court states the necessary logical conclusion, that: "Debts cannot be assets at the domicile of the debtor if their locality is fixed at the domicile of the creditors." In other words, title to the whole of a thing cannot be vested in each of two persons at the same time. However, as remarked in that case, a State, when called upon through its Courts to enforce a chose in action belonging to an administrator appointed in a foreign State where his intestate died domiciled, may protect the interests of home creditors by appropriate provisions. But this does not change the rule of law which vests title to simple contract debts in the administrator appointed at the domicile of the intestate, as held from the time of Lord Chancellor Hardwicke, in *Thorn* v. *Watkins*, 2 *Ves. Sen.* 36, to the present, and without deviation by the United States Supreme Court.

That being the rule of law, and the facts appearing, without dispute, that Col. Ingersoll died intestate possessed of said chose in action at his domicile in New York, and title and possession thereof passed to his administratrix appointed there, how can it be held, as the majority of the Circuit Court of Appeals held, that Harris as administrator appointed in Montana long afterward, without assignment or even showing possession of the simple contract in question, could have made a valid transfer of it "as against all other administrators appointed elsewhere?"

In the case of *St. John* v. *Hodges*, 68 *Tenn.* (9 *Baxt.*) 334, it was held, that the administrator appointed in the State *where the debtor* upon certain promissory notes *resided, had no title* to the notes, or the debt evidenced thereby, the same having been left by the intestate at his domicile in another State; and also held that the compromise settlement of said debt and suit brought to enforce it, by an

administrator appointed *where the debtor resided, did not discharge the debt*, and was not binding on the administrator appointed at the domicile of the intestate.

The majority of said Circuit Court of Appeals instead of viewing the title to simple contract debts owing an intestate when he died, as vested in the administrator appointed at his domicile, where the law vests it, reversed the rule in their view. Proceeding on the *situs theory* they regarded the administrator appointed at the domicile of the intestate as absolutely cut off from ownership of promissory notes, and other simple contract debts owing his intestate who died having the same in his possession, at his domicile, in case the debtor resided in another State—a view directly opposed to the rule established by decisions of this and other Courts throughout the country—and on that erroneous view, it is said in the majority opinion: "Debts owed to an intestate are not multiplied by the number of his administrators."

But following out that *situs theory*, might not debts owing an intestate when he died, be "multiplied by the number of his administrators?" How would it be in cases where there are several debtors on one simple contract, who reside in different rtates? Proceeding on the *situs theory* the majority of the Circuit Court of Appeals held that title to a simple contract debt was in the administrator appointed where *one* debtor on the contract resided, regardless of whether he had assignment from the administrator appointed where the intestate was domiciled and had the written contract in possession, when he died. Following out that idea, where debtors on the same contract reside in different states, and a different administrator is appointed in each, there would seem to be a multiplication of the debt. Or in such case, and under such theory, it might be contended that the debtors having separated, the property or thing called a chose in action, was so scattered in attempting to follow each debtor, that it has no *situs*. The debtors on the contract in the case at bar each reside in a different State. The supposed multiplication of a debt cannot take

place under the rule of law vesting title to simple contract debts in the administrator appointed in the State where the intestate was domiciled when he died.

In announcing their ruling that there *is privity* between administrators appointed in different states, the majority of said Circuit Court of Appeals refer to the fact that courts of law permit an administrator, who has recovered judgment in a foreign state, to sue thereon without qualifying as administrator where the latter suit is brought; and reason therefrom to the effect, that if they do not hold the administratrix of Colonel Ingersoll appointed at his domicile in New York, to be in privity with Mr. Harris as said administrator appointed in Montana, then *if* Harris had obtained judgment in his attempted action in Montana he might also have brought suit thereon in Massachusetts. So it is said in the majority opinion, "if complainant's theory is sound"—that there is *no such privity* between administrators appointed in different states—the defendants might be subject to two suits for the same debt, and the "result would be intolerable." The same idea is expressed in respondents' assertion that such result would be "shocking to the moral sense, and inconsistent with any practical system of administration."

No such result could ensue under a requirement that Harris show title to the chose in action on which he attempted to sue. It is said the policy of a State is to protect *home creditors*; so it may be that where there is no home creditor, but a home debtor, on a simple chose in action, title to which, according to the established rule of law, is vested in a foreign administrator appointed at the domicile of the intestate, the State where the debtor resides may desire to protect its *home debtor* to the extent of requiring another administrator who attempts to sue on such chose, to show assignment thereof. The rule that there is no privity between administrators appointed in different states might be considered good reason for requiring that such assignment be shown, especially since both New York and Montana permit such assignment and suit by the assignee.

The suggestion that *if respondents' theory is sound the "result would be intolerable,"* is only another manner of saying that the rule of law laid down by the United States Supreme Court, and the Courts of last resort everywhere in this country, and applied by the Circuit Court in the case at bar—*that there is no such privity*—is unsound and should be abandoned. We have pointed out disastrous results which could ensue from breaking down that rule, which are far worse than the possible inconvenience suggested in the majority opinion, or in respondents' argument against the rule. In the case of *Stacy* v. *Thresher*, 6 *How.* 44, this Court points to irreparable wrongs which could flow from breaking down the rule that there is *no such privity*, and also refers to some inconveniences which may arise from it; but observes that mere inconveniences do not prove the existence of privity where in the nature of things there is nothing to create it.

The law does not require a debt owing an estate when he died, to be twice paid. It has ample resources to prevent any such result. Administrators are simply trustees for those beneficially interested in the estate (*Armstrong* v. *Lear*, 8 *Pet.* 72, *Stanley* v. *Mather*, 31 *Fed.* 866). And even if courts of law would permit an administrator who has obtained a judgment in his representative character, in another State, to sue thereon without qualifying as administrator where the latter suit is brought, he is still a trustee in respect to the matter, and the equity jurisdiction would prevent the supposed intolerable result. There would be, at most, only a possible inconvenience. When or where, in the practical administration of justice, has "debts owed an intestate," when he died, been "multiplied by the number of his administrators," or the debtor been required to twice pay the debt, or any part of it? The doctrine asserted in the majority opinion in the case at bar, resulted in denying the legal representative of Colonel Ingersoll so much as *one* trial of the rights in question. The majority opinion seems to proceed on the theory that defendants would fail to invoke the law available to prevent the supposed intolerable result.

The rule of law that title to such simple contract debts vests in the administrator appointed at the domicile of the intestate, obviates the supposed intolerable result. When the administrator seeking to enforce a simple contract debt in a State foreign to the domicile of his intestate, is required to show title, either by the fact that he was appointed at the domicile of the intestate, or has assignment from the administrator appointed there, no such result as the majority opinion forebodes could take place. A State may authorize a foreign administrator to prosecute a suit in its jurisdiction without taking out letters there, as some do; or may authorize the appointment of an administrator who has been appointed at the domicile of the intestate, as some do. If the administrator is invested with title, either by appointment at the domicile of the intestate or by assignment, no such supposed intolerable result could take place. If, however, the State where the debtor resides lays hold of the debt to protect home creditors, what the debtor is thus compelled to pay would be allowed him against the administrator appointed at the domicile of the intestate, by analogy to the doctrine which protects a debtor who has been compelled to pay through garnishment proceedings.

Chicago, etc., R. Co. v. *Strum*, 174 *U. S.* 710.

Respondents assert in their brief opposing complainant's petition for certiorari (page 43), that if Harris as administrator appointed in Montana had not title to said chose in action, then by the same rule, Mrs. Ingersoll as administratrix appointed in Massachusetts has not title. It seems hardly necessary to remark, in refutation of that contention, that Mrs. Ingersoll went to Massachusetts vested with title to and possession of said chose in action by virtue of her appointment as administratrix in New York, as clearly affirmed by the authorities cited above.

In the case of *Pinney, admr.* v. *McGregory*, 102 *Mass.* 186, the intestate died at his domicile in Connecticut, having in his possession certain promissory notes. His administra-

tor appointed there, came into possession of said notes, and took out letters in Massachusetts, where one of the debtors resided. His title and right to sue was sustained in an opinion delivered for the Massachusetts Court by Mr. Justice Gray.

In the case at bar, one of the debtors, Mr. Coram, resides in Massachusetts, and both debtors were served with process there, and have answered and defended generally.

4. The Effect Given to Said Judgment of Nonsuit, by the Ruling of the Court of Appeals, in the Case at Bar, Deprives the Legal Representative of Col. Ingersoll of Property Without due Process of Law.

The majority of the Circuit Court of Appeals erred in defining the dismissal of said Harris case as anything more than a nonsuit under the statute and decisions of Montana, as well as the general rule of law. But when they construed it as purporting to cut off all right to claim compensation for Col. Ingersoll's services in prosecuting said will contests under said contract, leaving only the hopeless suggestion "that a recovery against defendants, *if any may be had at all*, must be upon *quantum meruit* for services *other than those provided for by the contract*;" then said Circuit Court of Appeals should have disregarded said judgment as obnoxious to the provision of the constitution of the United States, that no state shall deprive a person of property without due process of law, or deny any person within its jurisdiction the equal protection of the law.

No judgment could be rendered on the merits in said Harris case under due process of law, without permitting evidence to be introduced and allowing opportunity to introduce it at a trial, and find the facts therefrom, because all the vital facts set up in the complaint were in issue, and all new matter of defense alleged in answer was denied by replication. If a trial was to be had, it was the province of the trial Court to try said cause, and find the facts; but no trial was had, plaintiff was not permitted to introduce any

evidence, although he sought opportunity to present it, nor were any facts found by the trial Court. Many cases might be cited where volumes of evidence was introduced upon the issues, and the final result, upon considering the evidence, was a finding that plaintiff was not entitled to recover, and a dismissal of the action; but the record of said Harris case discloses no such proceedings. It shows that all vital facts were in issue, and by the rulings of the Court plaintiff was denied the right to introduce evidence.

The majority of said Circuit Court of Appeals regarded certain *dicta* in said Montana opinion, as "the interpretation put upon the contract by the Montana Court" (R. 984), and that its effect was to give defendants remission of their indebtedness, or shield them from recovery, for services rendered by Colonel Ingersoll in fulfillment of his engagement, under said contract; and held that the discussion in the Montana opinion was binding upon the federal courts, notwithstanding it was conclusively shown in the case at bar, where the exhibition of evidence was permitted, that Colonel Ingersoll did everything required by the terms, or by implication, of said contract, to be done on his part, and, through the prosecution of said will contests and decree determining the same, achieved all that was stipulated as the event on which he should be paid said compensation, and more.

The remarks in said Montana opinion about the interpretation of the contract amounts to no more than a reference to its simple provisions, laying emphasis upon everything required of Colonel Ingersoll before recovery would be permitted; although the law of Montana provides that the interpretation of a contract, if it needs any, shall be "in the light of surrounding circumstances," shown by the evidence; and embraces the just rule laid down by the United States Supreme Court in *Noonan v. Bradley*, 9 *Wall.* 408, *that*:

"A construction should be adopted which would be more to the advantage" of the party who received a contract prepared by the other, "upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should

have a construction given to the instrument favorable to him, and on the further ground that when an instrument is susceptible of two constructions—one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right." This rule is adopted in 3 Mont. 384. The law of Montana also contains the other usual rules of reasonable and just interpretation.

* *Donnell* v. *Humphreys*, 1 *Mont.* 526.
Ming v. *Woolfolk*, 3 *Mont.* 384.
Shrieve v. *Copper Bell M. Co.*, 11 *Mont.* 324.

The Montana opinion in said Harris case recites what "counsel for defendants contended," and agrees "with the contention of defendants," and says: "An attorney, as such, has no authority to compromise a controversy of his client, no matter what may be the difficulties involved, nor however advantageous the result may be to the client." And "if a compromise of a controversy be made it must be under special authority delegated for that purpose. Otherwise, in the absence of a ratification by the client, the compromise agreement, as well as any judgment entered in pursuance of it, is void at the option of the client." That "Mr. Ingersoll could not, therefore, under the contract assume the authority to make any compromise of the contest. His duty required him to prosecute it, and he could not be held entitled to recover under his contract, short of a successful result of the controversy, followed by actual distribution to his clients." That "a judgment sustaining the contest would not be sufficient. The shares must be received" (*Harris* v. *Root*, 28 *Mont.* 167, 168).

What is the upshot of all this? How long should Colonel Ingersoll prosecute said contests? Would it be sufficiently prosecuted, when a decree, determining those very contests mentioned in the contract with him, had been entered in the trial Court, and declared by the Supreme Court of Montana to have superseded and taken the place of the will, and "itself became the basis of administration and

controlling as to the devolution of the property?" (*In re Davis estate*, 27 *Mont.* 497). Was the prosecution "successful" enough, when his clients, whose shares were altogether only 350–1100, got absolute right and title to 515½–1100, by the decree determining said contests? Was it sufficient compliance with those extremely strict exactions against Colonel Ingersoll—that "a judgment sustaining the contest would not be sufficient" (absolute right and title to all their shares secured by such a decree determining said contests would not be sufficient), "the shares must be received," it must be "followed by actual distribution to his clients"—to show that his clients had *already* received, "by actual distribution" more than "their shares," as heirs of Andrew?

All these strict requirements could be met by the evidence, if its presentation had been permitted. Colonel Ingersoll had so fulfilled his engagement that liberal construction was not needed; but it would be necessary to defer a decision, whether or not these requirements had been fulfilled, until evidence was presented, or at least until opportunity was afforded to present it. A decision made without allowing that opportunity, denying that Colonel Ingersoll or his legal representative had any rights under said contract, is without due process of law.

Fayerweather v. *Ritch*, 195 *U. S.* 276.
Chicago B. & Q. R. Co. v. *Chicago*, 166 *U. S.* 226, 234.

Moreover, an opinion as to the interpretation of a contract *is not res judicata*; nor is it a finding of facts or a judgment, as the authorities with good reason hold.

Louisiana Mut. L. Ins. Co. v. *Tweed*, 7 *Wall.* 44.
Dickinson v. *Planters Bank*, 16 *Wall.* 250.
Kentucky L. & Acc. Ins. Co. v. *Hamilton*, 11 *C. C. A.* 42.
Penouihl v. *Abraham*, 43 *L. Ann.* 214; 9 *S. R.* 36.
City Bank of, etc., v. *Brigham*, 61 *Kan.* 727; 60 *Pac.* 754.
State ex rel. v. *Hornaday*, 62 *Kan.* 334; 62 *Pac.* 999.
State ex rel. v. *Dist. Court*, 16 *Mont.* 274.
Burk v. *Table Mt. Co.*, 12 *Cal.* 403.
Robinson N. Y. L. E. & W. R. Co., 64 *Hun.* 41.

The interpretation of a contract in an opinion may
changed upon receiving more light, by the same, or a
other Court, wherein the contract is in question. It is
held in the authorities last above cited, and in those ne
following. The province and duty of the Federal Cou
was to put its own interpretation upon the contract, "
the light of surrounding circumstances," disclosed in t
case at bar, as was done by the Circuit Court.

Nash v. *Town*, 5 *Wall.* 689.
Neves v. *Scott*, 13 *How.* 268.
United States v. *Howland*, 4 *Wheat.* 115.
Boyle v. *Zacharia*, 6 *Pet.* 658.
Gelpcke v. *Dubuque*, 1 *Wall.* 175.
Thomas v. *Hatch, by Story J.*, 3 *Sumn.* 170.
Same Fed. Case, No. 13,899.
Bradley v. *Lill*, 4 *Biss.* 743, *Fed. Case No.* 1,783.
Edwards v. *Davenport*, 20 *Fed.* 756.

But the Montana opinion shows that the conclusio
therein asserted was *not based upon any interpretation of th
contract*, but was based upon issuable facts assumed. Afte
laying down the extremely strict requirements which mus
be met on the part of Colonel Ingersoll, or his legal repre
sentative, the opinion goes on and assumes and attributes
to Colonel Ingersoll the issuable facts: that he made a
compromise of his clients' interests; that "additional
authority" was necessary to enable him so to do; that "this
was conferred by his clients," and "accepted by him;"
and that by these supposed events all his rights vanished—
"there was a mutual abandonment of the contract," says
the Montana opinion. But whether any such things were
or were not done, must be ascertained from evidence out-
side of the contract, and the assertion of them has nothing
to do with interpretation of the contract. The evidence
in the case at bar, where its presentation was permitted,
shows that *no such things were done*, and all such contention
is silenced by the showing here. The term or idea of *com-
promise* cannot, where the evidence is brought to light,

be applied to Colonel Ingersoll or his clients in respect to said contests, or the results achieved thereby.

Those issuable facts, moreover, on which said Montana opinion is based, were not set up in any pleading. It was nowhere alleged in any pleading in said Montana action that Colonel Ingersoll went through the operation of having "additional authority" to make a compromise, "conferred upon him by his clients," and "accepted by him;" or that he made a compromise concession or relinquishment of so much as a farthing of his clients' shares; or that he *abandoned* his rights under said contract. The compromise, *i. e.*, concession and relinquishment, was on the part of *other heirs*. Colonel Ingersoll's clients got their shares and more, through the decree determining said contests, as alleged in the complaint before the Montana Court. It was sufficient, according to statute of Montana, for a party claiming under a contract, to allege the due performance thereof on his part (*Code Civ. Proc., Sec.* 746), as was alleged in the complaint and denied in the answer, in said Harris case in Montana.

In attempt to controvert the manifest disclosure of the record that said Montana decision, construed as a judgment on the merits, is without due process of law, respondents' counsel say: "The complaint in the Montana suit alleged the facts as set out in the present suit; namely, that after the trial of the will case, by an agreement with the proponent of the will guaranteeing to him, that in case the will were defeated by some other contestant, he should, at the expense of Colonel Ingersoll's clients, receive more than a distributive share" (*Brief opposing certiorari*, 53). That statement is not correct. Neither the bill in the case at bar, nor the complaint in the Montana Court, nor any other pleading in either case, alleges any such thing. The bill in the case at bar avers that by reason of the force, effect and stress of the prosecution of said will contests, by Colonel Ingersoll, against the proponent of said will, in preventing the admission thereof to probate, the stipulations providing for the determination of said contests were made; and

goes on and alleges what portions of the estate it was stipulated should be decreed to Colonel Ingersoll's clients by a decree to be entered determining said contests (*Bill, par.* 11, *R.* 12). And then alleges what the decree did award them (*Bill, par.* 15, *R.* 16). So in the complaint of Harris as administrator in Montana, it is alleged what was, by the "tenor and effect" of the stipulations, allotted to Colonel Ingersoll's clients (*Pars. ix, xii, R.* 791, 795); and also alleges what the decree determining said will contests, awards them (Par. xiv, R. 797, and *amendment*, R. 833). Respondents do not, nor can they, cite anything in the record to substantiate their assertion quoted just above.

On that incorrect premise, respondents' counsel argue that: "It appears, therefore, that to support the reasoning on which the Montana Court based its decision, no recourse to facts alleged in the answer was necessary, and none was made. The Montana Court did not assume the existence of any facts except those alleged in the complaint. Certain things the Court did assume (see petition, p. 27). First, it did assume that the agreement alleged in the complaint to have been made for the allowance of the will, was made. Whether an agreement by which a client undertakes in one alternative to give up part of what he would otherwise receive in return for the opportunity in another alternative to get more than he would otherwise receive, is a compromise, is a question of law that need not now be argued. Second, it did assume that Colonel Ingersoll had no authority by virtue merely of his employment to defeat the will to make for his clients such an agreement. Whether right or wrong, this was not the assumption of an isstiable fact, but of a proposition of law" (*Brief opposing certiorari*, 54, 55).

It is not strange that respondents failed to cite any record for their premise, for no such thing as they assert is alleged in the complaint or any pleading before the Montana Court, and the light of evidence was shut out by its rulings. The stipulations providing for the determination of the will contests were neither in evidence nor attached to any plead-

ing, before the Montana Court. The decree finally determining the will contests and awarding to Colonel Ingersoll's clients 515½-1100 of the estate, to be distributed to them *in kind* directly and through trustees, was annexed to the complaint of Harris as an exhibit ("Exhibit C," R. 826). And that decree, the Montana Supreme Court had declared, superseded and took the place of the will, and "itself became the basis of administration and controlling as to the devolution of the property" (*In re Davis estate*, 27 *Mont.* 497). So there were no facts shown, either in pleading or evidence, on which respondents proceed in their attempt to defend the Montana opinion—as they interpret it—as a decision denying that Colonel Ingersoll or his legal representative had any rights whatever under said contract.

But in defining their position, even so adroitly, respondents aid in elucidating the point under consideration. Their attempted defense of the Montana opinion, construed as a decision on the merits, shows when considered in connection with the record, that the conclusion asserted in that opinion was based on issuable facts which were neither set up in any pleading before that Court, nor shown by evidence there, for all evidence was excluded.

Respondents' counsel have seen the stipulation (which the Montana Court had not seen) wherein Colonel Ingersoll's clients said in effect to their adversaries, the proponents of the will: You forego your attempt to take the whole estate under the will, stipulate for entry of a decree determining the will contests and awarding to us a large part of the estate, far exceeding our shares as heirs, and we will agree that in case anyone can overcome that decree and wrest the estate from its operation and distribute the property under the law of succession, then we will agree to give you one-eleventh of the estate, which would in the latter event go to us as heirs. This stipulation was introduced in the case at bar where the presentation of evidence was permitted (*Exhibit LV*, *R.* 598).

Upon that showing respondents' counsel suggest that, "to give up part of what he would otherwise receive,"

might be considered a compromise. But Colonel Ingersoll's clients gave up nothing. "To give up part of what he would otherwise receive," is not a proper premise unless the fact appears that "he would otherwise receive" something and actually gave up something. Colonel Ingersoll was in the midst of a struggle for his clients' shares. If the will prevailed, they would get nothing. Until it was defeated they had nothing. When the decree was entered they had something, for it was a muniment of title, itself "the basis of administration and controlling as to the devolution of the property" (*In re Davis estate*, 27 *Mont.* 497). And that decree awards Colonel Ingersoll's clients nearly half the estate, whereas "their shares" amounted to less than a third. Before that decree was entered, there was no part of the estate that Colonel Ingersoll's clients had any assurance they "would otherwise receive." Colonel Ingersoll builded so well, that his clients gave up nothing, but he won for them a large amount more than their shares. If they had failed to "get their shares" (as the contract with him expresses it), then would be time enough, upon showing such failure, to argue about the effect of a promise "to give up part of what" they had no assurance of ever getting at all. If the outcome of the contest had brought to Colonel Ingersoll's clients *only part of their shares*, it would be time enough then, when that fact were alleged and proved, to raise the cry of "compromise."

Respondents say the Montana Court "did assume that Colonel Ingersoll had no authority by virtue merely of his employment to defeat the will to make for his clients such an agreement." That statement further admits that there was *assumption* in the Montana opinion of *issuable facts*, without pleading or proof; and shows that if there was to be an adjudication of the rights of Colonel Ingersoll or his legal representative, with anything like due process of law, it would have been well to permit the evidence to be presented, or at least allow opportunity to present it. The stipulations providing for the determination of the will contests show that Colonel Ingersoll *did not* "make for his

clients such an agreement." The stipulations were signed and acknowledged by Colonel Ingersoll's clients in person, as appears when they are shown in evidence (*Exhibit LV*, *R.* 598 *et seq.*). If that had been shown—if the light of evidence had been let in, showing that his clients in person signed the stipulations—what would have become of the assumption that Colonel Ingersoll had no authority, etc., that "additional authority" had to be conferred "upon him by his clients," and "accepted by him" etc., and that by these suppositious events Colonel Ingersoll *abandoned* his rights? The evidence, when its presentation was permitted, shows that Colonel Ingersoll's clients did not "give up," so much as a farthing of their shares. The decree which shows that *no compromise* was made by Colonel Ingersoll or his clients, followed the stipulations, and when the decree was entered, Colonel Ingersoll's clients had within their grasp nearly half the estate, greatly exceeding "their shares."

The things respondents' counsel lay hold of in attempt to defend "the reasoning on which the Montana Court based its decision," as they assert, were not before that Court at all; and in that attempt respondents are found using the same assumptions of issuable facts on which that opinion is based. They assume, and admit the Montana Court assumed, what was not in any pleading before it, as we have pointed out above; they assume, and admit the Montana Court assumed, "that Colonel Ingersoll had no authority by virtue of his employment to defeat the will to make for his clients such an agreement," which the evidence, where its presentation is permitted, *shows he did not make*; and they assume that getting for his clients absolute and indefeasible title to more than their shares, through the prosecution of said contest and the stipulations and decree determining the same, signifies "compromise."

But still worse is that part of respondents' argument, in which—after admitting that the Montana Court "did assume that Colonel Ingersoll had no authority by virtue of his employment to defeat the will *to make for his clients such an agreement*," which he did not make for his clients,

as the evidence shows —they say: "the Court made no assumption as to whether any special authority to make the agreement was given, or if given, was accepted, or that Colonel Ingersoll intentionally abandoned all rights under the special contract" (*Brief opposing certiorari*, 55). This is the position to which respondents are driven, in attempt to defend that opinion, interpreted as purporting to destroy the rights of Colonel Ingersoll and his heirs and legal representative, and give defendants remission of their indebtedness, or shield them from its enforcement. While there, in that opinion, in plain type—on page 168 of 28 Montana report, and on page 879 of the record at bar introduced by respondents—is the statement: "Additional authority was therefore necessary to this end, and, when this was conferred by his clients and accepted by him, there was a *mutual abandonment* of the contract." Respondents' counsel say the Montana Court "made no assumption as to whether any special authority to make the agreement was given, or if given, was accepted, or that Colonel Ingersoll *intentionally* abandoned all his rights," under the contract. Does a declaration without pleading or proof that a thing was done, assume it? Does "*mutual*" signify "reciprocally acting?" (Webster's Dict.) Does acting reciprocally signify something done intentionally? The word *abandon* or *abandonment* itself signifies an *act done intentionally or voluntarily*. The authorities in Montana and everywhere have always held that *abandonment* is a question of fact depending upon *intention and act*, and must be alleged and proved, if used to defeat a claim. See Montana decisions cited and quoted in depositions of former Chief Justices Blake and Pemberton, R. 395 *et seq.*

Along with the *assumption of abandonment* is the further declaration in the Montana opinion, "that a recovery against defendants, *if any may be had at all*, must be upon *quantum meruit*, for services *other than those provided for by the contract.*" No *other services* could be proved. And if it were possible to prove any *other services outside* of those provided for by the written contract, recovery therefor

was barred by statute of limitations when that opinion was delivered.

To give the judgment dismissing said Harris case the effect of a judgment on the merits, is to deprive the legal representative of Colonel Ingersoll of all that is due for his fulfillment of said contract, without trial or proof, while denying opportunity to present proof, and consequently *without due process of law*. In view of the issues in that case no judgment could be rendered deciding the merits while denying opportunity to present evidence, without overriding and setting at nought the constitutional provision that no State shall deprive a person of property without due process of law. When, therefore, the majority of said Circuit Court of Appeals construed the dismissal of said Harris case as a judgment undertaking to determine the merits, they should have disregarded it, as Judge Aldrich insisted.

The Circuit Court of Appeals, by its ruling in the case at bar, gave the dismissal of said Harris case unwarranted effect.

Fayerweather v. *Ritch*, 195 *U. S.* 276.
Chicago B. & Q., R. Co. v. *Chicago*, 166 *U. S.* 226, 234.
Martin v. *Texas*, 200 *U. S.* 316.

II.

OTHER OBJECTIONS WHEREBY RESPONDENTS SEEK TO AVOID THE ENFORCEMENT OF THEIR JUST INDEBTEDNESS, "EVEN IF THE MONTANA JUDGMENT WAS NOT A BAR."

In opposition to complainant's petition for certiorari, respondents set up contention that, even though the Circuit Court of Appeals decision cannot be maintained upon any ground or reason mentioned in the majority opinion, nevertheless there are other grounds for denying complainant all relief, which that Court failed to notice. The other points of contention are:

(1) That complainant did not establish the existence of a lien on the interests of defendants Coram and Root

in said money and bonds acquired as part of the fruits of Colonel Ingersoll's labors in the will contests.

(2) That complainant failed to establish a debt due from Coram and Root, because, as they assert, she has not shown that the will was defeated, or that defendants got their shares.

(3) That plaintiff failed to show that there is any property in Massachusetts which can be subjected to a lien for said debt.

The same, with many other technical contentions, were presented to the Circuit Court by elaborate briefs and arguments, but were overruled; and the same contentions were likewise presented to the Circuit Court of Appeals, but ignored in its treatment of the case. We will consider them in the order above stated.

I. There is a Lien Existing in Favor of Complainant, by Virtue of the Montana Statute, and also by Virtue of Principles of Equity Independent of Statue, to Secure Payment for Colonel Ingersoll's Services in said Will Contests.

a. The Statutory Lien accrued in favor of Colonel Ingersoll by virtue of the statutes of Montana providing a lien in favor of attorneys and counsellors at law, upon judgments and proceeds thereof, recovered by their labors; which statutes are correctly set forth in the bill, as respondents admit in their answer (*Bill, R.* 22, 23, 24, *admissions Ib.* 110).

While Colonel Ingersoll was prosecuting said will contests, the *older* statute which is first recited in the bill (R. 23), was changed by the code of 1895, in respect to procedure under it, by eliminating the requirement that notice of such lien be filed. Thus when Colonel Ingersoll's lien matured on August 24, 1897, when final decree was entered determining said will contests in favor of his clients, the statute did not require any notice of lien to be filed. The provisions of the code adopted in 1895 were a continuation of the older statute as thus modified. Section 3454 of that code expressly provides (see bill, R. 24) that:

"The provisions of this code, so far as they are substantially the same as existing statutes, or the common law, must be construed as continuations thereof, and not as new enactments" (*Sec. 3454, Mont. Code Civ. Proc.*).

Bear L. & W. R. W. & I. Co. v. *Garland*, 164 *U. S.* 1.

The new code adopted in 1895 also provides that the changes thereby made shall not "abridge, abolish or impair any vested right or *rights accruing* or accrued," but that "all such rights and liabilities may be enforced and proceedings continued, conforming the same so far as practicable to the provisions and remedies prescribed by said codes." *Mont. Polit. Code, Sec.* 5182. See also depositions of Chief Justices Pemberton and Blake as to said statute laws of Montana, R. 387–393.

Statutes relating to procedure for preserving or enforcing rights may be changed and subsequent proceedings should conform to the statute as modified.

Tennessee v. *Sneed*, 96 *U. S.* 69.

Cooley's Const. Lim. (*5th Ed.*) 329, 330.

South. on St. Constr. 220.

So the *procedure* for preserving or enforcing a lien may be changed at any time by the Legislature.

Bear L. & W. R. W. & I. Co. v. *Garland*, 164 *U. S.* 1.

Whitehead v. *Latham*, 83 *N. C.* 236.

Willamette, etc., Co. v. *Riley*, 1 *Or.* 183.

When Colonel Ingersol commenced the prosecution of said will contests the statutes of Montana provided in the most comprehensive terms, that:

"All attorneys and counsellors-at-law shall have a lien upon all moneys in their hands and upon all judgments they may have obtained for any clients for any fees or balance of fees due or to become due for any professional services rendered by them in any Court or Courts of this Territory." Then follows the proviso as to filing notice of lien after it matures (see bill, R. 23).

Filmore v. *Wells*, 10 *Colo.* 228, 3 *Am. St. R.* 567.

Thereafter, while Colonel Ingersoll was prosecuting said will contests, and before his right of lien matured, the proviso of the foregoing statute, as to filing notice of such lien, was eliminated by the Code of 1895, so that no notice was necessary to fix or preserve the lien (see bill, R. 23, 24).

Potter v. *Ajax M. Co.*, 19 *Utah* 421, 57 *Pac.* 270.
Newbert v. *Cunningham*, 50 *Mc.* 231, 79 *Am. Dec.* 621.

The repeal of an exception or proviso extends the purview of the statute.

Bank for Savings v. *Fields*, 3 *Wall.* 495.
Smith v. *Hoyt*, 14 *Wis.* 256.
Surtees v. *Ellison*, 9 *B. & C.* 752.
South. On St. Constr., pages 216, 217.

Defendants affirmatively admit that liens accrued, in favor of attorneys who prosecuted said will contests on their behalf, "upon shares and interests in the property of the estate of Andrew J. Davis acquired or to be acquired" for said five heirs and Coram. It is averred in the bill in the case at bar, that said Coram and Root have "acknowledged and confessed" the "liens claimed by attorneys *resident in the State of Montana* who were employed by said Root and Coram *to assist* in the prosecution of said will contests on behalf of said five heirs and Coram, and whose liens on the funds and property acquired for said five heirs and Coram, through said contests, accrued by virtue of said statutes of the State of Montana," for "services as attorneys in the same contests prosecuted by said Robert G. Ingersoll," and that said liens of other attorneys "acknowledged and confessed by said Henry A. Root and Joseph A. Coram," have been "paid and discharged out of funds of said estate of Andrew J. Davis, deceased, acquired as aforesaid for," and ordered "distributed to, said five heirs and Joseph A. Coram" (see bill, R. 33, 34).

There is no denial of that averment and defendants have furnished evidence to prove it. In their answer to paragraphs 22, 23, 24 and 25 (R. 807–814) of the complaint of

Harris in Montana, introduced by defendants in evidence in the case at bar, they *admit* that certain attorneys named therein who assisted Colonel Ingersoll in the prosecution of said will contests, "have a lien upon said shares and interests in and to said property of the estate of Andrew J. Davis, deceased, acquired or to be acquired by said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd, Mary Louise Dunbar and Joseph A. Coram, and each and all of them" (R. 846, 847). That answer is verified by the affidavit of Henry A. Root (R. 848). In the same answer defendants admit that they "engaged and employed said Robert G. Ingersoll to act as attorney for and on behalf of said" five heirs naming them, and "Joseph A. Coram, in the prosecution of said will contests" (*see par.* 7, *R.* 789, *admitted par.* 7, *Ib.* 839).

The statutory lien given an attorney attaches and adheres to the judgment procured by his professional labors, and to all proceeds thereof. It also attaches to all rights growing out of the judgment, and to all judgments auxiliary to the original, such as a judgment on a bond given to secure the original judgment. And the attorney by virtue of his lien may prosecute proceedings to avail himself of the benefits to which his client is entitled under the original judgment.

Coombe v. *Knox*, 28 *Mont.* 202.
Justice v. *Justice*, 115 *Ind.* 201, 16 *N. E.* 615.
Filmore v. *Wells*, 10 *Col.* 228, 3 *Am. St. R.* 567.
Newbert v. *Cunningham*, 50 *Mc.* 231, 79 *Am. D.* 621.

Respondents in the case at bar simply assert that, "there is no statutory lien;" and that "it is not necessary to consider whether under the statutes of Montana a lien could exist in the present case, or whether if there was such a lien, it could be enforced by bill in equity" (*Brief opposing certiorari*, 56). But they cite no authority to support or explain that vague assertion. A bill in equity is the proper action to enforce such lien.

Wylie v. *Coxe*, 15 *How.* 415.
Coombe v. *Knox*, 28 *Mont.* 202.
Filmore v. *Wells*, 10 *Col.* 228, 3 *Am. St. R.* 567.

It is also asserted by respondents that the Montana "statutes can have no extra-territorial effect;" that the statute of Montana, "can no more create a lien on property in Massachusetts for attorney's fees, than for taxes." With these bare assertions, without support of any authority, respondents pass over this branch of the consideration.

The principle that the law regulating the subject matter of a contract becomes part of contracts on that subject, is so often and universally affirmed, it needs no citation of authority in support of it. The law of Montana expressed in its statutes giving Colonel Ingersoll a lien, became and is part of his contract with Coram and Root, to the same effect as if that contract had expressly stipulated that upon fulfillment thereof Colonel Ingersoll should have a lien on what was acquired by his labors, for his clients. The contract and its fulfillment along with the statute created the *right of lien* on the property acquired from said estate for Colonel Ingersoll's clients.

Rights can and do have extra-territorial effect, and it makes no difference whether they were created by statute law, or common law, or by contract, will, decree or other effectual means.

Dennick v. *Cent. R.R. Co.*, 103 *U. S.* 11.
Smith v. *Condry*, 1 *How.* 29.
Nor. Pac. R. Co. v. *Babcock*, 154 *U. S.* 190.

Both federal and State Courts constantly enforce rights founded upon the laws of other States, "whether the right of action be *ex contractu*, or *ex delicto*."

Texas v. *White*, 10 *Wall.* 483.
N. P. R. Co. v. *Babcock*, 154 *U. S.* 190.
Dennick v. *Cent. R. R. Co.*, 103 *U. S.* 11.
Smith v. *Condry*, 1 *How.* 29.
Huntingdon v. *Attrill*, 146 *U. S.* 657.

In the case of *Texas* v. *White*, *supra*, this Court refers to the law of Texas, where the letter was written, employing the attorney as the law supporting his lien asserted on funds in the city of Washington.

The Courts of the United States, "take judicial notice of" and "administer the laws of the States of the Union in cases to which they respectively apply," and enforce rights created thereby.

Owings v. *Hull*, 9 *Pet.* 607.
Merch. Exch. B. v. *McGraw*, 59 *Fed.* 972.
Bank v. *Franklyn*, 120 *U. S.* 747.
Lamar v. *Micou*, 114 *U. S.* 218.
Gormley v. *Bunyan*, 138 *U. S.* 623.

In attempt to controvert the statutory right of lien existing in favor of complainant, respondents say that "counsel for plaintiff at the final hearing *appeared* to urge that there was *some sort* of attorney's charging lien upon the property" (*Brief opposing certiorari*, 56). There was no discussion in any brief or argument by counsel for complainant, of a "charging lien," defined as such. That gratuitous remark simply serves the purpose of setting up *a feigned premise* to be afterwards disputed by respondents' "more serious" assertion that, "the so-called attorney's charging lien is not recognized in the Courts of the United States." And for support of that assertion they cite *Gregory* v. *Pike*, 67 *Fed. R.* 837. But that case decides no such thing. Moreover, the attorney's claim therein considered was allowed. Furthermore, the United States Courts *do recognize* and enforce the lien formerly defined as the attorney's "charging lien," although such terms to "indicate the distinctive nature of the liens . . . are now rarely employed." 3 *Am. & Eng. Ency. of Law* 447. *See also Weeks on Attorneys* (2nd ed.) *Sec.* 370, *and the note in* 31 *Am. Dec.* 755, 756, *citing decisions of the United States Courts maintaining the "attorney's charging lien."* Among those cases is *Wylie* v. *Coxe*, 15 *How.* 415. The same character of lien, without discussing refinements of definition, is enforced in *Texas* v. *White*, 10 *Wall.* 483, *and McPherson* v. *Cox* 96 *U. S.* 404. Many other cases could be cited where the Federal Courts have recognized and enforced the lien formerly defined as the "attorney's charging lien."

Complainant simply claims two-fold anchorage, in law, of the lien existing in her favor. The right to a lien exists by virtue of the statute. It also exists by virtue of the principles of equity independent of statute. In the case of *Texas* v. *White*, 10 *Wall.* 483, this Court referred to the two sources of law which supported the attorney's lien there maintained. The same principle is also declared by this Court in *Dennick* v. *Cent. R. R. Co.*, 103 *U. S.* 11.

The Circuit Court in overruling demurrers to the bill, expressed the view that complainant's claim of lien could not be maintained by reference to the statutes of Montana, and suggested that to found it on those statutes, and also on the principles of equity, might subject the bill to the objection of multifariousness. Those observations were made at an early stage of the case. But the Circuit Court held on the authority of decisions of the United States Supreme Court which we cite below, that an *equitable lien undoubtedly exists* in favor of complainant, by reason of the facts shown in the bill; and when the same were established, the Circuit Court foreclosed the lien.

A bill setting up facts which entitle complainant to a right, would not be multifarious under any rule laid down in the authorities, simply because that right has a double anchorage in the law—*i. e.*, because it may be maintained upon principles of equity, as well as by reference to statute law, applied to the facts established.

Gibsons suits in Chancery, Sec. 292.

Foster's Federal Practice, Sec. 71.

Von Auw v. *Chicago T. & F. G. Co.*, 69 *Fed. R.* 448.

A right of lien accrued by virtue of the statutes accompanying said employment, and labors of Colonel Ingersoll, and adheres to the property acquired for his clients, just the same as the *rights* of his clients established through his labors attaches to the property left by Andrew J. Davis, *wherever situate*. Under the decisions of this Court, cited above, such rights should be enforced in proper actions, though founded on statutes of a State. It is significant

that respondents' counsel do not claim to have found any authority to the contrary.

b. There is also an Equitable Lien existing in favor of complainant by virtue of the contract, promises, pledges and other facts shown in the bill and established by admissions and proofs.

The decisions of this Court, cited below, are entirely sufficient authority that the lien foreclosed in the case at bar is sustained upon principles of equity, independent of statute. But since respondents, in disputing it, have cited English authorities, we will first briefly refer to the comprehensive terms in which the English Chancellors declared the existence of the attorney's equitable lien, to contrast their affirmations with the extremely narrow contentions of respondents on this topic.

In *Turpin* v. *Gibson*, 3 *Atk.* 719, decided in 1749, Lord Chancellor Hardwicke said:

"I am of the opinion that a solicitor in consideration of his trouble, and the money he disburses for his client, has a right to be paid out of the duty decreed for the plaintiff, and has a lien upon it, before the bond creditors of the deceased plaintiff, and it is constantly the rule in this Court; neither can the administratrix controvert this rule, by insisting upon applying the effects in course of administration."

It is stated in the report of this case, that: "Upon another petition a short time before Lord Chancellor laid down the same rule."

In *Barnsley* v. *Powell*, 1 *Amb.* 102, decided in 1750, Lord Hardwicke again said:

"If a solicitor prosecutes to a decree, he has a lien on the estate recovered in the hands of the person recovering for his bills."

It is also stated in the report of that case that:

"It was referred to the Master to tax the petitioner his costs of suing out and prosecuting two commissions of lunacy against the plaintiff, and also his fees and disbursements in this and the cross cause, both at law and in this

Court, and to enquire what other suits and business had been solicited or performed by the petitioner, or for or on behalf of the plaintiff or his wife," etc. "And to tax the petitioner's bill of *fees* and *disbursements*."

The report of the last mentioned case shows that the Master found, "eight thousand three hundred and sixteen" pounds and some shillings, due the solicitor who prosecuted the suits mentioned. Such sum could hardly be supposed to represent simply *court costs*.

In *Welsh* v. *Hole*, 1 *Doug.* 238, decided in 1799, Lord Mansfield said:

"An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it in *transitu* if he can lay hold of it. If he apply to the Courts, they will prevent it being paid over till his demand is satisfied. I am inclined to go still further and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice."

In the case of *Ormerod* v. *Tate*, 1 *East* 464, Lord Kenyon said:

"The cause being at issue at York Spring Assizes, 1800," the parties agreed to an arbitration; and an award was made, to the effect that the defendant should pay plaintiff a certain sum in installments; and that:

"The plaintiff's attorney having been informed that the parties intended to settle the matter between themselves for the purpose of ousting him of his lien on the costs, served the defendant with notice to pay the amount of damages and costs to him, and not to settle the same with the plaintiff or any other person, as he had a lien upon the costs for his fees, etc., notwithstanding which the defendant on demand of the first installment by the plaintiff's attorney when it became due refused to pay it to him, but paid it over to the plaintiff himself, and obtained from him a receipt in full of all demands; and then told the attorney he would never

pay him a shilling, and he might get his costs how he could. Thereupon a rule was obtained on the part of the plaintiff's attorney, calling on defendant to show cause why he should not pay him his costs in this cause out of the money awarded to be paid by the said defendant to the plaintiff, and also the costs of this application."

"Lord Kenyon, C. J. The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the Court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien. Therefore,

Per Curiam: Rule absolute for the defendant forthwith to pay over to the plaintiff's attorney 10 pounds, the amount of the first installment awarded to be paid to the plaintiff, and to pay the remaining installments when due to the plaintiff's attorney."

"(*a*) Doug. 238. (*b*) 6 Term Rep. 361. (*c*) *Ib.* 456."

The report of this case shows that all of the award was ordered paid to the attorney notwithstanding it was claimed the parties had settled and "receipt in full" had been given, again very clearly showing that it was not merely Court costs that the attorney's equitable lien secured.

In the case of *Read* v. *Dupper*, 6 *T. R.* 361, Lord Kenyon also said:

"The principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained."

In the language of the English Chancellors, there is no minimizing as to what the attorney's equitable lien attaches to, or what is secured thereby. They declare that he has a lien upon "the fruits of the cause," or a "lien on damages

awarded," or "on the estate recovered," to secure "his bills," or his "legal demands." Nor is there requirement of any special conditions to establish this equitable lien, such as that the fee must be contingent, or there must be an agreement to pay out of the recovery. No such thing is mentioned.

Some of the early American cases enforcing the attorney's equitable lien—*Andrews* v. *Morse*, 12 *Conn.* 444, *McDonald* v. *Napier*, 14 *Ga.* 110, and *Weed M. Co.* v. *Boutelle*, 56 *Vt.* 570, and *Renick* v. *Ludington*, 16 *W. Va.* 378, *approved in* 138 *U. S.* 507—explain that the *bill of costs* under the English practice *included not only costs for Court officers, but disbursements and compensation of the attorney*; that such bill of costs might also include *counsel fees* paid out by the attorney for counsel in the cause; and that, in the English practice, the bill for attorney's fees and disbursements *had to be taxed* before it could be enforced. The bill was then spoken of as the attorney's bill of costs. "And in this country the distinction between attorney and solicitor, and counsel is practically abolished in nearly all the States," says the United States Supreme Court, *In re Paschal*, 10 *Wall.* 483.

The American Courts invested with the same equity jurisdiction have all along enforced the attorney's equitable lien, referring to the doctrine established in the common law.

In *Andrews* v. *Morse*, 12 *Conn.* 444, 31 *Am. Dec.* 752, decided in 1838, the parties, seeking to defeat the attorney's lien, claimed that the judgment had been settled. The attorney's claim was not for statutory fees. It was "for services rendered and for certain disbursements made in the progress of the suit." Nor was there any statutory provision for an attorney's lien. The Court sustained the attorney's equitable lien, referring to cases decided in England and New York, as authority therefor.

So in the case of *Sexton* v. *Pike*, 13 *Ark.* 193, decided in 1852, the Court declares that "an attorney has a lien for his fees upon the judgment recovered" (13 Ark. 194).

It was not founded upon any statute. Nor was there any express agreement that the attorney should look to the recovery for his compensation. The Court also ruled that the lien was not defeated by assignment of the judgment to one "who has not received previous notice of the attorney's lien." The assignee, as the Court observes, could enquire of the attorney of record whether his claims had been satisfied; while the attorney would have no certainty of knowing to whom the judgment creditor purposed to assign.

In the case of *Carter* v. *Davis*, 8 *Fla.* 183, decided in 1853, the Court affirms the attorney's *equitable lien* upon the judgment and its proceeds, obtained by his labors. There was no contract stipulating the amount of compensation, or that the attorneys should look to the recovery for remuneration. It was also held that such lien had precedents over an equitable set-off claimed by the judgment debtor.

In New York, prior to the adoption of the code, the Courts enforced the attorney's equitable lien on the judgment and proceeds obtained through his professional labor, to secure payment of his costs and disbursements *taxed under the fee bill*, which provided for taxing certain attorney's fees. But the code abolished the fee bill, and permitted attorneys to agree with their clients as to compensation. There was no provision in that code as first enacted, for the attorney's lien. Under that state of the law, the Court of Appeals, all members concurring, in *Rooney* v. *Second Av. Ry. Co.*, 18 *N. Y.* 371, held that the attorney had an equitable lien on the judgment recovered, to secure his compensation, which, in that case was, by agreement, half of the amount recovered. The Court refers to the principles laid down by Lord Kenyon in *Read* v. *Dupper*, *supra*, and by Lord Mansfield in *Welsh* v. *Hole*, *supra*, as authority sustaining the attorney's *equitable lien*. And it was ruled to the same effect in *Marshall* v. *Meech*, 51 *N. Y.* 140.

In the case of *Weed M. Co.* v. *Boutelle*, 56 *Vt.* 570, the attorney's equitable lien was upheld and enforced on the

judgment and proceeds thereof, even though they had passed into the hands of an assignee of the judgment. The Court in that case refers to the ruling of Lord Mansfield in *Welsh* v. *Hole*, *supra*, as authority sustaining the attorney's equitable lien. And upon thorough consideration the Court refused to adhere to its prior ruling that such lien only extended to *taxable costs*.

In *McDonald* v. *Napier*, 14 *Ga.* 110, decided in 1853, and *Warfield* v. *Campbell*, 38 *Ala.* 527, decided in 1863, upon full consideration the attorney's equitable lien on the property recovered in the suit, to secure his just compensation, is sustained solely on principles of equity, established in the English and American authorities. The latter case was afterward affirmed with emphasis in *ex parte Lehman*, 59 *Ala.* 561, because there had been some observation in another Alabama case, questioning the views expressed in *Warfield* v. *Campbell*, *supra*. The last mentioned case, and *McDonald* v. *Napier*, *supra*, are cited with approval by the United States Supreme Court in *Cent. R. R. Co.* v. *Pettus*, 113 *U. S.* 116.

In the case of *Renick* v. *Ludington*, 16 W. Va. 378, the attorney's equitable lien on the property recovered in the suit, to secure his compensation, stipulated or implied, is sustained and enforced, solely on principles of equity declared in the English and American authorities. This case is approved and quoted from, by the United States Supreme Court, *in Louisville & E. St. L. Co.* v. *Wilson*, 138 *U. S.* 507.

The United States Supreme Court and Circuit Courts have frequently affirmed and enforced the attorney's equitable lien in its full vigor.

A case directly in point sustaining the case at bar, is that of *Wylie* v. *Coxe*, 15 *How.* 415, decided in 1853, wherein this Court declared that the attorney had a lien upon funds in the hands of an administrator, obtained by the attorneys' prosecution of a claim before the commission authorized to make awards upon claims against the Mexican government. The points decided in that case are strikingly

similar to the case at bar, and fully sustain the decree therein. The attorney was to be paid out of the funds recovered, in case of success, otherwise he was to receive no compensation. The prosecution of the claim resulted in an award which came into the hands of an ancillary administrator, and the attorney's lien was enforced on the funds in that administrator's hands, with interest from the time the same became available.

In speaking of the case of *Wylie* v. *Coxe*, *supra*, this Court, in *Staunton* v. *Embrey*, 93 *U. S.* 556, says: "Professional services were rendered by an attorney . . in prosecuting a claim against the Republic of Mexico under a contract that the attorney was to receive five per cent of the amount recovered; . . . the efforts of the attorney were successful, and he demanded fulfillment of the contract, which was refused. The attorney brought suit, and this Court held that the decease of the owner of the claim did not absolve the contract, and *that the claim remained a lien upon the money when recovered*, and that a Court of equity would exercise jurisdiction *to enforce the lien*," etc. The case of *Wylie* v. *Coxe*, has been used as authority for maintaining the attorney's equitable lien in a great number of cases in this country (see *Notes on United States Reports*, *Vol.* 5, *page* 336).

The case of *McPherson* v. *Cox*, 96 *U. S.* 404, is also directly in point sustaining the equitable lien foreclosed in the case at bar. In the opinion therein, by Mr. Justice Miller, speaking "in regard to the facts relied on to create the lien" this Court said: the agreement was to pay the attorneys "a fixed sum for their services, which, in a letter written to them after a controversy had arisen as to the amount so fixed," the client said: "was to be paid out of the proceeds of sales of the property as such proceeds shall be realized." And "it will thus be seen," says the Court, the client "agreed to pay Carlisle & McPherson out of the proceeds of the sale of the property if she was successful." This agreement the Court holds constituted a lien on the land recovered, observing: "It was to be paid out of the proceeds of the

land recovered by the suit in equity in which they we
employed . . . It is also a very fair inference from th
fact that the bond was left in McPherson's possession, tha
it was done as a recognition of the lien." The bond i
question was part of the proceeds of the sale of the land.

The case at bar is stronger than that last mentioned
There is no dispute about the amount of compensatio
Colonel Ingersoll should have. The amount is agreed upo
in writing, also stipulating, "to pay such fee out of th
funds secured from the estate of Andrew J. Davis, deceased,
for his clients, naming them. In the McPherson cas
supra, the Court observed that in a letter written long afte
the services were performed, the client stated that th
attorney's compensation, "was to be paid out of the proceed
of sales of the property, if recovered." In the case at bar
in addition to the original stipulation, "to pay such fee ou
of funds secured from the estate," Mr. Root, who all th
while had charge of the interests of the five heirs associated
in the contests prosecuted by Colonel Ingersoll (see Exhibi
A annexed to bill, R. 43), said, in a letter to Mrs. Ingersoll
that "the agreement with Colonel Ingersoll was that he was
to receive a fee of $100,000 from moneys collected from the
Davis estate for his services" (see bill, R. 27, and letter, *Ib.*
156). It was understood, moreover, when Colonel Ingersoll
was employed, that he must look to the shares of his clients,
if recovered, for his compensation, and if they failed to
obtain their shares he would get nothing for his services
(see "Exhibit xxxii," R. 509½).

There was contention on the part of respondents to the
effect that the promise of Coram and Root to pay Colonel
Ingersoll, only provided that Mr. Coram was bound "to pay
such fee out of funds secured from the estate." But who
signed that stipulation "to pay such fee out of the funds
secured from the estate of Andrew J. Davis, deceased,"
for said five heirs, naming them? Mr. Root signed it, and
thereby pledged all his interests in the shares acquired for
said five heirs, as well as Mr. Coram. And Mr. Root states
in his letter to Mrs. Ingersoll, that "the agreement with

Colonel Ingersoll was that he was to receive a fee of $100,000 from moneys collected from the Davis estate for his services." So the facts are not only similar, but clearer and stronger than those referred to by this Court in sustaining the attorneys' equitable lien in *McPherson* v. *Cox*, *supra*.

Walker v. *Brown*, 165 *U. S.* 654, is another case which directly sustains the equitable lien foreclosed in the case at bar. It was shown by proofs in the case last cited, that when Brown wrote the letter recited in the opinion, neither he nor Mr. J. C. Lloyd, nor Lloyd & Co., held the bonds in question, but the same were held by a Chicago bank to secure a loan of fifteen thousand dollars; that afterwards Brown got the bonds back into his hands, and it was claimed he gave them to his wife. There was no assignment or "transfer" of the bonds to Lloyd, or Lloyd & Co., of Washington Territory, as respondents assert in speaking of this case (*Brief opposing certiorari* 76). Nor were the bonds ever delivered either of the parties mentioned in the letter. This Court in declaring the equitable lien created by the promise contained in Brown's letter, does not base it on any assignment or transfer or delivery of the bonds, but says: "To dedicate property to a particular purpose to provide that a specified creditor, and that creditor alone, shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien."

But in the case at bar, the lien exists in favor of the attorney, according to the principles of equity, on the fruits of his labors, without any special promise to pay his compensation therefrom. There is, moreover, in the case at bar a special promise *dedicating* the fruits of his labors, if successful, to secure the compensation promised Colonel Ingersoll.

In the case of *Goad* v. *Hart*, 128 *Cal.* 197, a promise by an attorney to pay a certain sum of money "out of the first money I collected on my fee," as attorney in a certain case, was declared, solely on the authority of *Walker* v. *Brown*, *supra*, *to constitute an equitable lien* on the property obtained by said attorney as compensation in the case mentioned.

There are many other cases which directly sustain the attorney's equitable lien foreclosed in the case at bar such as:

Meddaugh v. *Wilson*, 151 *U. S.* 333.
Central R.R Co. v. *Pettus*, 113 *U. S.* 116.
Louisville E. & St. L. R. Co. v. *Wilson*, 138 *U. S.* 501
Cowdry v. *Galveston, etc., R. Co.*, 93 *U. S.* 352.
Semmes v. *Whitney*, 50 *Fed. R.* 666.
Mahone v. *Southern Tel. Co.*, 33 *Fed. R.* 702, *Approved in* 138 *U. S.* 507.
Frink v. *McComb (Dela.)*, 60 *Fed. R.* 486.
Tuttle v. *Claflin*, 31 *C. C. A.* 419.
Needles v. *Smith*, 32 *C. C. A.* 226.
Foster v. *Danforth*, 59 *Fed. R.* 750.
Weeks v. *Wayne Cir. Judge*, 73 *Mich.* 256.
Carpenter v. *Meyers*, 90 *Mich.* 209.
Justice v. *Justice*, 115 *Ind.* 201.
Stratton v. *Hussey*, 62 *Me.* 286.

Referring to the case of *Semmes* v. *Whitney, supra*, which is directly in point sustaining the lien in the case at bar respondents say: "But the lien depends upon the statute which creates it. Such a case was *Semmes* v. *Whitney*, 50 *Fed. R.* 666" (*Brief opposing certiorari, p.* 74). There is nothing disclosed in that case to warrant such assertion. The Court does not refer to any statute providing a lien nor in any manner indicate that the lien there enforced is based upon any statute. Neither do the cases cited by the Court in that case mention a statutory lien.

In the case of *Mahone* v. *Southern Tel. Co., supra*, the attorneys' lien is sustained entirely on principles of equity and there was no agreement to pay a specified sum for the attorney's compensation, or to pay it out of the recovery. There was no recovery in that case; the attorney had simply represented the interests of certain bondholders in the prior litigation. That case is approved in 138 *U. S.* 507, wherein this Court quotes the language of Lord Kenyon in *Read* v. *Dupper, supra*.

So in the case of *Frink* v. *McComb*, 60 *Fed. R.* 486, the United States Circuit Court in Delaware quoting the observations of Lord Kenyon in *Read* v. *Dupper*, *supra*, sustained the attorney's equitable lien on the judgment and its proceeds obtained by their professional labor, although the claim in suit had been assigned before judgment, and the judgment was assigned after its rendition. The Court remarked that no Delaware case had been found, enforcing the attorney's equitable lien, but that nevertheless such lien existed.

In the authorities cited above there is complete refutation of all respondents' contentions touching the attorney's equitable lien They contend that "an equitable lien is not created by a mere promise or agreement to pay a debt from a specified fund." The cases they cite in support of that contention *have no relation to an attorney's equitable lien*. They say: "As long ago as the time of Lord Hardwicke, it was decided in Bradley's case, Ridgway's reports 194, that a promise to pay a debt out a of specified fund does not create a lien on the fund" (*Brief opposing certiorari*, 63). So too, Lord Hardwicke declared in the most comprehensive terms, in *Turwin* v. *Gibson*, and *Barnsley* v. *Powell*, *supra*, that an attorney has an equitable lien on the judgment and its proceeds to secure his compensation and disbursements. And the Reporter says the Lord Chancellor had before "laid down the same rule," in other cases. The same principles are affirmed by other English Chancellors as we have shown above.

Respondents also assert that in *Trist* v. *Child*, 21 *Wall.* 441, this Court declared "the established law in respect to equitable liens" and "from the rule thus laid down has never departed" (*Brief opposing certiorari*, 78). This Court, in *Stanton* v. *Embrey*, 93 *U. S.* 556, explains that in *Wylie* v. *Coxe*, 15 *How.* 415, it decided "that the claim," of the attorney for his agreed compensation "*remained a lien upon the money when recovered, and that a Court of equity would exercise jurisdiction to enforce the lien.*" And then referred to *Trist* v. *Child*, *supra*, and said: "Contracts

for lobbying stand upon a very different footing, as wa
clearly shown by the Chief Justice in commenting upon
prior decision in which the opinion was given by Justic
Swayne—*Trist* v. *Child*, 21 *Wall.* 250." The service
involved in the latter case—although rendered by a
attorney-at-law—were not professional services, nor per
taining to rights in litigation. Of course a claim for *othe*
services, such as lobbying, is not protected by the principle
establishing the attorney's equitable lien.

In support of the same line of contention, respondent
cite *Dillon* v. *Barnard*, 21 *Wall.* 430, in which this Cour
held that a contractor, who had constructed part of a rail
road, had no lien on bonds, or their proceeds, issued by th
Railroad Company—the lien being claimed on the alleged
ground that the fund derived from the sale of the bonds wa
to be used in payment for construction work. Upon that
and other cases of like effect respondents insist that there
can be no equitable lien in favor of an attorney on the fruits
of his labors, by reason of a promise to pay his compensation
therefrom, or by reason of anything short of an "actua
assignment of the fund or an interest in it."

In answer to that contention, besides pointing to the
English and American cases cited above, which clearly
and without any condition affirm the attorney's equitable
lien "on the fruits of the cause," attention may be called
to the fact that the two Justices of this Court—Swayne and
Field—who delivered the opinion in *Trist* v. *Child*, *and*
Dillon v. *Barnard*, *supra*, a short time afterwards concurred
with all members of the Court in the opinion delivered in
Stanton v. *Embrey*, 93 *U. S.* 548, wherein it is explained that
in *Wylie* v. *Coxe*, *supra*, this Court decided "that the claim"
of the attorney for his compensation, "*remained a lien upon*
the money when recovered;" and also explained that such
services as those involved in *Trist* v. *Child*, "*for lobbying*,
stand upon a very different footing." And a little later the
same Justices who had respectively delivered opinion in
Trist v. *Child*, *and Dillon* v. *Barnard*, *supra*, concurred
in the opinion delivered in *McPherson* v. *Cox*, 96 *U. S.* 404,

affirming the existence of the attorney's equitable lien on the land and proceeds thereof recovered in the litigation. Moreover, the views expressed in *Trist* v. *Child*, on the main question, of the validity of the contract, seem to have since been much relaxed, as appears in *Nutt* v. *Knut*, 200 *U. S.* 12, and cases there cited. Besides, there are numerous opinions of this Court *cited above*, delivered since the decision in *Trist* v. *Child*, *supra*, which plainly and directly contradict respondents' assertions in respect to equitable liens, such as the case of *Walker* v. *Brown*, *Meddaugh* v. *Wilson*, and others, *supra*.

Equally untenable is respondents' contention that the attorney's equitable lien has only been enforced *on funds in Court*, and "only in the Court by whose judgment the money was recovered;" and that "the so-called lien has never been held to give a right to any other than this summary relief" (*Brief opposing certiorari*, 56, 57).

In the English cases cited above, the Chancellors were not speaking of the attorney's equitable lien upon a *fund in Court*. They were enforcing his equitable lien upon the fruits of his labors which had not been brought into Court, but where the parties were attempting to place the same beyond the reach of the attorney.

In *Wylie* v. *Coxe*, 15 *How.* 415, this Court declared that the attorney had an equitable lien on funds which were not in the Federal Court at all, but like the case at bar, the funds upon which the lien was enforced were in the custody of an ancillary administrator. Nor was it a *summary* proceeding. The attorney brought his *bill in equity* in the Federal Court to enforce his lien.

In *Louisville E. & St. L. R. Co.* v. *Wilson*, 138 *U. S.* 501, the property on which the attorney's lien was established was not only out of Court, but it had been purchased by, and was in possession of, a new corporation; and the attorney in whose favor the equitable lien was enforced had not been attorney for the new corporation, but had served its predecessor in interest.

In *Cent. R. R. Co.* v. *Pettus*, 113 *U. S.* 116, this Court

affirmed the decree enforcing the attorney's equitable lien on property which was *not in Court at all*. Nor was that property actually recovered by the attorney's labors. The fruits of his labors were "nipped in the bud," by the Railroad Company's purchase of the claims of his clients, but their rights had been established in the litigation prosecuted by the attorney.

In *Meddaugh* v. *Wilson*, 151 *U. S.* 333, the property upon which the attorney's lien was enforced was *not in Court*. It was stock of a new corporation for which the interests formerly in litigation had been exchanged. But this Court said, equity "looks rather at the substance of rights than at the forms of proceedings," and "will not be satisfied, nor will justice be done, unless and until the plaintiffs are admitted to a share in the stock transferred to the defendant." And held that plaintiffs' claim for their compensation, "is in equity a lien upon the stock of the new corporation" in defendant's hands.

In *McPherson* v. *Cox*, 96 *U. S.* 404, this Court declared that an equitable lien accrued in favor of the attorneys on the land recovered in the litigation, and that the lien followed the proceeds for which the land was sold.

In *Walker* v. *Brown*, 165 *U. S.* 654, the bonds on which the equitable lien was declared to rest, were not, nor had they been, *in Court*.

In *Mahone* v. *Southern Tel. Co.* 33 *Fed. R.* 702, the bonds which were involved in prior litigation had been sold before the equitable lien was enforced in favor of the attorneys for professional services rendered the *former owner*, in such litigation. The Court held that an equitable lien existed in favor of the attorneys, superior to the claims of the purchasers; otherwise it would have been paying one man's debt out of property of another without any warrant of law. That case is cited with approval in 138 U. S. 507.

In *Frink* v. *McComb*, 60 *Fed. R.* 486, the claim in suit had been assigned before judgment was recovered, and the judgment was assigned after its recovery. So that, without the existence of an equitable lien in favor of the attor-

neys, the Court would have been paying the debt of the former client, out of property which was not his, and without any warrant of law.

In *Foster* v. *Danforth*, 59 *Fed. R.* 750, *there was no fund in* Court. The parties moreover had settled and satisfied the judgment, yet the attorneys equitable lien was enforced.

In the case of *Semmes* v. *Whitney*, 50 *Fed. R.* 666, it does not appear that the funds on which the attorney's equitable lien was enforced were in the Federal Court at all.

The decisions of the State Courts declaring and enforcing the attorney's equitable lien, also show that they did not found it upon the circumstance that the fund or property was in Court; or hold that otherwise the Court would be impotent to give relief.

In *Andrews* v. *Morse*, *supra*, the judgment had been satisfied by arrangement between the parties, and there was no fund in Court. A similar situation is shown in *Rooney* v. *Sec. Ave. R. Co. supra*, *Marshal* v. *Meech*, *supra*, *Renick* v. *Ludington*, *supra*, *McDonald* v. *Napier*, *supra*, *Weed M. Co.* v. *Boutelle*, *supra*, *Sexton* v. *Pike*, *supra*, *Warfield* v. *Campbell*, *supra*, *Carter* v. *Davis*, *supra*, and in *Goad* v. *Hart*, *supra*. In those and other State cases cited above, there was *no fund in Court*, but the attorney's equitable lien was enforced on the fruits of his skill and industry.

II. Was the Will Defeated, and did Colonel Ingersoll's Clients get their Shares?

Against things established by unimpeachable writings and decrees of Courts of competent jurisdiction, determining said will contests, establishing rights to the property of said estate, and ordering distribution thereof *contrary to the terms of said will*, whereby said five heirs are vested with absolute right to their shares of said estate and more, by virtue of which title, money and other property of the value of millions of dollars has been actually distributed to them—against these indisputable verities—respondents argue that "the will was not defeated," and that "defendants did not get their shares."

By way of apology for their extremely technical contention, respondents introduce it with the suggestion that "the rule of law" precluded them from testifying to "any oral agreement," with Colonel Ingersoll, "rescinding" or "establishing a modification of the contract," on account of "the great shrinkage in the value of the estate."

Both the apology and argument which follows it are untenable. There is no proof anywhere in the record showing or attempting to show any "*shrinkage*" in the value of the estate. It would be no less impertinent to assert, on the contrary, that there has been great increase in the value of mining interests acquired for Colonel Ingersoll's clients through the decree determining said will contests. The exact value of the estate is not material in this suit, but it was proper to show what has been already distributed to Colonel Ingersoll's clients, and that its value was so great, his compensation could have been paid long ago by handing over a small part of what has been distributed to Mr. Root as one of the heirs, and to him and Coram as assignees of the other four heirs; all which is shown by undisputed proofs and admissions. Nor was it "the rules of law" that prevented attempt on the part of defendants to show a "rescinding" or "modification" of the contract which had been so abundantly fulfilled by Colonel Ingersoll. That pretence is refuted beyond all question by evidence in writings fortunately possessed by complainant, so that no attempt was made to assert it by any character of proof. It is hardly worth while to ask *which* of the two *inconsistent* things had they in mind to show, if not precluded—"*rescinding*" or "*modification*" of the contract, by alleged "oral agreement?" The very manner of suggesting this pretence shows equivocation (*see brief opposing certiorari*, 80).

1. *Was the will defeated within the fair and reasonable intendment of the contract with Colonel Ingersoll?*

The contract provides that Colonel Ingersoll should be paid the agreed compensation for his "services in the contest of," etc., "in case the will is defeated and our clients get

their shares," and stipulates "to pay such fee out of the funds secured from the estate of A. J. Davis, deceased," for said five heirs, naming them.

Of course the language used in the contract with Colonel Ingersoll, "should receive a fair and reasonable interpretation so as to attain the objects for which the instrument is designed, and the purpose to which it is applied," as observed by Mr. Justice Story in delivering the opinion of this Court in *Laurence* v. *McCalmot*, 2 *How.* 449. And in giving it such fair and reasonable interpretation, the Court "will look to the language employed, the subject matter and the surrounding circumstances," as said in *Nash* v. *Town*, 5 *Wall.* 689.

Reference to authorities bespeaking a just and reasonable interpretation of such contract is hardly necessary here, but we will cite a few, where contracts *similar* to that in the case at bar, or far less clear and plain, have been interpreted and enforced in the Courts.

Wylie v. *Coxe*, 15 *How.* 415.
McPherson v. *Cox*, 96 *U. S.* 404.
Nash v. *Town*, 5 *Wall.* 689.
Walker v. *Brown*, 165 *U. S.* 654.
Meddaugh v. *Wilson*, 151 *U. S.* 333.
MacKall v. *Willoughby*, 167 *U. S.* 681.
Noonan v. *Bradley*, 9 *Wall.* 405.
Ballard v. *Carr*, 48 *Cal.* 74.
Howard v. *Throckmorton*, 48 *Cal.* 482.
Thurber v. *Meves*, 119 *Cal.* 35.
Chester v. *Jumel*, 5 *N. Y. Supp.* 809.
Same case in Court of Appeals, 125 *N. Y.* 327.
Justice v. *Justice*, 115 *Ind.* 201.
Goad v. *Hart*, 128 *Cal.* 197.
Gliddon v. *McKinstry*, 25 *Ala.* 246.

Manifestly the *object* of Messrs. Coram and Root and the four heirs associated with them in the will contests, was to secure from said estate the shares to which said five heirs were entitled, as next of kin of Andrew. For that purpose

the will contests were instituted, and Colonel Ingersoll's services engaged to prosecute the same.

It was the impending *will title* that menaced the rights of Colonel Ingersoll's clients. If the will were admitted to probate—unrestrained in its effects, as a will, by provisions of a decree or some other effective instrument—it would control the succession, and cut off Colonel Ingersoll's clients from sharing in the estate. That *will title was what they feared.* To get their shares, it must be defeated. It must be prevented from becoming an effective muniment of title to the estate or they would get nothing therefrom; and if that were accomplished—if the will were prevented from withholding *their shares* from them—it would be defeated. That was the result sought by Coram, Root and the other heirs associated with them, and by Colonel Ingersoll on their behalf.

"*Defeat*" is defined as signifying: "To deprive of something expected, desired, or striven for by some antagonistic action or influence, applied to persons." "To frustrate, prevent success of, make of no effect; thwart; applied to things." "In law the act of annuling or rendering null and void; annulment as the defeat of a title. An act depriving a person of something expected, desired or striven for by some antagonistic force" (*Cent. Dict.*).

"*Defeasance*"—"Littleton having spoken at large of conditions in deed and in law, somewhat seemeth necessary to be said of defeasance whereby the state or right of freehold and inheritance may be *defeated* and avoided. 'Defeasance,' *Defeisantia*, is fetched from the French word *defaire, i. e.*, to *defeat* or undo, *infectum redere quod factum est.*" 2 Co. Lit (Harg.) 236, *b.*, Sec. 384.

"*Defeasance*"—"An instrument which *defeats* the force or operation of some other deed, or of an estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance. Comyn's Dig. *Defeasance.*" Bouv. Dict.

"A *defeasance* is an instrument which *defeats* the force or

operation of some deed or estate; that which in the same deed is called a condition, in another deed is a *defeasance.*"

Simmons v. *West Va. Ins. Co.*, 8 W. Va. 486.

The contract with Colonel Ingersoll does not require that *he* shall defeat the will; or that the will must be defeated *by the contests* which he was prosecuting. The language of the contract is: "We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, rendered and to be rendered, that your fee in case the will is defeated and our clients get their shares shall be one hundred thousand dollars." Nor does the contract with Colonel Ingersoll prescribe *how* the will should be defeated; nor by what kind of defeasance its effect should be so restrained that it could not control the shares of said five heirs. The defendants "*admit* that Henry A. Root and Joseph A. Coram and their associates in said will contests agreed to, sanctioned, approved, and *acquiesced* in each and all said stipulations, arrangements and proceedings," whereby said will contests were successfully determined in their favor (see admissions cited under *first* head of foregoing statement of the case). So that if there had been any possible ground of dissatisfaction on the part of Colonel Ingersoll's clients as to the proceedings by which the will was defeated and their shares secured, it was waived. But there was none.

Swain v. *Seamens*, 9 *Wall.* 254.

Scott v. *Jackson*, 89 *Cal.* 258.

The *very thing* mentioned in that promise as the event upon which the stipulated compensation should be paid Colonel Ingersoll, and the *very thing* for which he, and his clients, were striving, was consummated by the stipulations, proceedings and decree determining said contests. *The will was broken.* It was *devitalized* so that it could not withhold the shares of said five heirs from them or give their shares to another. The estate does not go according to the will, but passes according to the stipulations and decree

determining said contests. There is no doubt about that. It is set at rest. Thus the will was *defeated*. A *defeasance* of the *will title* was brought forth by the stress of said contests, so that no one could take or withhold, by virtue of the will, the shares of Colonel Ingersoll's clients, or any part thereof, *and they got their shares*.

The right of Colonel Ingersoll's clients to share in the distribution of the estate of Andrew J. Davis, deceased, had to be established, if established at all, "according to the law of his domicile," as said by Story J., speaking for this Court in *Amstrong* v. *Lear*, 8 *Pet.* 52. Their rights were established beyond all question according to the law of the domicile by the stipulations, proceedings and decree determining the will contests, as affirmed by the highest Court of the State, *In re Davis Estate*, 27 *Mont.* 497. The rights so established will be given effect wherever said Andrew left estate.

Ennis v. *Smith*, 14 *How.* 400.
Armstrong v. *Lear*, 8 *Pet.* 52.
Wilkins v. *Ellett*, 9 *Wall.* 740.
Shannon v. *White*, 109 *Mass.* 146.

In attempt to support their assertion that "the will was not defeated," respondents say: "and it was so decided by the Supreme Court of Montana" (*Brief opposing certiorari*, 81). There is no warrant for such statement. No such thing has ever been decided by the Supreme Court of Montana. On the contrary that Court declared, *In re Davis estate*, 27 *Mont.* 497, that the decree determining the will contests prosecuted by Colonel Ingersoll, and mentioned in the contract with him, superseded and took the place of the will, and "*itself became the basis of administration and controlling as to the devolution of the property*," of said estate; and further declared that said five heirs "*are in effect distributees*," of the estate.

In the same line of contention, respondents say: "Had the will been defeated, John A. Davis, and those claiming under him, would have been entitled to one-eleventh of the

estate," but the fact that his representatives were awarded more than that share, by the decree determining the will contests, "indicates clearly that the will was not defeated." If the will had *prevailed*, if it had *not been defeated*, John A. Davis's representatives would have gotten the whole estate.

The contention of respondents, *before this Court*, is contradicted by their petition, verified by the oath of Henry A. Root, presented to the *Probate Court of Suffolk County*, Massachusetts, introduced by complainant in the case at bar (R. 674). To that petition they annexed a copy of the decree determining said will contests, and the petitioners therein declare:

"That said decree of said Montana District Court, exhibit B, dated August 24, 1897, is in full force and effect, is final and cannot in any respect be modified or changed, and sets forth the shares or interests in said estate of Andrew J. Davis to which the persons therein mentioned are entitled, which shares and interests are as follows:"—there follows a showing of the shares exactly as set forth in said decree (R. 674, par. vi).

Respondents *admit* in their answer in the case at bar, that said five heirs "were related to said decedent," as alleged in the bill, "and were entitled to share in the estate" of said deceased, "as therein alleged;" that they were altogether entitled to $3\frac{1}{2}$–11, or 350–1100, of said estate as heirs-at-law of Andrew; that neither of said five heirs were mentioned in, or given anything by said will; that if it had been allowed effect as the will of Andrew, said five heirs would have been cut off and got nothing from said estate (see Answer R. 99, 100). They *admit* the entry of the decree as shown in the bill, determining said will contests prosecuted by Colonel Ingersoll, and that they are thereby awarded $515\frac{1}{2}$–1100 of all said estate; they *admit* distributions from said estate as alleged in the bill; and "*that said five heirs and Coram, have participated in and have had and received and had the use and benefit of* $515\frac{1}{2}$–1100 *of each and all distributions of funds, and other property of said estate . . both real and personal;*" and

that they have already received from said estate prior t the commencement of this suit, over $374,000 in money besides said real estate of the value of five million dollars as shown by undisputed proof. *These things could no have taken place without defeat of the will* (see *admission* pointed out under the *first* head of the foregoing statemen of the case, with citations to the record).

2. Did Colonel Ingersoll's clients "get their shares?"

That the contracting parties meant by the terms "their shares," used in the contract with Colonel Ingersoll, the shares to which said five heirs were entitled as next of kin to Andrew, is so manifest that respondents concede it (*Brief opposing certiorari*, 85). But they say: "defendants never became entitled to share as distributees of an intestate estate." The contract with Colonel Ingersoll does not provide they should. The Supreme Court of Montana, however, in sustaining respondents' contention there, *that they were distributees*, declared that said five heirs "*are in effect distributees*," of the estate to the extent of the shares awarded them by the decree determining said will contests (*In re Davis estate*, 27 *Mont.* 497). How is the estate distributed, if not as an intestate estate? It certainly is not distributed according to the will, for in that case respondents would get nothing.

But the main contention of respondents on this point is that Colonel Ingersoll would not be entitled to payment until the last dollar of "their shares" had been actually received by said five heirs or their assigns. Such is the construction respondents contend should be given to the terms "*get their shares.*" It would not be sufficient, according to their contention, to secure to said five heirs absolute right and title to their shares, so that whenever distributions were made, their shares would be handed over to them, as they *admit* has been done in each former distribution.

No authority is cited which is even claimed to support such strained and unreasonable interpretation. That the Courts do not sanction such an interpretation contrary

to the common sense and understanding of such terms, when used in practical affairs, is shown by the cases above cited construing similar contracts.

In the case of *Goad* v. *Hart, supra*, the Court overruled contention almost identical with that of respondents upon this point. So in *MacKall* v. *Willoughby, supra*, and in *Gliddon* v. *McKinstry, supra*.

But Colonel Ingersoll so abundantly fulfilled his engagement, and the conditions on which he should be paid, that respondents' assertion that they "have not yet got their shares," is refuted by mathematical demonstration, based upon facts established in the case at bar by undisputed proofs and admissions—showing conclusively that said five heirs and their assigns *have already got more than "their shares,"* through distribution heretofore made from said estate. In other words, 515½–1100 of the *admitted distributions* already made from said estate, and paid over to said five heirs and Coram and Root as assignees of four of them, *amounts to more* than 350–1100 of the whole estate to which they were entitled as heirs of Andrew.

There was distributed on August 26, 1897, $670,000 (see "exhibit L," R. 582) of which 515½–1100, amounting to $313,986.12, was, *as respondents admit*, "distributed and paid over to said five heirs and Coram and for their use and benefit to said trustees, *in accordance with said decree of August 24, 1897*," *i. e.*, the decree determining said will contests (*see Admissions* "t," "u," "v," "w," with citations of record, under *first* head of foregoing statement of the case, also the answer, R. 108). Other distributions from the estate in Montana followed, of which said five heirs and Coram got 515½–1100, which brings the amount of money distributed *to them* up to a sum exceeding $374,000. They also had from the entry of decree determining said will contests, on August 24, 1897, undisputed title to 515½–1100 of the real estate left by Andrew, the value of which is five million dollars, according to undisputed testimony of several witnesses introduced in the case at bar; all which is pointed out with citations to the record in the above statement of the case. Possession of the real estate was,

by order of said Montana Court, delivered in February, 1898, to the distributees named in said decree; but they *had* the real estate ever since the decree was entered. The administrator, under the laws of Montana, is entitled to possession of real estate of a decedent only in case the estate is indebted (*Mont. Code Civ. Proc., Sec.* 2560). The Davis estate was not indebted as shown by the bill and undisputed proofs (*see bill, par.* 24, *R.* 34, *and proof Ib.* 410).

Now it is a fact which may be demonstrated by a simple mathematical calculation, that $515\frac{1}{2}$–1100 of the personal estate distributed on August 26, 1897, and the real estate to which said five heirs then had absolute undisputed title, is more than $3\frac{1}{2}$–11 or 350–1100 of the whole estate, including the funds now remaining in Massachusetts.

What would "their shares," *i. e.*, 350–1100 of the whole estate, amount to? According to the undisputed proofs in the case at bar (cited under the *first* head of the foregoing statement of the case), the value of the estate, including the funds in Massachusetts, *is six and a half million dollars.* "Their shares," *i. e.*, $3\frac{1}{2}$–11 or 350–1100, of that aggregate value, is $2,068,150, discarding in the calculation fractional parts of a dollar.

How much had they actually got on August 26, 1897? They had $515\frac{1}{2}$–1100 of the real estate, valued at five million dollars, according to undisputed proofs in the case at bar; and they also had the same proportion of $670,000. The total of which sums is $5,670,000. They then had $515\frac{1}{2}$–1100 of the last mentioned sum, which amounts to $2,657,165, discarding in the calculation fractional parts of a dollar.

The extremely technical interpretation of the contract with Colonel Ingersoll, insisted upon by respondents, is therefore more than complied with, without considering the funds in Massachusetts yet to be distributed; for according to undisputed facts established in the case at bar, what they had got from said estate on August 26, 1897, exceeds their shares of the whole estate. That was the date from which the Circuit Court allowed simple interest at six per cent., on the balance due Colonel Ingersoll.

The value put upon the real estate makes very little difference in the result of the above deduction. Practically the same result follows if the real estate be valued at a million dollars—the value defendants were constrained to admit by a pregnant denial in their answer (R. 109, top of page).

There is still another pertinent consideration bearing upon respondents' contention that they "have not yet got their shares:" namely, that the lien existing in favor of complainant is foreclosed upon the interests of Coram and Root in the *last part* of the estate remaining to be distributed; and according to the terms of the decree foreclosing the lien it is to be satisfied out of the interests of Coram and Root in these remaining funds when ordered distributed. If the decree should be then enforced, said five heirs and Coram will have gotten "their shares," even to the last distribution.

III. The Property in Massachusetts Acquired for Colonel Ingersoll's Clients as Part of the Fruits of his Labor in Said Will Contests, the Interest of Coram and Root Therein Subject to Complainant's Lien, and what Parties Should be Joined in this Action, Explained.

Respondents dispute *in argument* that complainant has shown any property in Massachusetts "that can be subjected to a lien." But obviously to avoid creating an estoppel against themselves, respondents cautiously refrained from denying in answer, that the interests acquired for said five heirs, in said money and bonds in Massachusetts, or that the interests owned therein by Coram and Root, are exactly as alleged in the bill. Besides their interests therein could be readily established for the purpose of foreclosing complainant's lien.

The bill in paragraphs 10, 11, 12, 13, 14, and 15 (R. 11 *et seq.*)—every averment of which is established by admissions and undisputed proofs, pointed out above—show how the will contests prosecuted by Colonel Ingersoll were determined in favor of his clients, securing to them, by

muniments of title good and sufficient everywhere, absolute right and title to $515\frac{1}{2}$–1100 of said estate wherever situate.

The share of each of said five heirs as next of kin to Andrew, is averred in the bill, and *admitted* in defendants' answers (*see bill, par.* 1, *R.* 3, *and answer Ib.* 99). It is also alleged in the bill and *admitted* in the answers, that four of said associate heirs assigned to Mr. Root one-third of each of their shares, "out of the avails thereof," as that instrument declares (R. 44), to aid in procuring counsel to prosecute said will contests (*Bill, par.* 5, *R.* 7, *and answer Ib.* 101). A copy of that assignment duly executed, is annexed to the bill, as "Exhibit A" (R. 43), and the original thereof was proved in evidence (R. 467). It is thereby conclusively shown that, besides his share as an heir, Mr. Root became and is owner of one-third of the share of each of his four associate heirs.

The bill further avers, and the answer of Coram and Root, *joined in by* Mary L. Dunbar and the legal representative of Elizabeth S. Ladd, *admits* "that Joseph A. Coram acquired and still has, owns and holds all the remaining interests and shares claimed and finally acquired by Elizabeth S. Ladd and Mary L. Dunbar in and to said estate" (*Bill, par.* 6, *R.* 8, *Answer, Ib.* 102). And in answer to paragraph 23 of the bill, they further "admit that all the shares and interests of, in, and to said funds and effects of the estate of Andrew J. Davis, deceased, *acquired as aforesaid*, for said Elizabeth S. Ladd and Mary L. Dunbar, and each of them have been by them and each of them, sold, assigned and transferred to said Henry A. Root and Joseph A. Coram" (R. 113). It may be noticed in passing, that defendants *admit* said shares were "*acquired as aforesaid.*" There is not a clause or word in any answer asserting that their shares were acquired in any other manner than as alleged in the bill.

Thus it is established by admissions and undisputed proofs, that Mr. Root owns his share as an heir, and one-third of the shares of each of his four associate heirs; and

that Coram owns the remaining two-thirds of the shares acquired for Elizabeth S. Ladd and Mary L. Dunbar. Thereby it is conclusively shown that Coram and Root own all of the shares acquired for said five heirs, except two-thirds of the share of Sarah Maria Cummings and of Ellen S. Cornue, reserved to them as alleged in paragraph 23 of the bill (R. 29, 30).

The relationship and the share of each heir associated in the will contests, as set forth in paragraph 1 of the bill (R. 3), is *admitted* in the answers by defendants, and among the answering defendants are four of said associate heirs (R. 99). According to that averment and admission, in which admission the legal representative of Sarah Maria Cummings joined, her interest in said funds and effects in Massachusetts, was 100–1100, of which she assigned to Henry A. Root (by the instrument annexed to the bill as "Exhibit A"), one-third, to wit, $33\frac{1}{3}$–1100, reserving to herself $66\frac{2}{3}$–1100, "which is all the interest owned by her and her legal representatives in said funds and effects" in Massachusetts.

By the same paragraphs of the bill, admissions and proofs above mentioned, it is shown that the share of Ellen S. Cornue (who, with her brother Henry A. Root represented one of Andrew's deceased sisters) was 50–1100 of the estate; that one-third thereof, towit, $16\frac{2}{3}$–1100, she assigned to Mr. Root, reserving to herself $33\frac{1}{3}$–1100, "which is all the interest she now owns" in said funds and effects in Massachusetts.

After showing what interests *were reserved* to Sarah Maria Cummings and Ellen S. Cornue, and that the same together amount to 100–1100 of the portion of said estate acquired for Colonel Ingersoll's clients, the bill avers that no lien is claimed on said interests in said funds and effects *reserved* to said Sarah Maria Cummings and Ellen S. Cornue (R. 30); and the decree foreclosing said lien in favor of complainant, leaves said interests of Sarah Maria Cummings and Ellen S. Cornue untouched and uneffected by the lien or decree foreclosing it.

Ellen S. Cornue could not be joined as a party to this action for the reason, shown in the bill (R. 30), that she is a citizen and resident of the State of New York, of which State complainant is also a citizen and resident. But Henry A. Root is attorney in fact, irrevocably empowered to represent Ellen S. Cornue's interest in said estate, as provided by said instrument duly executed, annexed to the bill as "Exhibit A," admitted in answer, and presented in evidence (R. 467). Moreover, the interest of Ellen S. Cornue, as well as all other interests in said funds and effects in Massachusetts, are represented in this suit by defendant John H. Leyson, who, as administrator, holds title to the same in the relation of trustee.

"In Courts of chancery, executors and administrators are considered as trustees." And when an administrator or trustee is made party to a suit touching the trust estate, he represents the interests of each *cestui que trustent*, of whose interests he is presumed to have full knowledge.

Kendall adm'r v. *Creighton*, 23 *How.* 90.
Wilkins v. *Ellett, adm'r*, 108 *U. S.* 256.
Concoran v. *Chesp. & O. C. Co.*, 94 *U. S.* 741.
Ritcher v. *Jerome*, 123 *U. S.* 233.
Semmes v. *Whitney*, 50 *Fed.* 666.

It is, moreover, unnecessary to make the assignor of a thing, party to a suit against the assignee touching the thing assigned.

Robertson v. *Carson*, 19 *Wall.* 94.
South Fork C. Co. v. *Gordon*, 6 *Wall.* 561.
West v. *Randall, per Story J.*, 2 *Mason* 181.
Same, F. C. No. 17,424.
Fitch v. *Creighton*, 24 *How.* 159.

So the Circuit Court ruled that in view of the showing in this case, under equity rule 49 and 50, as well as the general principles of law, neither Ellen S. Cornue, nor any of said four heirs associated with Mr. Root in said will contests, were necessary parties to this action, and dismissed

those who had been made parties thereto, but against whom no relief was sought (R. 93). They, however, remained and joined with Coram and Root in answering the bill, making the admissions pointed out above.

Charles H. Palmer and Andrew J. Davis, Jr., as trustees of certain interests of said five heirs, in said funds and effects in Massachusetts, are also parties defendant in this action, and have answered. The portion belonging to said five heirs which was to pass through the hands of the last named trustees, is 265½-1100 of all property of said estate in Montana and Massachusetts (see proofs, R. 352, 353, Exhibit lxiii, *Ib.* 695, also *Ib.* 721, 722). Mr. Root, who was empowered to, and has represented said heirs in all of said business, states in one of his letters that the interests of said five heirs, put in charge of said trustees, Palmer and Davis, "are all applicable to the expenses, and will be so utilized on all future distributions" (Exhibit xxxix, R. 562). That arrangement is very favorable to Coram and Root, because it would leave only 250-1100 to be divided between the associate heirs after Coram and Root had "utilized" or withheld from them 265½-1100 for expenses. That plan would draw away from the other heirs more than the one-third of their shares which they assigned to contribute to expenses. The Court, however, in rendering its decree, considered their shares as the bill, admissions and proofs, pointed out above, show them to be, and left the shares reserved to Sarah Maria Cummings and Ellen S. Cornue untouched by the decree. The lien is foreclosed upon the interests owned by Coram and Root alone, in said money and bonds in Massachusetts, acquired for said five associate heirs, through the labors of Colonel Ingersoll in said will contests.

There is no dispute anywhere *in answer* or *in evidence*, touching the respective interests, or as to the showing thereof, above pointed out. But reference thereto with the above explanation, is necessary to refute numerous unwarranted assertions made in respondents' brief, in attempt to obscure, for the purposes of this case only, the interests

owned by Coram and Root in said money and bonds in Massachusetts.

By mathematical deduction from the facts shown in the bill, and established by admissions and undisputed evidence, it was shown at the trial that Mr. Coram has already received over $107,000 *in money* from the interests assigned to him by Elizabeth S. Ladd and Mary L. Dunbar, besides their interests in real estate of the value of five million dollars, as shown by undisputed proof.

Messrs. Coram and Root signed the promise to pay Colonel Ingersoll "such fee out of the funds secured from the estate of A. J. Davis, deceased," for said five heirs, naming them. Mr. Coram has and holds, besides the other interests mentioned, over $107,000 which has come to his hands from a part of the shares of Ladd and Dunbar, out of which he was bound, by the terms of his promise, to pay Colonel Ingersoll's fee. The Court decreed that Mr. Coram is personally liable to that extent for any deficiency of said indebtedness remaining unpaid after applying the interests of Coram and Root in the funds and bonds on which the lien rests, situate in Massachusetts.

Mr. Root also signed, with Coram, the promise to pay Colonel Ingersoll "such fee out of the funds secured" from said estate for himself and associate heirs; thereby pledging all his interest as an heir, and the interests assigned to him, to secure payment of Colonel Ingersoll's promised compensation. Or as said by this Court in *Walker* v. *Brown*, 165 *U. S.* 654, he *dedicated that property*, as security for the payment. But *an equitable lien exists in favor of the attorney*, on the fruits of his labors, to secure his compensation, *without any special dedication* of the property recovered, as abundantly shown by the authorities cited above.

It was also shown at the trial by mathematical deduction from facts established by admissions and undisputed proofs, that Coram and Root have already received *in money*, from the shares assigned to them by Elizabeth S. Ladd and Mary L. Dunbar, alone, sufficient to have paid Colonel Ingersoll's promised compensation, and left a margin of

over fifty thousand dollars in their hands, besides the interests acquired for those two heirs in the real estate, and in the other property yet to be distributed. Those are only part of the interests held by Coram and Root, subject to complainant's lien.

In seeking to obscure, by mere assertion outside of the pleadings or proofs, the rights of Coram and Root in said funds and effects in Massachusetts, respondents say "the will of Andrew J. Davis unaffected by any decree" of the Montana Court in determining said will contests, "was then admitted to probate in Massachusetts" (*Brief opposing certiorari*, 88).

The so-called will presented to the Probate Court in Massachusetts was a *mere copy* of a writing. To be of any validity in Massachusetts, proper showing had to be made that the original of that copy had been properly admitted to probate at the domicile of the supposed testator, by decree of a Court of competent jurisdiction. Along with the copy of the so-called will, there was presented to the Probate Court in Massachusetts a duly authenticated transcript of the decree of said Montana Court, rendered in determining contests of that alleged will, and decreeing that the estate left by Andrew shall be distributed contrary to its terms.

In presenting such copy of the so-called will, with a duly authenticated transcript of the Montana decree determining said contests thereof, to the Massachusetts Probate Court, a blank printed form, commonly used in probate proceedings, was used as a petition for the appointment of John H. Leyson as administrator in Massachusetts. That printed form of petition did not aptly set forth the facts in regard to the proceedings touching the so-called will in Montana. Likewise, in making the order appointing Mr. Leyson as administrator in Massachusetts, a printed blank form was used. Looking at those two papers, alone—without reading in connection therewith, the Montana decree determining contests of the so-called will, whereby "the will became a mere name and only a *husk*," as held by Circuit Judge

Putnam (*Ingersoll* v. *Coram*, 127 *Fed. R.* 431), which decree was filed in the Probate Court of Massachusetts, with said petition for the appointment of Leyson as administrator—it might seem that the so-called will of Andrew was received in probate in Massachusetts, as a foreign will. So respondents, without venturing to deny, but admitting in their pleadings, ownership of the interests in said funds and effects left by Andrew in Massachusetts, as alleged in the bill—manifestly for the purpose of obscuring if they could, for this occasion, their interests in said funds on which complainant's lien rests—introduced some *fragments* of the records of the Probate, and Supreme Judicial Court, of Suffolk County, Mass. touching the estate of Andrew J. Davis. And upon those *fragments*, they set up contention *in argument, outside of anything averred or denied in pleading*, that the *will alone* was admitted to probate in Massachusetts, and therefore, there is "no property in Massachusetts that can be subjected to a lien" (*Brief opposing certiorari*, 88). Those *fragments of records* are presented as defendants' Exhibit No. 9 (see R. 889–901).

The presentation of that *fragmentary* showing caused complainant to introduce, in rebuttal, a complete exhibit of the records touching the matters to which those fragments relate. The complete records mentioned are shown as "complainant's exhibits in rebuttal" marked "lxii," "lxiii" and "lxv" (R. 672–754).

In refutation of respondents' statement in their brief opposing certiorari, page 88 *et seq.*, that the will "unaffected by any decree" of the Montana Court determining the contests thereof, "was then admitted to probate in Massachusetts," and that such decree, admitting the will in Massachusetts, "unaffected," etc., "was subsequently affirmed," we point to said "exhibits in rebuttal," which show as follows:

"Exhibit lxv in rebuttal," shows that one Erwin Davis claimed to be "owner of one-half share in said estate," by virtue of "assignment from sole legatee" under *said will*, and to be "aggrieved by the decree of the Probate Court

held at Boston in said County of Suffolk," Mass., appointing Mr. Leyson administrator there, upon the showing of said Montana decree, whereby said *will was overthrown* and the estate ordered distributed contrary to its terms; and that Erwin appealed from the order appointing Leyson as administrator in Massachusetts (R. 732). That exhibit also shows the record of proceedings in Montana on which said Probate Court of Suffolk County, Mass., acted in appointing Leyson as such administrator (R. 730–754). There is, among other things, in that record, the decree of the Montana Court determining "the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent and Henry A. Root *et al*, contestants," and decreeing and ordering that said estate be distributed, "*in kind*," to persons not named in the will, and contrary to its terms (R. 736).

The objections of the appellant, Erwin Davis, to the appointment of Leyson as administrator in Massachusetts, on the record of those proceedings in Montana, overthrowing said will and ordering the estate distributed contrary to its terms, are also shown in said exhibit in rebuttal, to be that: "Leyson as the administrator of that distribution and committed to it," would "not perform the will of Andrew Jackson Davis," and "that he would distribute the estate to persons not named in the will or entitled thereunder;" that he would distribute the estate according to the "extraordinary clauses in the Montana decree which purport to make distribution of the estate," contrary to the will (R. 746). And it further states the position of said appellant Erwin to be: "That the appellant prefers that the will alone should be admitted to probate but rather than that the compromise distribution should take effect, desires to have intestacy decreed, and contends that the alternative is between intestacy and the will alone" (R. 747). The record clearly shows that Erwin Davis insisted in the Probate Court, in Massachusetts, that "the will alone" ought to be given effect there, although it was overthrown by the decree of the Montana Court accompanying the copy thereof

presented in the Massachusetts Probate Court. That appeal of Erwin Davis was dismissed by a *consent order* entered in the Supreme Judicial Court (R. 753). It is that appeal and that determination of it, upon which respondents base their declaration that the decree of the Massachusetts Probate Court (which they assert by reference to a *mere fragment* of the record, admitted the will to probate in Massachusetts, "unaffected by any decree" of the Montana Court), "was subsequently affirmed" (*Brief opposing certiorari*, 88).

"Exhibit lxii in rebuttal" shows, that *in the Probate Court of Suffolk County*, Mass., Messrs. Root, Coram and associate heirs have represented their interests, as distributees of said estate, according to the Montana decree determining said will contests, prosecuted in their behalf by Colonel Ingersoll. In their *verified* petition to the last mentioned Court, they point to that decree, and say: "That said decree of said Montana District Court, exhibit B, dated August 24, 1897, is in full force and effect, is final and cannot in any respect be modified or changed, and sets forth the shares or interests in said estate of Andrew J. Davis to which the persons therein mentioned are entitled" (R. 674). Besides, respondents in their answer in the case at bar, "admit that Henry A. Root and Joseph A. Coram and their associates have petitioned the Probate Court for distribution, as set forth in said paragraph 23 of said bill of complaint" (R. 112). In that paragraph of the bill it is alleged that they have petitioned said Probate Court in Massachusetts, "praying said Court to order distribution to them of said shares, parts and portions of said funds and effects of the estate of Andrew J. Davis, deceased, situate in Boston, Mass., to which they are entitled directly and through said trustees, as provided by said decree of said District Court of Montana determining said will contests, to wit, five hundred fifteen and a half eleven-hundredths ($515\frac{1}{2}$–1100), thereof" (R. 29).

"Exhibit lxiii in rebuttal" shows: that John E. Davis, administrator, in Montana, of the estate of John A. Davis, the deceased proponent of said will, named therein as legatee and devisee of the estate, and Andrew J. Davis, Jr., trustee—

one of the defendants in this action—filed their petition in said Probate Court of Massachusetts, representing among other things that said five heirs are entitled to shares of the property of said estate situate in Massachusetts directly and through said trustees, exactly as provided in said decree of August 24, 1897, determining the contests of said will prosecuted by Colonel Ingersoll. And they annex to that petition a duly authenticated copy of said decree (R. 688 *et seq.*). That petition is supported by the affidavit of said administrator, John E. Davis (R. 711 *et seq.*), wherein he sets forth a brief history of the litigation in Montana respecting said will and declares that: "said will was in fact and in law superseded and defeated." by said decree of August 24, 1897; "that there is now *no dispute*, or controversy, as to the shares of said estate of Andrew J. Davis, deceased, situate in Massachusetts, or Montana, or elsewhere, to which each of his heirs," formerly contending in litigation "are entitled; the same having been fully and finally settled and determined by said will contests, stipulations and decree determining the same, made and entered on August 24, 1897" (R. 721–723). And that "the administrator and legal representative of John A. Davis, the deceased legatee and devisee under said will, cannot lawfully claim or demand, take, or hold, and does not claim, nor can the heirs of John A. Davis claim, take, or hold, nor do they claim or demand, any part of the property belonging to the estate of Andrew J. Davis, deceased, situate in Suffolk County, Mass., other than" that awarded to them by said decree of August 24, 1897 (R. 694–695). In the same affidavit, said administrator, John E. Davis, further shows, by reference to exhibits annexed to his affidavit, that the appointment of Leyson as administrator of Andrew J. Davis, in Massachusetts, was contested by Erwin Davis, who appealed therefrom, on the ground that Leyson as such administrator "*would not perform the will of Andrew J. Davis,*" but would administer the estate according to said Montana decree determining said will contests, and would "distribute said estate to persons not mentioned in the will,

or entitled thereunder." And that the appeal of Erw
from the order appointing Leyson as such administrat
in Massachusetts, was dismissed by a *consent order* (R. 72

Besides the showing above pointed out, there are t
stipulations executed and acknowledged in considerati
of the determination of said will contests, by all the co
tending heirs, including the *legal representative and he*
of the legatee and devisee of the estate under said alleg
will, relinquishing and assigning to Colonel Ingersol
clients, by title good everywhere, absolute right to 515
1100 of all property of said estate in Massachusetts a
elsewhere (R. 598–658). Respondents admit in the
answers that said stipulations were made and execute
as alleged in the bill (R. 104–106).

Nevertheless in the face of this undisputed showing
rights thus established, confirmed and acknowledged, b
all concerned, respondents point to *a fragment* of the recor
and the "form of a proceeding," and assert before th
Court in contradiction of their verified statements cite
above, that "there is no property of defendants in Mass
chusetts."

"Equity looks rather at the substance of rights than a
the forms of proceedings."

Meddaugh v. *Wilson*, 151 *U. S.* 333.
Justice v. *Justice*, 115 *Ind.* 201.

In this connection respondents again assert that th
Montana decree rendered in said will contests distributin
the estate contrary to the terms of the will, filed with the cop
thereof in the Massachusetts Probate Court, "can, of course
have no extra-territorial effect" (*Brief opposing certiorar*
88). But in another part of their brief respondents conten
that a ruling of the Montana Court *merely nonsuiting*
case, to which complainant here was neither a party, no
in privity with any party thereto, *does have* the "extra
territorial effect," of destroying the rights of complainan
as administratrix in Massachusetts, and everywhere.

We have cited in a former part of this brief the author

ties showing that *rights* established by decree or otherwise, *do have extra-territorial effect*, and that Courts of competent jurisdiction with the parties present, will enforce such rights; and showing, moreover, that the right of succession to personal estate is governed by the law of the domicile, though such personal property happens to be in another State. Respondents have cited no authority to the contrary.

In their brief opposing certiorari, page 89, respondents recite the statute of Massachusetts which provides that personal property left there by a decedent, "who was an inhabitant of another State or country," shall after settlement of the estate "be distributed and disposed of according to the laws of the State or country of which he was an inhabitant;" and further providing that such personal property may be distributed in Massachusetts, or be transmitted to the executor or administrator "in the State or country where the deceased had his domicile, to be there disposed of according to the laws thereof" (*Rev. L. c.* 143, *Secs.* 1 *and* 2). So whether distributed in Massachusetts, or transmitted to Montana, the rights of succession to said personal property on which complainant's lien rests, situate in Massachusetts, is governed by said Montana decree which declares the law of the domicile controlling the right of succession thereto.

Respondents admit (*Brief opposing certiorari*, 92), that if said property in Massachusetts were distributed to the administrator or next of kin of John A. Davis, the legatee under the will, they are bound "to pay over what they might receive out of the Massachusetts property" belonging "to the contestants." But they assert that it makes no difference "what contractual rights" respondents may have to said property, because "none of the next of kin of John A. Davis are joined as defendants" in this suit at bar. It is by such assertions they attempt to support their contention that there is no property in Massachusetts "that can be subjected to a lien."

A lien on personal property is defined to be, "a right

which the law gives" the lienor "upon property, without satisfying which, such property cannot be demanded by its owner."

1 *Jones on Liens, Sec.* 4.

The right of Coram, Root, and associates established and confirmed as above shown, is to have their portions distributed to them "*in kind*" *directly from the estate.* Their portions do not go to the administrator, or next of kin, of John A. Davis, the legatee under said will, or through their hands. Not only so, but the latter persons disclaim any right or interest in the shares awarded Colonel Ingersoll's clients by the decree determining said will contests, as shown without dispute in the case at bar.

By the decree of foreclosure, the lien existing in favor of complainant is fastened upon the rights and interests of Coram and Root only, in said personal property, and adheres thereto wherever the same may be taken. The foreclosure decree provides that the lien must be satisfied before Coram and Root shall receive their shares of said property. No other rights or interests are effected by that decree.

It is not necessary to join in an action persons who have assigned, and disclaim any right to, the property or interests, to which the action relates.

Fitch v. *Creighton*, 24 *How.* 159.
Robertson v. *Carson*, 19 *Wall.* 94.
South Fork C. Co. v. *Gordon*, 6 *Wall.* 561.

Respondents also appear to contend that a Court of equity has no power to foreclose a lien on the interests of Coram and Root in said funds and effects, because they are in the custody of an administrator. They exclaim in closing their brief, that "the whole legal and orderly course of administration should not be set at naught merely to enable the plaintiff to maintain this suit."

That sort of contention was set up before this Court, and overruled, in *Payne* v. *Hook*, 7 *Wall.* 425, and in *Hook* v. *Payne*, 14 *Wall.* 252. Similar contention was overruled by Lord Hardwicke in *Turwin* v. *Gibson*, 3 *Atk.* 719. See

also refutation of the same idea, in *Kendall adm'r* v. *Creighton*, 23 How. 90.

In *Dennick adm'r* v. *Cent. R. Co.*, 103 *U. S.* 11, this Court said: "There can be no doubt that an administrator invested with the apparent right to receive or recover by suit, property or money, may be compelled to deliver or pay over to some one who establishes a better right, or that what was so recovered was held in trust for some one not claiming under the will or under the administrator."

In *Wylie* v. *Coxe*, 15 *How.* 415, the attorney's equitable lien was foreclosed on funds in the hands of an administrator. So in *Semmes* v. *Whitney*, 50 *Fed. R.* 666.

In *Palmer* v. *Whitney*, 166 *Mass.* 306, the Court said: "When a formal decree of distribution has been made, the assignee of a distributive share ordinarily by a bill in equity can compel the administrator to pay over the amount to himself if the assignment is a valid one." And further, "It cannot be true that an administrator is necessarily compelled to pay actually and literally into the hands of the distributees the amounts due them and cannot pay the amounts to their order . . . In a hearing on the allowance of an account it must be determined by the Court passing upon the account whether payments made on orders are to be allowed or not."

In *Davis* v. *Newton*, 6 *Met.* 537, an assignee in insolvency of a distributee was held entitled to receive his share from the administrator.

In *Ricketson* v. *Merrill*, 148 *Mass.* 76, which was a bill in equity to apply the share of a distributee to the satisfaction of his debt, the Court said:

"The next inquiry is therefore whether and to what extent the creditor, Mrs. Ricketson, can be substituted as a beneficiary for Geo. B. Merrill, by a decree binding the executors to account until her debt is paid. The creditor is put in Geo. B. Merrill's place simply until his debt is paid. But no more and no less is paid for that reason, on his share. As he could assign this share or transfer it by will, there is no reason why a creditor ought not, after

proper proofs and proceedings, to be allowed to stand in his place, and receive thus the amount of his debt."

Respondents also contended that the Circuit Court had no power to enjoin, as provided in its foreclosure decree in the case at bar, the delivery of the funds on which complainant's lien rests, to defendants. But all that contention is refuted by decisions of this Court.

Cole v. *Cunningham*, 133 *U. S.* 107.
French v. *Hay*, 22 *Wall.* 250.
Phelps v. *McDonald*, 99 *U. S.* 308.
Hart v. *Sampson*, 110 *U. S.* 151.
Lawrence v. *Nelson*, 143 *U. S.* 215.
McDaniel v. *Traylor*, 196 *U. S.* 415.
Riverside C. M. v. *Alabama & G. M. Co.*, 198 *U. S.* 188.

We submit that the ruling and decree of the Circuit Court of Appeals, in the case at bar, is in conflict with established law, deprives petitioner of property without due process of law, defeats justice, is entirely erroneous and ought to be reversed, and that the decree of the Circuit Court therein is right in law and in fact, and ought to be affirmed, by this Honorable Court, as prayed by petitioner in her petition for certiorari.

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Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 107.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,

Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEES,

Respondents.

Additional Brief for Petitioner.

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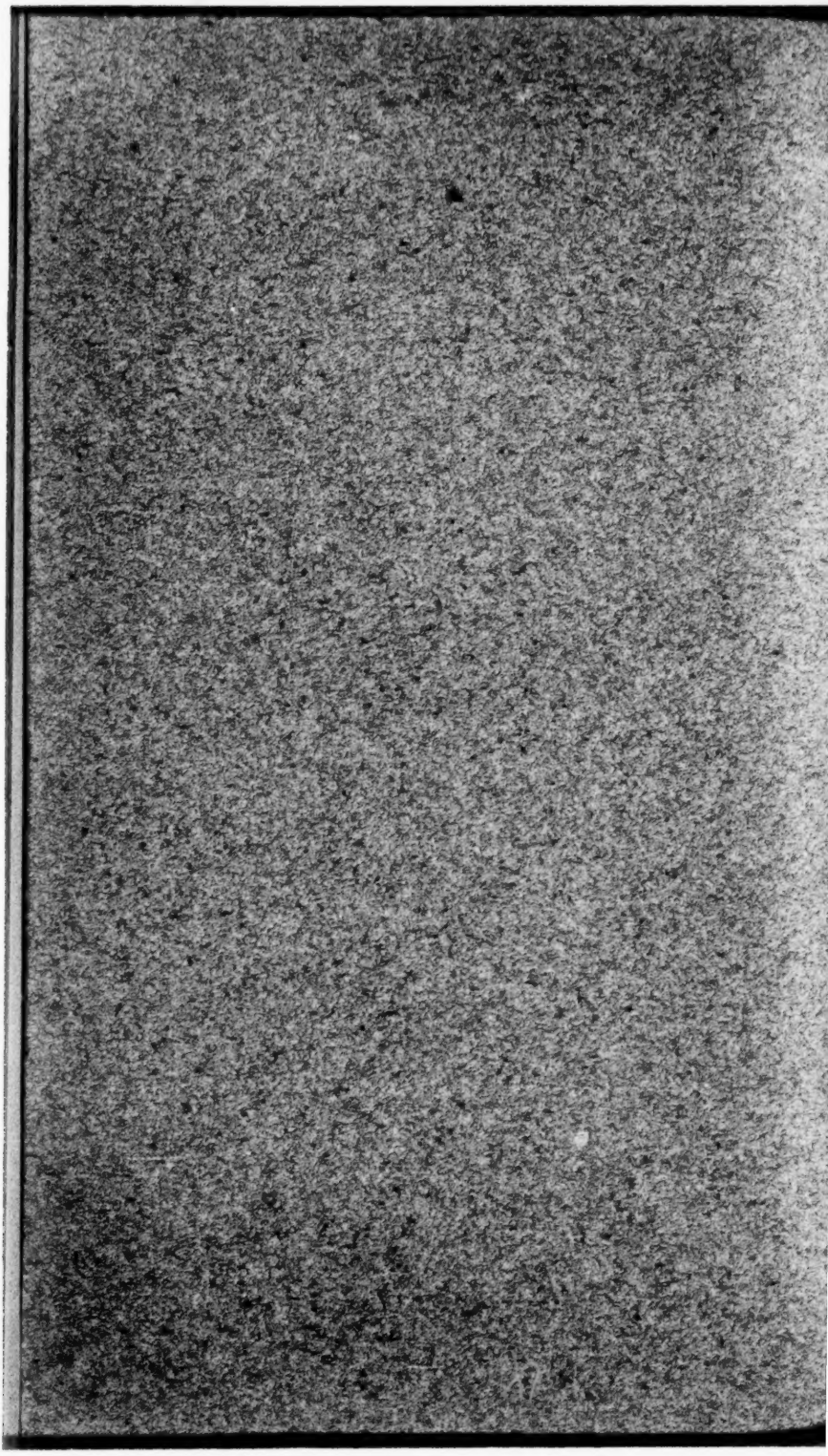

Supreme Court of the United States.

OCTOBER TERM, 1907.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,
Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,
Respondents.

No. 169.

ADDITIONAL BRIEF FOR PETITIONER.

I.

Res Judicata.

The Circuit Court of Appeals based its judgment on a single ground which it states as follows: "We need consider only one of their contentions, viz.: that the complaint is barred by a judgment in their favor entered in Montana. In order that this defence shall avail them, the defendants must show that the Montana judgment relied on was rendered, (1) for the same cause of action; (2) upon the merits; (3) between the same parties or their privies." The character of every judgment or decree depends upon the law of the sovereignty within which it is rendered. By the

codes of the several states of the Union the character of judgments rendered therein is defined. The State of Montana has gone to the limit in depriving what is known as a judgment of dismissal, even when "*a final judgment*," of all power as an estoppel to "a new action for the same cause of action." Sec. 1007 of her code, in force for some years prior to the bringing of the suit of Harris, as Administrator of Ingersoll, provides that "*A final judgment* dismissing the complaint *either before or after trial* does not prevent a new action for the same cause of action unless it expressly declares or it appears by the judgment roll, that it is rendered upon the merits." The judgment in the case in question reads as follows:

"This day the parties hereto being present in Court as on Wednesday, December 10, 1902, and the jury being present and answering to their names, and further trial herein is by the Court resumed, now, the opening statement on behalf of plaintiff is resumed, and being concluded the introduction of testimony on behalf of the plaintiff is commenced. Come now defendants and object to the introduction of any and all testimony on behalf of plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. After argument of counsel the motion to exclude testimony is by the Court sustained, to which ruling of the Court plaintiff by counsel duly excepts and is by the Court granted thirty days' additional time to prepare and serve bill of exceptions herein, and upon motion of defendants the complaint herein is by the Court ordered dismissed, and the motion to discharge receiver herein is by the Court reserved for further consideration. Whereupon the jury herein is discharged from further attendance of this cause and this term of Court" (R., pages 866, 867).

The Court also entered judgment for costs in said action, which after reciting the title is in words and figures as follows:

"This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by

their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the Court and sustained—Now, therefore, in consideration of the premises and the law, it is ordered, adjudged, and decreed that the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $12.50. Done in open Court this twelfth day of December, 1902" (R., page 868).

The answer filed by these defendants to this bill admits that "when said cause came on to be heard in said District Court of the State of Montana, said Root and Coram, by their attorneys, made objection to the introduction of any evidence whatever in said cause on the alleged ground that the plaintiff's complaint therein did not state facts sufficient to constitute a cause of action; that said District Court sustained said objection and refused to permit any evidence whatever to be introduced in support of the allegations of said complaint, and then and there *non suited* said plaintiff and *dismissed* said complaint on the alleged ground that it did not state facts sufficient to constitute a cause of action, *and on no other ground whatever.*" Here we have an emphatic admission (1) that the judgment rendered was one of "non-suit" or "dismissal," used as equivalent terms, and (2) that the dismissal was "on the alleged ground that it (complaint) did not state facts sufficient to constitute a cause of action." No ingenuity of counsel can possibly torture that judgment entry coupled with that admission, into *an express declaration* that the non suit or dismissal was upon the merits. That entry declares in express terms the contrary when it explains that, after issues of contested facts were made up and a jury empanelled to try them, the plaintiff was denied the right to offer testimony in support of his side of such contested issues, "whereupon the jury herein is discharged from further attendance of this

cause and this term of Court." The Circuit Court of Appeals was entirely misled on this point by relying on the case of U. S. *v.* Parker, 120 U. S. 89, for two reasons: (1) because in the words of the head note in that case, "a judgment of dismissal *based upon and entered in pursuance of an agreement of the parties, which recites that the subject matter has been adjudicated and settled by them*, is a bar to a subsequent action both at law and under the statutes of Nevada;" (2) because the statute of Nevada referred to in that case is radically different from the Montana statute. Since the submission of the case at bar to the Circuit Court of Appeals, the Montana Supreme Court has had occasion to consider whether the ruling in the case of U. S. *v.* Parker, 120 U. S. 89, based upon the statute of Nevada, is applicable to a case in Montana Courts. It held that it was not, because of the radical difference in the statutory provisions governing the subject under consideration. If this Court will only give effect to Sec. 1007 of the Montana Code, *which alone can determine the character of the "non-suit" or "dismissal" in question*, the plea of *res judicata* will come at once to an end. In Montana that "non-suit" or "dismissal," even if rendered as "a final judgment after trial," can "not prevent a new action for the same cause of action." *Who will contend that it possesses other attributes outside of the sovereignty within which it was rendered?* In Gardner *v.* Michigan C. R. Co., 150 U. S. 349, this Court has decided that a judgment of non-suit in a state Court, although after reversal of a prior judgment for plaintiff, is no bar to a new action in a Federal Court, and is no estoppel in the latter Court. The prevailing American doctrine as to the effect of a judgment of dismissal as an estoppel has been thus stated: "15. *Effect as a bar. a. General Rule.* A termination of the suit without a consideration of the merits does not affect the cause of action sued upon, nor the legal rights of the parties, except to raise a liability for costs. Such termination leaves the parties as if no legal proceedings had been taken and no question raised by the pleadings adjudicated. The judgment or decree of dismissal is not *res*

adjudicata and constitutes no bar to a new proceeding for the same cause of action between the same parties" (Enc. of Pl. and Pr., vol. 6, p. 986).

II.

Action of the Supreme Court of Montana. Denial of Due Process of Law.

The appeal to the Supreme Court of Montana only gave it jurisdiction to reverse or affirm the judgment of dismissal or non-suit rendered by the District Court. The Supreme Court never attempted to render an independent judgment of its own; it only affirmed the judgment of the District Court, and *it was that judgment* that was pleaded as *res judicata* to the bill in this case. No judgment of the Supreme Court was ever pleaded as an estoppel. Who will say that the Supreme Court in affirming the judgment of dismissal had the power to change or modify in any way the effect of Sec. 1007 of the Montana Code by which the character of that judgment was irrevocably fixed? After affirmance, as before, that judgment, even if final, did "not prevent a new action for the same cause of action." Only one word in the judgment of the Montana Supreme Court has any legal effect whatever and that is the final word —"Affirmed." The process of reasoning by which that result was reached is of no legal significance, unless it can be demonstrated that the Montana Supreme Court possessed the power to repeal or modify Sec. 1007 of the Code. Under the law of Montana the opinion of the Supreme Court is no part of the judgment roll (see principal brief, p. 87 *et seq.*). But, for the sake of the argument, let us assume the contrary. In that event it clearly appears that, if effect could be given to the opinion of the Montana Supreme Court as an adjudication of the merits of this cause, it clearly denies due process of law. That is manifest upon the face of the record. The amended complaint of Harris, Administrator, clearly shows that it was for the enforcement of the special contract with

Ingersoll of August 17, 1891 (R., p. 784 *et seq.*), without any claim of *quantum meruit*. As an affirmative defence, *based on facts not appearing upon the face of complaint*, defendants pleaded in their answer that upon a valuable consideration paid by Root and Coram to Ingersoll they had cancelled, or revoked, or set aside that special agreement (R., pp. 837, 848). *That was the very essence of the defence as embodied in the answer.* To that affirmative defence, which in the very nature of things could not have appeared upon the face of the complaint, Harris, Administrator, filed a replication in which he traversed the special and affirmative defence in question in these terms: "Plaintiff further denies that ever at any time said Robert G. Ingersoll, and Henry A. Root and Joseph A. Coram or either of them, upon a valuable or any consideration whatever, paid to said Robert G. Ingersoll by said Henry A. Root and Joseph A. Coram or either of them, or of which receipt was acknowledged or confessed by said Robert G. Ingersoll, *cancelled, or revoked, or set aside, or held for naught*, the said contract mentioned in plaintiff's amended complaint in this action, evidenced by the writing of which is annexed to said amended complaint marked "Exhibit B." And plaintiff further denies that said Robert G. Ingersoll ever at any time, for a valuable or any consideration whatever, paid to him by said Henry A. Root and Joseph A. Coram or either of them, or confessed or acknowledged by said Robert G. Ingersoll, or in any manner or for any consideration whatever, the said Robert G. Ingersoll agreed with the said Root and Coram or either of them *to cancel or revoke or set aside or hold for naught* the said contract mentioned in plaintiff's amended complaint" (R., pp. 864, 865). That special plea of cancellation or revocation embodied in the answer and thus traversed by the replication—*matter which did not in any way appear upon the face of the complaint*—presented a distinct and independent issue of fact which was the very essence of the controversy. It was upon the contested facts involved in the issues presented by the pleadings that the plaintiff Harris was attempting to produce his evidence to the jury, when the District Court cut him off and

dismissed his complaint. What happened when the record, *with no proof in behalf of plaintiff on the vital issues*, reached the Supreme Court of Montana? That Court expressly states in its opinion that "*Upon the issues made by the answers of defendants the cause came on for trial in the District Court sitting with a jury on December* 11, 1902 (R., p. 875). That statement precludes the idea that the complaint was dismissed because it failed to state facts sufficient to constitute a cause of action. Incredible as it may seem, the Supreme Court, in its fanciful excursion, attempted to go beyond even the issues of contested facts as presented by the answers and replication. The opinion recites that "Counsel for defendants contended in the Court below, and contended here, that . . . the contract for the contingent fee was *abandoned* by the parties, and that a recovery against the defendants, if any may be had at all, must be upon *quantum meruit* for services other than those provided by the contract. . . . We agree with the contention of the defendants" (R., p. 877). The record shows that the defendants had not pleaded "*abandonment*" at all; they had set up *recision* which is an entirely different thing. The vital part, therefore, of the opinion rests upon the assumption that the specia contract had been "abandoned" by Ingersoll, despite the fact that that issue was not presented by the pleadings at all. But if in using the term *abandonment*, the Court meant *recision*, it was still assuming, in favor of defendants, and basing its conclusion upon, a vital fact directly in issue, while denying plaintiff opportunity to present evidence to controvert it. Judge Aldrich clearly perceived that the opinion of the Montana Supreme Court was not based upon the facts recited in the complaint. He says: "Moreover, the conclusion is irresistible, upon a critical examination of the reasoning of the Montana Supreme Court, that the Court having denied to the plaintiff the right to be heard upon proofs in support of the allegations of the complaint and in support of his side of the issues raised by the replication, which was denial of 'due process of law,' proceeded to

determine the rights of the parties *under the influence the probative force of the answer*, though the case was nev submitted for hearing on bill and answer. *I say this cause the reasoning of the Montana Court is based up substantial matter contained in the answer, matter contra to the express allegations of the complaint*" (R., p. 99 Thus Judge Aldrich was driven to the irresistible conc sion that the Montana Supreme Court—in basing its opinio upon vital and contested facts, which did not appear the complaint, and as to which plaintiff was denied t right to offer proofs—denied to plaintiff due process of la Upon that question he says: "The fundamental error the Montana judgment, and in the majority opinion here well, resides in these assumptions in respect to controverte questions involving law and fact, and in deciding again the plaintiff without hearing his evidence. It is plain deciding against a party without hearing him. *How w it possible for the Montana Court, without hearing the proo to rightfully pass upon the controverted question of waiver contract, or upon the controverted questions relating to th waiver of the contingency and to the agreement to pay, an how is it possible for this Court to rightfully say that no evidenc would have changed the result in Montana?*" (R., p. 997

No more ideal case than this of a denial of due process o law by a state Court was ever presented, as that right i defined, with such masterful and lucid force, in the cas of Fayerweather *v.* Rich, 195 U. S. 276. Therein it wa held that "The application of the due process of law clause of U. S. Court, 5th Amend., is involved so as to sustain a direct appeal to the Federal Supreme Court from a Circuit Court, where the latter Court gave effect, as *res judicata* to the judgment of the State Court which is claimed unlaw fully to have deprived the parties of their property under the forms of law, *without any judicial finding of the vita fact which alone could justify such deprivation.*" Here the record shows affirmatively that neither of the Montana Courts ever pretended to hear evidence or to make "any judicial finding of the vital fact which alone could justify such deprivation."

III.

Effect of a Judgment on a Demurrer to an Imperfect Complaint.

What has now been said completely disposes of a difficulty which seems to have troubled some members of the Court on the oral argument. It was then assumed by some that the Montana Courts pronounced a judgment upon the facts as set forth in the complaint and held that such facts, if admitted, constituted no cause of action. The Supreme Court of Montana says in express terms that "Upon the issues made by the answers of the defendants the cause came on for trial in the District Court sitting with a jury on December 11, 1902" (R., p. 875). Upon the issues thus presented by the answer and replication, or upon the issuable fact of "abandonment" not presented by the pleadings at all, the Montana Supreme Court based its opinion. It is therefore purely abstract to assume, as the Circuit Court of Appeals did assume, "that the defendant's objection 'to the introduction of any and all testimony on behalf of plaintiff upon the grounds that that complaint does not state facts sufficient to constitute a cause of action' was in effect a demurrer; and, at common law, a judgment upon a demurrer is deemed to be a judgment upon the merits." In the first place, as a matter of pleading such a motion could not perform the function of a demurrer at common law or under Code procedure (see our principal brief, p. 68 *et seq.*). In the second place, the very cases cited by the Circuit Court of Appeals on this point, overthrow its contention. In Gould *v.* Evansville R.R. Co., 91 U. S. 520, this Court held that "it is equally well settled that if the plaintiff fails on demurrer in the first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, judgment in the first suit is no bar to the second although the respective actions were instituted to enforce the same right; for the reason that the

merits of the cause as disclosed in the second declaration, were not heard and decided in the first action." Then this Court cites Gilman *v.* Rives, 10 Pet. 301, in which it was held that "A judgment that a declaration is bad in substance (which alone and not matter of form is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no sense a judgment on the merits." Relying upon and citing these cases the Supreme Court of Montana in Kleindschmidt *v.* Binzel, 14 Mont. 31, held that "when the pleader has submitted to the ruling of the Court on demurrer, against the sufficiency of the cause of action, or defence, as stated, that ruling would not bar him or those in privity with him from again asserting the same facts accompanied by additional allegations which complete the statement of a good cause of action or defence." So even if it were true (1) that the motion to exclude testimony was in effect a demurrer to the complaint; (2) that it was sustained upon the ground that such complaint failed to state a sufficient cause of action, the judgment sustaining such demurrer on that ground could not be pleaded as an estoppel to this bill which does contain every essential allegation. Our principal brief (pp. 40–43) sets forth in detail the additional material facts alleged in the bill in this case, which were not alleged in the complaint of Harris as administrator. *The vitally important new element added consists of facts negativing, on the face of the bill, the defence of Root and Coram set up in the Montana case that there was a revocation or recision of the contract; and negativing abandonment by Ingersoll of the special contract which was never set up in that case.*

Who can doubt that if this new matter thus stated upon the face of the pending bill, had appeared affirmatively upon the face of the Montana complaint the Supreme Court of that State would have reached a diametrically opposite conclusion, as its reasoning was based entirely upon the assumption that there had been an *abandonment* of the special contract, which the new matter in the bill

expressly controverts, and there is no pretense or "contention" to the contrary here.

IV.

The Questions of Privity and Situs.

Even if the Court should reject every argument so far made, the plea of *res judicata* must fail, because there was no privity between this petitioner as administratrix, who held the title to the chose in question, and who also qualified in Massachusetts as ancillary administratrix in order to gain the right to sue in that jurisdiction, and Harris the ancillary administrator appointed by the District Court of Montana. Judge Putman held in accordance with the decisions of this Court that "the law is settled beyond question that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction; so that no judgment by or against Harris as ancillary administrator in Montana could avail for or against an ancillary administrator appointed by the Courts of Massachusetts, bringing a suit in that State, or in this District, although the cause of action was identically the same. This rule is so thoroughly established that we need not dwell upon it, only to say that it has been fully recognized and enforced by the Supreme Court in Aspden *v.* Nixon, 4 How. 467, 497; Stacy *v.* Thrasher, 6 How. 44, 58 *et seq.*; Johnson *v.* Powers, 139 U. S. 156, 159; Carpenter *v.* Strange, 141 U. S. 87, 104" (R., pp. 86-87). This Court said in Stacy *v.* Thrasher that "An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is in privity to the testator, and would be estopped by a judgment against him; *but they have no privity with each other, in law or in estate.* They receive their authority from different sovereignties, and over different property." Judge Aldrich accepts Judge Putman's conclusion as to the lack of privity in these words: "I leave that phase of the case upon the reasoning of Judge

Putman and the authorities cited in his opinion in th
Circuit Court." The Circuit Court of Appeals, after asser
ing that there can be no *res judicata* without privity, work
out the existence of privity *in defiance of the judgments o
this Court*, upon a theory or invention of its own. Couns
for defendants regard that theory or invention as so untei
able that they have openly and pointedly repudiated
in these words: "This result does not depend on an
doctrine of privity. There is no privity of title betwee
one ancillary administrator and another, or between a
ancillary and a domiciliary administrator of the same State
(Brief, p. 119). In the hope of filling the vacuum thu
made by the repudiation of the conclusion of the Circui
Court of Appeals upon a vital point in their favor, counse
for defendants have fallen back upon the doctrine of *situ*
thus stated in their brief opposing *certiorari* (pp. 43, 44)
"a debt due from a resident of Montana has its *situs* i
Montana, and title to it vests in an ancillary administrato
appointed in Montana." The ancient rule of English
ecclesiastical law was that the *situs* of a chose in actio
was at the residence of the debtor and not at that of th
creditor (see opinion of Shaw, C. J. in Rand *v.* Hubbard
4 Met., p. 255). That rule, so incompatible with inter
national comity, was repudiated by Lord Hardwicke i
Thorn *v.* Watkins, 2 Ves. Sen 36. In that case, after declar
ing the old rule to be "a strange imagination," that great
judge held that title to a simple chose in action owned by
a resident of England, who died there intestate, vested
in his administrator appointed in England, though the
debtor resided in Scotland. That rule, and not the ancient
English ecclesiastical rule, has been adopted generally in
this country, and expressly by this Court in Wilkins *v.*
Ellett, 9 Wall. 740, in these words: "All debts follow the
person, not of the debtor in respect of the right or property
but of the creditor, to whom due" (Thorne *v.* Watkins,
2 Ves. Sen., 35). Strangely enough Judge Lowell in his
opinion (R., p. 989), in his attempt to maintain that the
situs of a debt is at the residence of the debtor, has cited

Dicey on the conflict of Laws, Am. ed., p. 460 (referring to pp. 318–321), in which that author has stated the ancient rule of Eng. ecc. law, repudiated generally in this country, and in express terms by this Court. Many other cases directly in point upon this question are cited in petitioner's principal brief at pages 92 *et seq.*

V.

Lack of Mutuality.

"Estoppel by judgment must be mutual," *i. e.*, "a party cannot claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same matter if adverse to him" (per Earl, J., 98 N. Y. 409). That maxim expresses the reason why a judgment of non-suit is not *res judicata*. For the authorities, see principal brief, p. 77.

Summary.

We trust that we have demonstrated that the plea of *res judicvta* is bad.

1. Because "a final judgment" of dismissal or non-suit is, under the terms of Sec. 1007 of the Code of Montana, no bar to "a new action for the came cause of action," even when rendered "after trial."

2. Because a judgment on demurrer to an imperfect complaint is no bar to a second suit upon the same cause of action in which the omissions of the first are supplied. The Court will please remember that, in this case, no judgment was ever rendered on a demurrer to the facts stated in the complaint in the Montana suit. The Supreme Court of that state say in express terms that "*Upon the issues made by the answers of the defendants the cause came on for trial in the District Court sitting with a jury on December* 11, 1902." Whatever action was taken was on those issues. *There could be no demurrer, with an answer—both pending at the same time (see authorities in principal brief, pp. 70 et seq.).*

These vitally important matters may not have been as clearly demonstrated in oral argument as they should have been.

3. Because there was a flagrant denial of due process of law, both in the District Court of Montana and in the Supreme Court, where contested issues of vitally important facts were passed upon, after a refusal to permit the plaintiff to offer any proof whatever under the issues made by the pleadings.

4. Because there is no privity whatever between an ancillary administrator in one jurisdiction and an ancillary administrator in another.

5. Because there was no mutuality.

VI.

An Attorney's Equitable Lien.

If the plea of *res judicata* is swept away in this Court as it was in the Circuit Court nothing will remain for consideration but the validity of the final decree there rendered enforcing the attorney's equitable lien in favor of this petitioner. The authorities, English and American, upon that subject have been fully stated in our principal brief (pp. 129–143). In Read *v.* Dupper, 6 T. R. 361, Lord Kenyon said: "The principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained." That doctrine this Court has enforced with great liberality in Wylie *v.* Cox, 15 How. 415; Texas *v.* White, 10 Wall. 483; Staunton *v.* Embrey, 93 U. S. 556; McPherson *v.* Cox, 96 U. S. 404; Louisville E. and St. L. R. Co. *v.* Wilson, 138 U. S. 501; Cent. R.R. Co. *v.* Pettus, 113 U. S. 116., and in many other cases. In these cases this Court has refuted every one of the untenable and technical objections to the existence of the equitable lien set up by counsel for defendants. Such objections, if sustained, would destroy entirely the law

upon this subject as settled by this Court. The attorney's lien, as it has been defined here, is a lien that exists in favor of the attorney on the fruits of his labors, *without any special promise to pay his compensation therefrom.* There is, however, in this case a special promise *dedicating* the fruits of his labors, if successful, to secure the compensation promised Ingersoll. In McPherson *v.* Cox this Court, speaking "in regard to the facts relied on to create a lien," said: the agreement was to pay the attorneys "a fixed sum for their services, which, in a letter written to them after the controversy had arisen as to the amount so fixed," the client said "was to be paid out of the proceeds of sales of the property as such proceeds shall be realized." And "it will thus be seen," said the Court, the client "agreed to pay Carlisle and McPherson out of the proceeds of the sale of the property if she was successful." That agreement this Court held constituted a lien on the land recovered, observing: "It was to be paid out of the proceeds of the land recovered by the suit in equity in which they were employed." This case is stronger than that because the exact amount to be received by Ingersoll was fixed by the contract. In Louisville E. and St. L. R. Co. *v.* Wilson, 138 U. S. 501, the property on which the attorney's lien was established was not only out of Court, but it had been purchased by and was in possession of a new corporation. In Cent. R.R. Co. *v.* Pettus, this Court affirmed the decree enforcing the attorney's equitable lien on property that was *not in Court at all.* Nor was that property actually recovered by the attorney's labors. The fruits of his labors were "nipped in the bud," by the Railroad Company's purchase of the claims of his clients, but their rights had been established in the litigation prosecuted by the attorney.

A case directly in point sustaining the case at bar is that of *Wylie* v. *Coxe*, 15 *How.* 415, wherein this Court declared that the attorney had a lien upon funds in the hands of an administrator, obtained by the attorneys' prosecution of a claim before the commission authorized to make awards upon claims against the Mexican government.

The points decided in that case are strikingly similar to the case at bar, and fully sustain the decree therein. The attorney was to be paid out of the funds recovered, in case of success, otherwise he was to receive no compensation. The prosecution of the claim resulted in an award which came into the hands of an ancillary administrator, and the attorney's lien was enforced on the funds in that administrator's hands, with interest from the time the same became available. In speaking of the case of *Wylie* v. *Coxe*, *supra*, this Court, in *Staunton* v. *Embrey*, 93 *U. S.* 556, says: "Professional services were rendered by an attorney . . . in prosecuting a claim against the Republic of Mexico under a contract that the attorney was to receive five per cent. of the amount recovered; . . . the efforts of the attorney were successful, and he demanded fulfillment of the contract, which was refused. The attorney brought suit, and this Court held that the decease of the owner of the claim did not absolve the contract, and *that the claim remained a lien upon the money when recovered*, and that a Court of equity would exercise jurisdiction *to enforce the lien*," etc. The case of *Wylie* v. *Coxe* has been used as authority for maintaining the attorney's equitable lien in a great number of cases in this country (see *Notes on United States Reports*, *Vol.* 5, *page* 336). This leading case emphatically refutes the suggestion that *an attorney's equitable lien* must be the product of a special assignment. On the contrary it is a right which the law creates out of certain conditions of fact. In that respect *the attorney's equitable lien* differs from certain other equitable liens that many require a special assignment. Many other decisions cited in petitioner's principal brief, page 129 *et seq.*, are to the same effect.

VII.

Upon the Question of Necessary Parties, the Rights and Interests Affected by the Decree, and Divers other Contentions Presented in Respondents' Final Brief.

The matters referred to here should be considered in connection with what is pointed out in petitioner's principal brief under the head of "property in Massachusetts," etc.

With reference to the contention that the widow and children of John A. Davis, legatee under the alleged will, ought to have been made parties to this suit, it should be mentioned that no defect of parties, by reason of *their* absence, is set up in any pleading. The only alleged defect of parties set up in pleading is based upon the absence of Ellen S. Cornue, who is a citizen of the same State of which complainant is a citizen, as the record shows, (*see bill, R., p.* 30 *and answer ib.*, 121). No other defect of parties is alleged in any pleading.

It is insisted by respondents *in argument* (see respondents' brief, p. 157), that the executor of Sarah Maria Cummings is a necessary party. Her executor, Herbert P. Cummings, being a citizen of Massachusetts, could be, and was, joined as a party defendant (*see bill, R., p.* 2). But the Circuit Court ruled that neither he, nor any of the heirs associated with Root and Coram were necessary parties (*R.*, pp. 93-94). However, said executor of Sarah Maria Cummings, and the administrator of Elizabeth S. Ladd and Mary Louise Dunbar, three of said associate heirs, remained and answered with Coram, Root, and trustee Palmer (*R.*, p. 99 *et seq.*). Neither in their answer, nor in the answer of Andrew J. Davis, Jr., co-trustee with Palmer, nor in the answer of John H. Leyson, administrator of Andrew J. Davis, deceased, appointed in Massachusetts, having custody of said money and bonds, is there any averment that the interest therein of Sarah Maria Cummings, or her executor, is otherwise than as averred in the bill. Her relation-

ship to Andrew J. Davis, deceased, and that as next of kin she was entitled to one eleventh of said estate, is averred in the bill and admitted in the answer, in which her said executor joined (*see bill, R. p. 3, and answer, ib.*, 99). The bill in paragraph 23 alleges her share of said money and bonds to be the same as she was entitled to as an heir of Andrew, namely, "one hundred eleven-hundredths thereof, and that by the terms of said instrument (a copy of which is annexed to the bill marked 'Exhibit A') she assigned, transferred and conveyed to said Henry A. Root one-third of said interest, to wit, $33\frac{1}{3}$–1100, reserving and leaving to said Sarah Maria Cummings $66\frac{2}{3}$–1100, which is all the interest owned by her heirs and legal representatives in said funds and effects; that complainant does not claim any interest in, or lien upon, said $66\frac{2}{3}$–1100 of said funds and effects owned by the heirs or legal representative of said Sarah Maria Cummings" (*R.*, p. 30).

The proof shows that Mr. Root was empowered to attend to the interests of his associate heirs, and collect, receive and receipt for them ("*Exhibit A*," *R.*, p. 43). This as well as other evidence in the record shows that Mr. Root was in close touch with those associated with him in interest and has knowledge of all arrangements between them. In a letter put in evidence, written by Mr. Root concerning these affairs, he states that all the interests of said five associate heirs which were to go through the hands of said trustees Palmer and Davis, Jr., "are all applicable to expenses and will be so utilized on all future distributions" ("*Exhibit xxxix*," *R.*, p. 562). This tends to show that by arrangement of said associate heirs they have set apart the portion of their interest which was to pass through the hands of said trustees, to be *applied* to the expenses of said will contests. No other reasonable interpretation can be put upon the statement of Mr. Root quoted above. That letter was put in evidence in this suit where said executor of Sarah Maria Cummings as a party had answered, and is represented by counsel, yet he made no attempt to show anything to the contrary.

The decree determining said will contests awards to Palmer and Davis, Jr., trustees (both of whom are defendants in this suit and have appeared personally and answered), 431–1100 (*see "Exhibit C," R.*, p. 47). One hundred-eleven-hundredths of that portion is to be delivered by said trustees to said associate heirs whom Colonel Ingersoll represented in the will contests; and one-half of the remainder of that portion also belongs to said associate heirs as beneficiaries of the trust vested in said Palmer and Davis, Jr. (*see bill; R., p. 12 and admissions of answer ib.* 104). According to that arrangement said trustees would, after passing 1–11, or its equivalent 100–1100, over to Colonel Ingersoll's clients, have remaining in their hands $165\frac{1}{2}$–1100 of the interests awarded to said five heirs by the stipulations and decree determining said will contests. The statement in Mr. Root's letter above mentioned was put in evidence in this suit where the executor of Sarah Maria Cummings, who has an interest in the pooled interests, was a party answering and represented by counsel, and where two other heirs associated in said will contests where also parties answering and represented by counsel, and where Leyson as administrator, who is obliged to account to Ellen S. Cornue for her share, and to account also to the others interested in said funds and effects, was present answering in person and represented by counsel, and where Palmer and Davis, Jr., secondary trustees, were also present answering in person and represented by counsel, but no dispute was raised as to the correctness of Mr. Root's statement; nor was any showing made to the contrary, by any of the defendants before the Court, although having an interest in the subject matter and knowledge of the respective rights and interests of associates and beneficiaries in interest. Besides that evidence, there is much other proof in the record tending to show that it was the intention and understanding of said five heirs and Coram to devote the overplus won for them in the determination of the will contests, to the payment of expenses, and to construe their respective rights in the pooled interests, on the basis of their shares, as heirs.

In framing its decree foreclosing the lien in the case at bar, the Circuit Court did not treat *all* said interests which were to go through the hands of said trustees Palmer and Davis, Jr., for the use and benefit of Colonel Ingersoll's clients, as a fund to be "utilized" for expenses, although the heirs interested could, and still can, do so if they desire. The Circuit Court considered and treated their shares according to their respective interests as they must have viewed their interests when four of them assigned a third each of their shares to Mr. Root. The additional amount acquired for Colonel Ingersoll's clients by the decree determining the will contests, the Court left to be utilized for expenses. If what Mr. Root stated in his letter referred to above is true, neither the executor of Sarah Maria Cummings, nor Ellen S. Cornue, will share in 350-1100 of said property in Massachusetts, as they may according to the decree of the Circuit Court in the case at bar. For if *all* that was to pass through the hands of trustees Palmer and Davis, Jr., for the use and benefit of said associate heirs, is to be "utilized" for expenses, there is left only 250-1100 to divide among them.

Appeal to review said decree was prosecuted by defendants Coram, Root and Palmer, *but not by said executor of Sarah Maria Cummings*. He expressly declined to join in said appeal, when notified that by so doing he would "be deemed to have acquiesced in the said decree" (*see summons and severence*, R., p. 976). So he *acquiesced* in the decree which interpreted his interest in said money and bonds to be as alleged in the bill and shown by the proofs. But respondents here contend that the decree should be modified because the executor of Sarah Maria Cummings is a necessary party (*see Respondents' brief, p.* 156).

It is strenuously insisted that Ellen S. Cornue should have been made a party. But her rights and interests in said money and bonds are represented by Leyson as administrator in custody thereof, in the same relation as trustee and *cestui que trust*. Authorities on this point are cited in petitioner's principal brief at page 156; and respondents agree in their brief at page 122 that an administrator "acts

in a purely representative capacity as a trustee." The right or interest of Ellen S. Cornue in said funds and effects is interpreted and left unaffected by the decree, in the same way as that of Sarah Maria Cummings, except that Cornue's interest pooled with said associate heirs is one-half of an eleventh, or its equivalent, 50–1100 of the estate. The administrator Leyson, who is is charge of Cornue's interest in the same capacity as a trustee and obliged to account to her, did not appeal from said decree but *acquiesced* therein (*see Summons and Severence, R.*, p. 976). If the interest of Ellen S. Cornue in said money and bonds is greater, or even claimed by her to the greater, than the Circuit Court found, the defendants present in person in this suit, interested in the subject matter, have kept the fact secret through this litigation. But her rights are not prejudiced. She can require Leyson to account to her for whatever interest she may be intitled to (*Payne* v. *Hook*, 7 *Wall.* 425, *Hook* v. *Payne*, 14 *Wall.* 252). If in fact some part of Cornue's interest is subjected to the lien foreclosed by the decree, neither Coram, Root, nor trustee Palmer (who are the only appellants from said decree, in the Circuit Court of Appeals and the respondents here) are prejudiced thereby. Messrs. Coram and Root would be benefited thereby. And Mr. Palmer as a secondary trustee is not obliged to account to Cornue for anything which has never come into his hands. Besides, if Palmer were obliged to account for, represent or defend, Cornue's interests, and her interests have been prejudicially affected by the decree, then he is in the same position as Mr. Leyson respecting this suit. Mr. Palmer has kept the secret. He has failed to speak when he should have spoken. If on the other hand the decree leaves unaffected a greater interest in said money and bonds, for Cornue, than she is entitled to have, she can adjust that matter with Coram and Root in the same way as if no decree in favor of complainant had been entered. The rights of Ellen S. Cornue are not prejudiced in any way whatever by said decree.

It is asserted in respondents' brief, pages 155–156, in effect that Mr. Root being empowered by the instrument, of which

a copy is annexed to the bill as "Exhibit A," to collect
receive the portion of the estate already distributed
longing to his sister Ellen S. Cornue, he may have reta
more than the third thereof assigned to him, and that if
a thing has been done she would have a right to insist o
imbursement out of future distributions. It seems str
indeed for Mr. Root to set up contention in argument l
on an assumption which implies that he may have
mitted a breach of trust with respect to his sister's int
in funds heretofore distributed. However, we suppose
notwithstanding such strange suggestion, this Court
still indulge the presumption with respect to defen
Henry A. Root, that persons act honestly in discharg
trusts until the contrary is shown. Other obvious rea
for discarding that suggestion in support of the all
necessity for making Ellen S. Cornue a party could be
tioned, but we will not dwell upon it.

According to her relationship to Andrew J. Davis, E
S. Cornue as one of said associate heirs is entitled to
seventh of their pooled interests. If it should be de
mined by this Court that she is entitled to that propor
of the entire five hundred, fifteen and a half eleven-h
dredths of said estate acquired for said five associate
by the decree determining said will contests, such
clusion would require a modification of the decree in the
at bar, by one of two methods, towit: Either by elimina
from the operation of said decree, one-seventh of
$515\frac{1}{2}$–1100 of said money and bonds in Massachusett
which said associate heirs and Coram are entitled; or
elimination from the operation of said decree, one-seve
of $515\frac{1}{2}$–1100 of said money and bonds, *less one-third of*
seventh, which was assigned by said Ellen to defend
Root by the instrument of which a copy is annexed to
bill marked "Exhibit A" (R., p. 43). It seems to petitio
that there is no more need of a *table of fractional inter*
to elucidate this point than there is need of a table show
"loss" and "gain" of other heirs, not concerned in this s
(*Respondents' brief, page* 10), whereby, without proper re
ence to the record, it would seem that Erwin and Di

Davis got naught. Whereas the record shows that Erwin pooled his interests with John A. Davis (R., p. 732), and that Diana sold and assigned her interest to other heirs whose shares were finally fixed by the decree determining said will contests (R., pp. 624, 625). But petitioner submits that in view of the showing made by the record there should be no modification of the decree.

The interests which the other two associate heirs, namely, Ladd and Dunbar, formerly had were all assigned to defendents Coram and Root, as admitted by said Dunbar and the administrator of Elizabeth S. Ladd, in their answers to the bill (*Bill, par. 6, R., p. 8, and answer ib.* 102).

The legal representative of Gideon Wells is not a necessary party to this suit because *all* remainder of the interests assigned by four of said associate heirs to Henry A. Root and Gideon Wells, *not used in paying expenses* of said will contests, is by the terms of the assignment, *to be the property of Henry A. Root* (*see* "*Exhibit A*," *R.*, p. 43, *proved in evidence ib.* 467, *also bill, par. 5, ib. 7, and answer ib.* 99).

This suit is founded on the contract and facts shown by the record, which establish personal liability of defendants, as well as a lien on said property within the jurisdiction of the Court. It is a suit between citizens of different States. Defendants Coram, Palmer, Dunbar and the legal representative of Elizabeth S. Ladd, and of Sarah Maria Cummings, are all citizens of Massachusetts; and all of them have appeared and answered generally. Defendant Leyson, while a citizen of Montana, is administrator of Andrew J. Davis, deceased, appointed in Massachusetts, and has custody of said funds and bonds on which the lien existing in favor of complainant rests. He was served with process in Massachusetts and has appeared and answered generally. Defendant Root, through a citizen of Montana, was served with process in Massachusetts and has appeared, answered and defended generally, without objection as to the district within which this suit was brought. The Court therefore has jurisdiction of the parties in person for all purposes of personal liability, as well as foreclosure of said lien, and the injunction of its decree. The injunction clauses of the

decree are framed strictly within the rules of law laid do
in decisions of this Court; and do not in the slighest dec
interfere with the administration of said estate anywher

Cole v. *Cunningham*, 133 *U. S.* 107.
French v. *Hay*, 22 *Wall.* 250.
Phelps v. *McDonald*, 99 *U. S.* 308.
Hart v. *Sampson*, 110 *U. S.* 151.
Lawrence v. *Nelson*, 143 *U. S.* 215.
McDaniel v. *Traylor*, 196 *U. S.* 415.
Riverside C. M. v. *Alabama & G. M. Co.*, 198 *U. S.* 1

There is in respondents' brief much discussion about
alliance of Colonel Ingersoll's clients with the proponents
the alleged will and making common cause against oth
heirs. If respondents deemed it pertinent to this case
show reasons or motives for the course pursued, or the fa
from which such reasons or motives could be deduced
the Court, it seems to complainant that it would have be
much better enlightenment to have shown the facts by pr
than to assume and assert conclusions without proof
facts. Whether concessions or promise of concessions
other heirs opened the way to terminate the contest, whi
might result in such a way as to deprive them of any sha
of the estate; or whether the course taken in shaping t
termination of the contest in the manner shown by the pr
ceedings and decree terminating it, was to prevent oth
persons who asserted nearer kinship to Andrew than Colon
Ingersoll's clients, from harassing them with litigatio
are matters which were not deemed pertinent to this ca
and explanation thereof by evidence was not undertake
It was considered sufficient on the part of complainant
show that the will was overthrown by the proceedings a
decree which terminated said contests prosecuted
Colonel Ingersoll, and that his clients got their shares.

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Supreme Court of the United States

OCTOBER TERM, 1907

EVA A. INGERSOLL, APPELLANT

v.

JOSEPH A. CORAM ET AL., APPELLEES

BRIEF FOR THE APPELLEES

STATEMENT OF FACTS

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This is a bill in equity brought by the appellant, Eva A. Ingersoll, as administratrix, appointed in Massachusetts, of the estate of her deceased husband, Robert G. Ingersoll, to recover a sum alleged to have been due to him at his death for professional services. The bill alleges that the sum due is secured by a lien on certain property in Massa-

chusetts, and seeks to foreclose that lien, and have
property applied to the satisfaction of the claim.

The bill was filed June 15, 1903, in the Circuit C
for the District of Massachusetts. The defendants
murred to the bill, but upon a hearing the demurrers
overruled. The defendants then filed answers, evid
was taken, and upon a hearing on the pleadings and pr
the Circuit Court entered a decree for the plaintiff fo
amount claimed, and declared that amount a lien upo
property in question. This decree was reversed by
Circuit Court of Appeals.

The material facts shown by the record and not
puted are as follows:

I. THE ANDREW J. DAVIS WILL

Andrew J. Davis, a citizen of Montana, died
March 11, 1890, leaving a large amount of real
personal property in Montana and personal propert
Massachusetts.

In July, 1890, John A. Davis, one of the brother
Andrew J., propounded for probate in the District C
for the Second Judicial District of Montana, for the Co
of Silver Bow, a document alleged to be the last wi
Andrew J. Davis, executed in 1866, by which, after gi
certain inconsiderable legacies, all the residue of the e
was given to John A. Davis, to the exclusion of all
other next of kin. (Rec. p. 373.)

The next of kin of Andrew J. Davis and the share
which they were respectively entitled in case of intes
were as follows:

John A. Davis	brother	100
Erwin Davis	"	100
Calvin P. Davis	"	100
Diana Davis	sister	100
Sarah Maria Cummings	"	100
Harriet Wood	"	100
Elizabeth S. Bowdoin	"	100

Henry A. Root	nephew	children of a	50/1100
Ellen S. Cornue	niece	deceased sister	50/1100
Elizabeth A. Smith	niece	children of a	50/1100
Mary Louise Dunbar	niece	deceased sister	50/1100
Elizabeth S. Ladd	niece	child of a deceased sister	100/1100
Harriet R. Sheffield	niece	children of a	50/1100
Henry A. Davis	nephew	deceased sister	50/1100

II. THE ROOT-CUMMINGS CONTEST

In August and September, 1890, Henry A. Root and Sarah Maria Cummings, two of the next of kin of Andrew J. Davis, entitled in case of intestacy respectively to fifty and to one hundred eleven-hundredths of his estate, filed contests denying the authenticity of the instrument propounded as a will. (Rec. pp. 881, 885.)

On September 25, 1890, Elizabeth S. Ladd, Mary Louise Dunbar, and Ellen S. Cornue joined with Sarah Maria Cummings and Henry A. Root in an instrument by which, after reciting the pendency of the contest and that Root had undertaken to procure evidence and prosecute the contest, the parties to the instrument other than Root assigned each one-third of her interest in the estate of Andrew J. Davis to Root and Gideon Wells, in trust, from the avails of such third to reimburse Root for his expenses, any surplus to be retained by him as compensation for his services. It was stipulated that the assignors should be in no way liable for any expenses incurred, and Root agreed to procure counsel, pay expenses, and prosecute the contest. (Rec. p. 43.)

III. THE EMPLOYMENT OF COLONEL INGERSOLL

Root employed Colonel Ingersoll to act as counsel in contesting the will in Montana, and on January 17, 1891, wrote to him that all had been arranged, and that he was retained. (Rec. p. 468.) On May 1, 1891, Colonel Inger-

soll wrote to Root with reference to the terms of his em
ployment (Rec. p. 509¼) as follows:

MAY 1st 1.

"MY DEAR ROOT. Do not know whether I can get the money but feel sure I can raise $25000 — have already secured $13000 —

"Now, there is another thing: I suppose it is best for yo and I to have a specific and definite understanding in regar to my fee. Of course, if you should lose the case you could no pay. We can raise money enough to pay expenses and of cours I shall want expenses — but the real question is as to what am to have in case of success and how that is to be secured — *i. e.* what papers are necessary, etc.

"Let me hear from you.

"Yours,

"R. G. INGERSOLL."

This letter was not answered at that time. The trial o the will contest began in Butte in July, 1891, and continue for six or seven weeks. While the trial was in progress Root wrote to Colonel Ingersoll, apparently in reply to th preceding letter, the following letter (Rec. p. 45) in whic the defendant Coram also joined:

BUTTE CITY, MONT., August 17, 1891.

R. G. INGERSOLL, Esq., Butte City, Montana.

"SIR, We agree that for your services in the contest of Mari Cummings and Henry A. Root, against the probate of the allege will of A. J. Davis, deceased, rendered and to be rendered, tha your fee, in case the will is defeated and our clients get thei shares, shall be one hundred (100,000) thousand dollars, and tha your expenses and disbursements shall be paid in any event.

"There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root ar unsuccessful, and in no event is the said J. A. Coram obligate except to pay such fee out of the funds secured from the esta of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Lad M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

"HENRY A. ROOT,

"J. A. CORAM."

Coram had at this time apparently some interest (precisely what does not appear) in the shares of Mary Louise Dunbar and Elizabeth S. Ladd, and he joined in the foregoing letter on this account.

The trial of the will contest resulted in September, 1891, in a disagreement of the jury.

IV. THE ROOT-JOHN A. DAVIS SETTLEMENT

Before the case was brought on for a second trial, negotiations were opened for a settlement between John A. Davis and the contestants. John A. Davis died intestate on January 24, 1893. (Rec. p. 345.) The negotiations proceeded with the knowledge and approval of Colonel Ingersoll until, on April 28, 1893, an agreement of compromise was made between the widow and children of John A. Davis and the administrator appointed in Montana of his estate, parties of the first part, and Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Ellen S. Cornue and her husband, and Elizabeth S. Ladd and her husband, parties of the second part. (Rec. p. 598.)

The agreement of April 28, 1893, provided in substance:

I. That, in case the will was finally allowed, the parties of the first part should have two-elevenths and the parties of the second part three and one-half elevenths of the estate. That each should have from the remainder of the estate five hundred thousand dollars for expenses of litigation, and the balance of the estate should be divided equally between them.

II. That the parties of the first part to carry out this agreement assigned three and one-half elevenths of the estate to the parties of the second part, of which two and one-half elevenths should be distributed in kind immediately in such interests to each as the second parties might at the time direct, and that two-elevenths of the estate should in like manner be at once distributed in kind to

the first parties. That the remainder of the estate sh
be distributed to Charles H. Palmer and Andrew J. D
son of John A., as trustees, to be used in carrying the
tract into effect, including in such remainder the o
one-eleventh assigned to the second parties, such
eleventh to be distributed to the second parties in
interests as they might direct.

III. That in case of a defeat of the will by cont
other than those of Root and Mrs. Cummings, so that
estate had to be distributed as intestate property,
second parties should give to the first parties one-eleve
of the estate, and themselves receive only two and
half elevenths.

IV. That the second parties to carry out the ag
ment assigned one-eleventh of the estate to the first part
to take effect only in the event of such defeat.

V. That in case the will was defeated, but the first
ties obtained the estate, or any part of it, by assignm
from the heirs or otherwise, the agreement should b
full force, and in that event the first parties assigned
interests in such assignment necessary to give effect
the agreement.

VI. That, in case the appointment of a general adm
istrator or administrator with the will annexed beca
necessary, John H. Leyson should be appointed.

VI½. That the contests of Root and Mrs. Cummi
should be withdrawn whenever the representatives of
parties agreed that it was best to do so.

VII. That, if the will should finally be allowed,
decree should be based upon the terms of the agreem
"as a consideration of the settlement and compromise
the litigation."

VIII. That no person claiming an interest in the est
should have the benefit of the contract without rati
ing it.

IX. That the question of the ownership of certain b
stock should be reserved.

X. That neither of the parties should without consent of the other make any settlement with any other heir.

XI. That such legal proceedings for closing up the estate should from time to time thereafter be taken as the parties might agree upon.

XII. That each of the parties should nominate a representative to act for them in the matter, and in case of disagreement those two parties should have the dispute referred to a third person for decision, and the parties did thereby name Andrew J. Davis and Charles H. Palmer to represent them respectively.

XIII. That each party should bear half the expenses of carrying out the contract and be entitled to reimbursement.

XIV. That it was understood that the agreement was made for the purpose of settlement and compromise of the action.

V. THE SETTLEMENT WITH HARRIET R. SHEFFIELD ET AL.

At the time the above agreement was made Harriet R. Sheffield and Henry A. Davis, two other heirs at law, had also filed a contest of the will which was pending. As the result of further negotiations, an agreement was made March 25, 1895, between these contestants and all the parties to the agreement of April 28, 1893, by which it was agreed in substance that these two contestants should together have in kind one twenty-fifth of the estate, whether distributed under the will or as an intestate estate, and that they should withdraw their contest. (Rec. p. 613.)

On March 27, 1895, a decree was entered allowing the will and directing distribution to be made — 1 25 to Harriet R. Sheffield and Henry A. Davis, and of the remainder, 19 44, to the person representing John A. Davis, and 25 44 to Root and his associates. (Rec. p. 574.)

VI. THE SETTLEMENT WITH ELIZABETH S. BOWDOIN ET AL.

Contests were thereupon entered by Elizabeth S. Bowdoin and Calvin P. Davis. On June 22, 1897, an agreement was made between all the parties to the agreement of April 28, 1893, and their respective husbands and wives, and Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood, interested with them in their contest, by which it was in substance agreed that these latter should each have one twenty-second of the estate in kind, and that the contests be abandoned. (Rec. p. 622.)

VII. THE SETTLEMENT WITH ELIZABETH A. SMITH

Elizabeth A. Smith, after the probate of the will, filed a petition to revoke the probate. By agreement dated August 6, 1897, between all the parties to the agreement of April 28, 1893, and their respective husbands and wives and Elizabeth A. Smith and her husband, it was in substance agreed that she should have one forty-fourth of the estate, and that the petition for revocation of probate be abandoned. (Rec. p. 639.)

VIII. THE MONTANA DECREES CONFIRMING SETTLEMENTS

On August 24, 1897, a decree was entered in proceedings on the estate of John A. Davis, approving the action of the administrator in making the several compromise agreements, authorizing him to carry them out, and authorizing him to receipt to the administrator with the will annexed of Andrew J. Davis for all interest of the estate of John A. Davis in the estate of Andrew J. Davis upon delivery of the residue after payment of all debts and claims and satisfaction of the several compromise agreements. (Rec. p. 578.)

On the same day, August 24, 1897, a decree was entered (Rec. p. 580) in the matter of the estate of Andrew J. Davis, dismissing the contests of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith, confirming the probate of the will, and modifying the order of March 27, 1895, to conform to the compromise agreements. This decree directed that the administrator with the will annexed of Andrew J. Davis retain possession of the estate and distribute it, subject to the small bequests in the will and to the expenses of administration and outstanding debts, according to the compromise agreements, viz.:

Two hundred eleven-hundredths in kind to John E. Davis, administrator of the estate of John A. Davis;

Two hundred and fifty eleven-hundredths in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue;

Forty-four eleven-hundredths in kind to Harriet R. Sheffield and Henry A. Davis;

Fifty eleven-hundredths in kind to Calvin P. Davis;

Fifty eleven-hundredths in kind to Harriet Wood;

Twenty-five eleven-hundredths in kind to Elizabeth A. Smith;

Fifty eleven-hundredths in kind to Elizabeth S. Bowdoin;

Four hundred and thirty-one eleven-hundredths in kind to Andrew J. Davis and Charles H. Palmer as trustees for the purposes of the trust under the agreement of April 28, 1893.

The decree did not provide for the payment of $500,000 to each party to the original compromise, but it did expressly declare that the compromise agreements were adopted and made the basis of the decree according to the terms of the agreements. (Rec. p. 580.)

The distribution ordered by the decree was the result of the following gains and losses caused by the compromise agreements on the part of the next of kin as compared with a distribution of the estate as intestate property:

	Amount Received.	Gain.	Loss.
John A. Davis Estate	200/1100		
" " " " through the Trustees	165 1/2/1100	265 1/2/1100	
Henry A. Root			
Sarah Maria Cummings			
Mary Louise Dunbar			
Elizabeth S. Ladd and Charles H. Ladd	250/1100	165 1/2/1100	
Ellen S. Cornue and Joshua G. Cornue			
Same through the Trustees	265 1/2/1100		
Harriet R. Sheffield	22/1100		28/1100
Henry A. Davis	22/1100		28/1100
Calvin R. Davis	50/1100		50/1100
Harriet Wood	50/1100		50/1100
Elizabeth A. Smith	25/1100		25/1100
Elizabeth S. Bowdoin	50/1100		50/1100
Diana Davis	00		100/1100
Erwin Davis	00		100/1100
		431/1100	431/1100

IX. THE MONTANA DISTRIBUTION

On August 26, 1897, a distribution of six hundred and seventy thousand dollars was ordered in the proportions fixed by the decree. (Rec. p. 582.) On December 18, 1897, the administrator was ordered to turn over all the real estate in Montana to the persons and in the shares fixed by the decree. (Rec. p. 587.)

By indenture dated November 25, 1898, Elizabeth S. Ladd and Charles H. Ladd, her husband, and Mary Louise Dunbar, assigned and transferred to Joseph A. Coram all their interest in the Davis estate as heirs at law or under the decree confirming the compromise or otherwise. (Rec. p. 659.) So far as appears, this is all the interest Coram has, or ever has had, in the Davis estate.

On December 3, 1901, a further decree of distribution was made, directing a share as fixed by the final compro-

mise in one hundred thousand dollars in cash and one hundred shares of bank stock to be turned over to Root and his associates. In this decree Coram was substituted for Elizabeth S. Ladd, Charles H. Ladd, and Mary Louise Dunbar. The decree also directed the payment of certain attorneys' fees. (Rec. p. 592.) It made no provision for the payment of any fee to Colonel Ingersoll.

X. THE DAVIS WILL PROCEEDINGS IN MASSACHUSETTS

On October 8, 1897, John H. Leyson filed a copy of the will of Andrew J. Davis in the Probate Court for Suffolk County, Massachusetts, with a petition that the will be recorded and letters of administration with the will annexed be granted to him. (Rec. p. 733.) A decree was entered December 9, 1897, allowing this petition, directing that the will be filed and letters of administration issued. (Rec. p. 735.) From this decree an appeal was taken by Erwin Davis (Rec. p. 738), which was on March 9, 1898, dismissed (Rec. p. 753). No part of the estate in Massachusetts has been distributed.

XI. THE INGERSOLL ROOT MONTANA SUIT

The estate, which had been estimated as over five million dollars, had by 1897 shrunk very seriously. (Rec. p. 566.) It was found by decree of the Montana Court entered March 27, 1895, not to exceed $3,000,000. (Rec. p. 575.) The personal estate in Montana actually distributed, as shown in the record, was $770,000 and one hundred shares of bank stock (Rec. pp. 582, 592), and this with expenses practically exhausted the personal property there. (Bill, par. 24, Rec. p. 33.) The personal property in Massachusetts was found by the Circuit Court to amount to $337,862 in cash and $170,000 par value of bonds. (Rec. p. 955.) The real estate was only alleged in the bill and found by the Circuit Court to amount to over one

million dollars. (Rec. p. 947.) The aggregate estate was thus less than half the estimated value. Robert G. Ingersoll died a resident of New York on July 21, 1899. At the time of his death Colonel Ingersoll had received from Root, on account of services in the Davis will case, five thousand dollars. (Bill, par. 20, Rec. p. 24.) On August 21, 1899, the plaintiff was duly appointed in New York administratrix of his estate. (Bill, par. 21, Rec. p. 25.)

In July, 1901, the appellant brought suit in her own name as administratrix in a District Court in Montana against Root, Wells, Coram, Elizabeth S. Ladd, Ellen Cornue, M. Louise Dunbar, Herbert P. Cummings, as executor, and Henry A. Root, as administrator with the will annexed, of Sarah Maria Cummings, Palmer and Andrew J. Davis as trustees, and Leyson as administrator with the will annexed of Andrew J. Davis, deceased. The complaint filed set forth the facts above stated as to the employment of Colonel Ingersoll to contest the will, the result and the compromise made, the ownership of certain real estate by the defendants and the existence of property of the estate of Andrew J. Davis in the hands of the administrator, claimed that the balance of ninety-five thousand dollars was due to Colonel Ingersoll at his death, and prayed for judgment against Root for that sum, and that the debt and judgment be declared a lien on the share acquired by Root in the estate and on one-third of the shares acquired by Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, respectively, in each case including the shares acquired and held by Palmer and Davis as trustees for Root and his associates, and upon the interest of Coram in any of those shares, and for satisfaction of the claim from the property so alleged to be subject to a lien. (Rec. p. 992.)

Objection was taken to the right of the plaintiff as administratrix appointed in New York, to maintain that suit. (Bill, par. 25, Rec. p. 36.) On December 4, 1901,

John S. Harris was appointed administrator in Montana of Colonel Ingersoll's estate; and on December 6, 1901, he was, on motion of the appellant, substituted as plaintiff in the suit brought by her in Montana last mentioned. (Rec. pp. 930–932.)

After the substitution of Harris as plaintiff sundry amendments to the complaint were made: to wit, on February 6, 1902, on July 7, 1902, and on December 10, 1902. Among these amendments was the joinder as defendants of various attorneys claiming liens on the property for services and of certain persons who had acquired interests in parts of the property, and the omission of Gideon Wells, who had died before the suit was brought, as a defendant. (Rec. pp. 933, 784, 830, 833.)

Answers were filed by the several defendants. (Rec. pp. 837, 850, 853, 856, 858.) Root, Coram, and several other defendants joined in an answer denying the existence of the debt, setting up the statute of limitations and alleging a rescission of the contract by Colonel Ingersoll in his lifetime. (Rec. p. 837.)

This suit came on for trial on December 11, 1902; the defendants objected to the introduction of any evidence by the plaintiff, on the ground that the complaint did not set forth facts sufficient to constitute a cause of action. The court sustained the objection, and ordered the complaint dismissed. (Rec. p. 866.) A judgment was accordingly entered dismissing the action with costs. (Rec. p. 868.) The plaintiff appealed to the Supreme Court of Montana, and on May 28, 1903, the order of the court below was affirmed, and the suit dismissed with costs of appeal (Rec. p. 868), on the ground set forth in an opinion by the Chief Justice, that the facts alleged in the complaint failed to show that Colonel Ingersoll ever became entitled to the agreed fee of one hundred thousand dollars. (Rec. p. 872.)

XII. THE INGERSOLL-ROOT SUIT IN MASSACHUSETTS

On May 29, 1903, the plaintiff was duly appointed by the Probate Court for Suffolk County, Massachusetts, administratrix of the estate of Robert G. Ingersoll in Massachusetts (Rec. p. 25), and on June 15, 1903, as such administratrix, brought this bill of complaint (Rec. p. 1) against Coram, Palmer and Andrew J. Davis as trustees, Leyson as administrator with the will annexed of Andrew J. Davis in Massachusetts, Root, Elizabeth S. Ladd, her husband, Charles H. Ladd, Mary Louise Dunbar, and Herbert P. Cummings, executor of the will of Sarah Maria Cummings.

a. THE BILL

The substantial allegations of the bill are as follows:

That Andrew J. Davis died in Montana on March 11, 1890, leaving real and personal property, and next of kin, as above set forth, and that John A. Davis in July, 1890, propounded the alleged will giving him practically the whole estate. (Par. 1–3.)

That Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd, and Mary Louise Dunbar associated themselves to oppose probate of the will, and that objections to its probate were accordingly filed in the names of Root and Mrs. Cummings, and that to aid in prosecuting the contest Root and the other four joined in the indenture, dated September 25, 1890, a copy of which is annexed to the bill, whereby Root undertook to prosecute the contest, and the other four assigned each one-third of her interest in the estate to Root and Gideon Wells, as trustees, to reimburse Root for his expenditures, and to pay over for his use any surplus of the interests assigned; that Gideon Wells subsequently died, and no successor to him as trustee has been appointed. (Par. 4, 5.)

That "during the times herein mentioned" Coram acquired and still has all the remaining interests of Elizabeth S. Ladd and Mary Louise Dunbar, and also acquired some interest in the shares of Root, Mrs. Cornue, and Mrs. Cummings, and that these rights and interests of Coram were dependent on the prosecution of the contest. (Par. 6.)

That Root and Coram employed Robert G. Ingersoll to prosecute the will contest, and the latter accepted the employment and rendered valuable services, and while Ingersoll was rendering his services Root and Coram made the agreement with him embodied in the letter of August 17, 1891, for payment of a contingent fee of one hundred thousand dollars, and that Ingersoll rendered services mentioned in the letter both before and after its date. (Par. 7, 8, 9.)

That the will contest was tried in Montana in 1891, before a jury, for seven weeks, during which Ingersoll was constantly present and rendered great services, and that the jury finally refused to return a verdict in favor of the alleged will. (Par. 10.)

That Ingersoll made preparations for a new trial, and that on April 28, 1893, by reason of the prosecution of the contest and the failure to secure probate of the will, the legal representatives and heirs of John A. Davis, the proponent of the will, made the agreement with Root and his associates for probate of the will and an accompanying decree directing distribution in accordance with the agreement, and that Root and his associates and Coram agreed to this settlement, and that Palmer and Davis, named in the agreement as trustees, accepted the trust, and on March 27, 1895, a decree was entered allowing the will, and directing distribution according to the agreement, by which twenty-five forty-fourths of the estate was to go to Root and his associates. (Par. 11, 12.)

That other contests of the will were pending, which were subsequently, with the acquiescence of Coram, Root, and his associates, and with the counsel and aid of Ingersoll, settled, and that finally, on August 24, 1897, the Montana Court made a decree for the distribution of the estate of Andrew J. Davis in accordance with the various agreements: that Leyson was duly appointed administrator with the will annexed, and the distributions under the decree were made as specified above, including real estate of a value exceeding one million dollars, and that Root, Coram, and their associates received five hundred and fifteen and one-half eleven-hundredths of all the distributions. (Par. 13, 14, 15, 16.)

That Root, Coram, and their associates have by deeds dated May 10, 1900, conveyed away the real estate. (Par. 17.)

That the five hundred and fifteen and one-half eleven-hundredths of distributions of personal property in Montana received by Root, Coram, and their associates, has amounted to three hundred

and seventy-four thousand nine hundred and seven dollars and ninety-one cents, and the distributions have practically exhausted the estate in Montana, and that any remainder will be consumed in paying costs and expenses. (Par. 18.)

That Robert G. Ingersoll became entitled to one hundred thousand dollars, and by virtue of his services, the contract, and the laws of Montana, an attorney's lien accrued to him upon the interests of Root, Coram, and their associates, in the estate of Andrew J. Davis, as provided in the statutes of Montana in force at the time the services were begun and subsequently. (Par. 19.)

That only five thousand dollars was paid to Colonel Ingersoll in his lifetime, and that the balance is due with interest at ten per cent from August 26, 1897, to February 28, 1899, and at eight per cent thereafter. (Par. 20.)

That Colonel Ingersoll died July 21, 1899, and the plaintiff was appointed his administratrix in New York on August 21, 1899, and in Massachusetts on May 29, 1903. (Par. 21.)

That soon after her appointment the plaintiff, by interviews and correspondence with Root and Coram directly and through her agents, sought to collect the unpaid balance, and that Root and Coram acknowledged the indebtedness, and Root wrote various letters, passages from which are quoted in the bill, saying he would do his best to assist the plaintiff and the like, and that by reason of these acknowledgments and letters the plaintiff acquired an equitable lien on the property of the estate in Massachusetts. (Par. 22.)

That there is property of the estate of Andrew J. Davis in Massachusetts of the value of about four hundred and fifty thousand dollars, and that Coram, Root, and their associates are entitled to receive directly and through trustees five hundred and fifteen and one-half eleven-hundredths thereof, and have petitioned the Probate Court in Massachusetts for payment thereof; that the plaintiff has a lien on all of their shares, except thirty-three and one-third eleven-hundredths belonging to Ellen S. Cornue and sixty-six and two-thirds eleven-hundredths belonging to the estate of Sarah Maria Cummings. (Par. 23.)

That Root and Coram are seeking to secure distribution of the property in Massachusetts so as to exclude the plaintiff and defeat the lien; that they have no tangible property; that they have assented to all liens claimed for services in the will contests,

except this one, and that the administration in Montana is practically closed. (Par. 24.)

That the plaintiff as administratrix appointed in New York brought suit in Montana in July, 1901, to enforce payment of this claim; that, on objection being taken to her right to maintain such suit, John S. Harris was appointed administrator of Colonel Ingersoll's estate in Montana, and was substituted as plaintiff; that upon trial of that suit the defendants therein objected to the admission of any evidence on the ground that the complaint did not state a cause of action, and that the objection was sustained, the plaintiff nonsuited, and the complaint dismissed. (Par. 25.)

That John H. Leyson is duly appointed administrator with the will annexed of Andrew J. Davis in Massachusetts, and has control of all the property of his estate there. (Par. 26.)

The bill prayed, first, for an injunction against any payment of the property in Massachusetts to Root, Coram, or Palmer and Davis, as trustees; second, for discovery of the interests of the several defendants in the estate and for judgment against Coram, to the extent of his full interest in the estate, and especially to the extent of two-thirds of the interests therein of Elizabeth S. Ladd and Mary Louise Dunbar, and that the judgment be declared a lien on all interests of said Coram in the estate in Massachusetts; third, for judgment against Root for ninety-five thousand dollars, with interest as claimed, and that the judgment be declared a lien on all interest of Root in the estate and on one-third of the interests acquired by his associates; fourth, for judgment against Leyson and against Palmer and Davis, as trustees, requiring them to apply any estate in their possession subject to such lien in satisfaction thereof after such estate is released from administration by the Probate Court for Suffolk County, and making them personally liable for failure so to apply funds in their hands or hereafter coming into their hands; fifth, for general relief.

b. THE DEMURRERS

The bill was heard upon demurrers filed by the defendants, Root, Coram, Herbert P. Cummings as executor, Leyson, and Palmer and Davis as trustees. The Court sustained the demurrers to all parts of the bill claiming a

statutory lien, and to all parts making Charles H. Ladd, individually and as administrator of the estate of Elizabeth S. Ladd, Mary Louise Dunbar, and Herbert P. Cummings as executor of the will of Sarah Maria Cummings, parties to the bill, and dismissed the bill as against them. As to all other parts of the bill, the demurrers were adjudged insufficient. (Rec. pp. 67, 93.)

c. THE ANSWERS

Answers were subsequently filed by Andrew J. Davis as trustee (Rec. p. 94), and by John H. Leyson (Rec. p. 123), and a joint answer by Coram, Root, Palmer, as trustee, Charles H. Ladd, individually and as administrator, Mary Louise Dunbar, and Herbert P. Cummings, as executor. (Rec. p. 99.)

The joint answer of Coram, Root, and others admitted most of the material facts alleged in the bill, but not the statements of evidence or the conclusions of law contained in the bill. The answer denied that there was any lien or any debt as alleged, and specifically denied that the value of the Davis estate was two million dollars to three million dollars, that Ingersoll was employed as attorney (as distinguished from counsellor), that Ingersoll fully performed the stipulated services for which his fee was to be paid, that Root and his associates acquired by the compromise agreement title to parts of the Davis estate (Rec. p. 107), that the value of the real estate was over one million dollars, that the plaintiff's intestate ever became entitled to the fee of one hundred thousand dollars, that the rights acquired by the defendants were acquired by the defeat of the will, that the defendants ever acquired any right to receive directly any property of the estate in Massachusetts (Rec. p. 112), and neither admitted nor denied the acknowledgments of indebtedness and promises to pay alleged in the bill. The answer set up as affirmative defences: first, estoppel by the judgment rendered in the Montana suit; second, rescission of the contract with

Colonel Ingersoll in his lifetime; third, defect of parties in not joining Mrs. Cornue. (Rec. pp. 99–122.)

Testimony was taken, and the case came on for hearing upon the merits. The defendants, owing to their inability under the United States statutes to testify to personal transactions with Colonel Ingersoll, abandoned the defence of rescission. (Rec. p. 774.)

d. THE DECREE

The Court entered a decree declaring an indebtedness to the amount of $95,000, as claimed, with simple interest at 6% from August 26, 1897 (Rec. p. 945), and further adjudged:

(1) A personal liability of the defendant Root for the whole amount;

(2) A personal liability on the part of the defendant Coram to the full amount received by him or which he may be entitled to receive from the shares of Root and the four heirs associated with him acquired by them under the Montana decree for distribution, including their rights in the trust held by Palmer and Davis (Rec. p. 946);

(3) That Elizabeth S. Ladd and Mary Louise Dunbar have no further interest in the Davis estate, and, therefore, they and Charles H. Ladd were not necessary parties, and that, no lien being claimed on so much of the share of Ellen S. Cornue as she did not assign to Root, she and her husband were not necessary parties (Rec. pp. 947–948);

(4) That Coram and Root directly, and through Palmer and Davis as trustees, were entitled to $\frac{4151}{1100}$ of the estate, and have received that proportion of $374,907.90, and of real estate exceeding in value $1,000,000 (Rec. p. 949);

(5) That the administrator in Massachusetts has in his hands $337,862 in cash and $170,000 par value of bonds, of which on distribution Root and Coram are entitled to receive $\frac{4151}{1100}$ (Rec. pp. 949–950);

(6) That the plaintiff has a lien on the above interest of Root and Coram in the property in Massachusetts for the indebtedness established (Rec. p. 950);

(7) That the plaintiff recover from Root and Coram said indebtedness with interest, so far as it can be satisfied from the $\frac{415}{1100}$ of the property in Massachusetts which may be ordered by the Probate Court in Massachusetts or the court in Montana or any other court having jurisdiction, to be distributed to the defendants or Mr. or Mrs. Cornue, and that the lien thereon be foreclosed to secure payment of said sum (Rec. pp. 951–952);

(8) That upon any order of distribution being made by a court having jurisdiction over the property Leyson or his successor deposit with the clerk $\frac{415}{1100}$ of the money, and bonds so ordered to be distributed (Rec. p. 953);

(9) That Palmer and Davis as trustees in like manner bring into court all the money and bonds distributed to them as trustees for Root, Elizabeth S. Ladd, and Mary Louise Dunbar, and one-third of amounts so received by them as trustees for Ellen S. Cornue and Sarah Maria Cummings (Rec. pp. 953–954);

(10) That Leyson be restrained from removing $\frac{415}{1100}$ of the money or bonds so held by him from Massachusetts except on order of the Probate Court, and from distributing any part of said $\frac{415}{1100}$ pursuant to any order of any court, but upon such order to bring the amount so distributable into court (Rec. p. 955);

(11) That Leyson be restrained from transferring any part of the funds to a successor in case of his resignation or removal without first reporting such proposed action to the Court (Rec. p. 956);

(12) That Coram and Root and Palmer and Davis as trustees be enjoined from demanding or receiving any part of the $\frac{415}{1100}$ from any person anywhere (Rec. p. 957);

(13) That, if the proceeds of the property on which the lien is foreclosed fail fully to satisfy the indebtedness and costs, a judgment be entered against Root personally for the deficiency and against Coram to an amount not exceeding $107,000 (Rec. p. 957);

(14) That Elizabeth S. Ladd, her husband, Charles H.

Ladd, individually and as administrator, Mary Louise Dunbar, and Herbert P. Cummings, as executor, be dismissed from the suit (Rec. p. 958). The decree also reserved the right to make further orders. (Rec. p. 958.)

e. THE APPEAL

The defendants Coram and Root and Palmer, as trustee, duly claimed and perfected an appeal from this decree, the other defendants declining to join them. (Rec. pp. 963 *et seq.*)

The appeal was heard before the Circuit Court of Appeals for the First Circuit, composed of Judges Colt, Lowell, and Aldrich. On October 10, 1906, the Court, Judge Aldrich dissenting, sustained the appeal and ordered the decree of the Circuit Court to be reversed and the case to be remanded, with directions to dismiss the bill with costs. (Rec. p. 1001.) The majority of the Court, in an opinion by Judge Lowell, held that the decision of the Supreme Court of Montana in the suit brought there by the ancillary Administrator in Montana, seeking to recover the same indebtedness, was a bar to the maintenance of the suit.

f. THE PETITION FOR CERTIORARI

The original plaintiff filed a petition to this Court for a writ of *certiorari* to review the decision of the Circuit Court of Appeals, and on December 26, 1906, such a writ was issued. (Rec. p. 1003.)

The appellees, originally defendants, submit that the decree of the Circuit Court of Appeals should be affirmed. If the Court should be of opinion that the suit can be maintained, then the appellees submit that the decree of the Circuit Court must be altered in the particulars hereafter set forth.

ARGUMENT

PART FIRST

The appellant has not established the existence of any lien on any interest of any of the defendants in the estate of Andrew J. Davis in Massachusetts.

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Jurisdiction of this case depends wholly on the existence of a lien on property of the defendants in Massachusetts. In the absence of such lien not only is there a failure of jurisdiction in equity, but the case ceases to be one in which the Court can proceed against non-resident parties.

The only grounds that have been suggested for maintaining the existence of a lien are (1) a statutory lien under the law of Montana, (2) an attorney's lien for compensation and expenses, (3) an equitable lien created by act of the parties.

The bill alleged the existence of a statutory lien under certain provisions of the Montana statutes. (Par. 19, Rec. pp. 22–24.) The bill also set forth various letters written by Root and statements made by him after Colonel Ingersoll's death, and claimed that these acts created an equitable lien. (Par. 22, Rec. pp. 25–29.)

On demurrer to the bill the judge of the Circuit Court held that "for various reasons not necessary for us to detail no statutory lien can be maintained" (Rec. p. 72), but that the agreement of August 17, 1891, created an equitable lien. (Rec. pp. 73–76.) The Court entered a decree that "the demurrers are adjudged good and sufficient so far as they relate to all portions of the bill claiming a statutory lien." (Rec. p. 93.) The plaintiff took no appeal from this decree. The Circuit Court of Appeals disposed of the case without considering the existence of a lien.

I

NO LIEN CAN BE MAINTAINED UNLESS AN EQUITABLE LIEN WAS CREATED BY ACT OF THE PARTIES.

1. *No statutory lien can be maintained.*

(a) It is not now open to the appellant to assert the existence of a statutory lien.

The demurrer filed to the bill put in issue as matter of law the existence of any lien on the property in Massachusetts by virtue of the Montana statute. The Circuit Court sustained the objection. Ultimately the Circuit Court by its final decree granted relief on the ground that a different lien was shown. From this decree the original defendants appealed. No appeal was taken by the plaintiff, now the appellant, from the decree denying the existence of a statutory lien.

According to the uniform decisions of this Court a decision or ruling of a lower court adverse to one of the parties is not open to review, when the only appeal taken

is by the party in whose favor the decree or ruling was made.

In *Landram* v. *Jordan*, 203 U. S. 56, a decree was entered in the Supreme Court of the District of Columbia, upon a bill for construction of a will, and the determination of the validity of a trust created thereby partly for the benefit of Gabriella K. Jordan. The decree declared the whole trust bad as tending to create a perpetuity. Gabriella K. Jordan brought a bill of review and on demurrer the decree was modified to the extent of declaring valid so much of the trust as was for her benefit, and so modified the decree was affirmed by the Court of Appeals. An appeal was taken to this Court by the executors and a daughter of one of the testator's heirs. On the appeal it was argued for Gabriella K. Jordan that the whole trust created by the will was valid. This Court held that the question was not open to her as she did not appeal from the decree.

"According to the rule that has been laid down in this court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527; *The Stephen Morgan*, 94 U. S. 599; *Chittenden* v. *Brewster*, 2 Wall. 191, 196; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 621. We assume this rule to be correct. Although her counsel attempted to argue the validity of the trust as a whole, and other questions, we assume, without deciding, the decree to be unimpeachable and right except so far as appealed from. Therefore we shall confine ourselves to considering whether the gift to Gabriella is so intimately connected with the failing scheme as to fail with it." 203 U. S. 62.

In the case at bar the decree of the Circuit Court established an equitable lien created by contract between the parties and denied the existence of any other lien. From this decree the original defendants alone appealed on the ground among others that there was no such equitable lien. The plaintiff did not appeal and thereafter the adjudication that there was no statutory lien could not be impeached.

(b) The Montana statute could not create a lien upon property in Massachusetts.

The property of the estate of Andrew J. Davis in Massachusetts consisted of cash and bonds (Rec. p. 303, Int. 44). It is not alleged and there is nothing to show that any of this property was ever in the State of Montana or represents the proceeds of property situated there at the time of the testator's death. It is not property within the jurisdiction of the State of Montana or that, so far as appears, was ever subject to the laws of that State.

Whatever may be the rights given by the laws of Montana to attorneys contesting the probate of a will, those rights certainly cannot extend to property outside of Montana. The Montana statute can no more establish a lien on property in Massachusetts for attorneys' fees than for any other class of services or liabilities. A Montana statute might declare that in an ordinary action at law a judgment in favor of the plaintiff should be a lien on all property, real or personal, of the defendant. It will hardly be contended that such a statute would create a lien on property of the judgment debtor in Massachusetts. If the Montana statute cannot create a lien in favor of a judgment creditor it cannot create a lien in favor of the attorney who recovers the judgment.

No one questions that a cause of action arising in a State, though founded upon a right created by statute of that State, may with few exceptions, if the action is transitory, be enforced in any other State. The appellant has cited authorities supporting this undisputed proposition (Brief, p. 126); but no case has been referred to tending even to show that one State can by statute declare that a lien shall exist over property, in part of nonresidents, situated in another State.

To attribute any such extra-territorial force to a statute of a State is inconsistent with every doctrine of international law. One sovereignty cannot assume to dispose of property within the jurisdiction of another, or to create

rights over property in another jurisdiction. The property of the estate of Andrew J. Davis in Massachusetts is subject to such provision as the law of Massachusetts makes for its distribution; it cannot be disposed of by a Court in Montana except through the agency of a decree *in personam* which compels a transfer by the person interested.

(c) The Montana statute does not create a lien in a will contest.

The Montana statutes in fact give no lien for services in a case like the present. The provision of the law in force in 1891 and until July 1, 1895 (Compiled Statutes of Montana), was that attorneys should have a lien "upon all moneys in their hands and upon all judgments they may have obtained for any clients." This statute further provided that notice of claim of lien must be filed with the Clerk of the Court within three days after final judgment (Rec. p. 23). That statute dealt with judgments recovered in proceedings to obtain or enforce a payment. The lien given was upon the payment to be made pursuant to the judgment. Where the services rendered were in contesting the allowance of a will, a proceeding not intended to result and incapable of resulting in a judgment for the payment of a sum of money, the statute could have no application.

The lien is expressly made applicable to moneys in the hands of the attorneys and to judgments obtained by them, clearly contemplating the creation of a lien on what the attorney has in possession and on what in the ordinary course of legal proceedings would pass through his hands.

Upon the revision of the statutes in 1895, for the provision of the Compiled Statutes was substituted section 430 of the Code of Civil Procedure, which provided that "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim." This language points even more directly to a lien only on the proceeds of an action which will result in a judgment in the proper sense.

In the present case the contestants of the will of Andrew J. Davis had no "cause of action" to which a lien could attach. They asserted in opposition to the proponent of the will that the will was invalid and that consequently they were entitled as heirs at law to the property. The proponent of the will was not in possession of the property which the contestants sought to recover. The whole purpose of the proceeding was to obtain a decision upon the question of heirship and not a judgment for the payment of money or transfer of property by a defendant. The final decree in the will contest did not purport to do more than determine this question. It established in the form of a decree *in rem* the respective shares to which the various parties were to be entitled. It made no order on any person for the payment of those shares. (Decree Rec. p. 580.)

Colonel Ingersoll was retained to contest the probate of the alleged will of Andrew J. Davis. He was not retained to prosecute a cause of action against any one. The proceedings which he was to carry on did not and could not result in a judgment on which he could have a lien because the only judgment would be one establishing certain facts, and not one ordering a payment. To speak of a lien on such a decree as the final decree in the will contest (Rec. p. 580) is meaningless. The decree declares that certain persons are the persons entitled to share in certain property; it does not purport to give the property to them in the sense of providing for a transfer and process to enforce such transfer. A lien on a judgment for the payment of money is a right in an obligation that can be enforced and is intelligible. A lien on a decree pronouncing that Andrew J. Davis died intestate and that certain persons are his heirs is not a right in an obligation or in any property; one might as well assert a lien on a decree for a divorce or for a restitution of conjugal rights.

The provision of the Montana law as to attorneys' liens (Code of Civil Procedure, sec. 430, Rec. p. 23) is practically identical with and was taken from sec. 66 of

the New York Code of Civil Procedure in force prior to 1899. That section provided:

"The compensation of an attorney or counsellor for his services, is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, or counterclaim which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come."

Under this provision it was the settled law in New York that the lien given to attorneys by sec. 66 was not applicable in special proceedings as distinguished from actions.

In *Smith* v. *Central Trust Co.* 4 Dem. (N. Y. Surr.) 75, it was held that attorneys who had rendered services to legatees upon the accounting of an executor could not claim a lien upon the legacies of the legatees.

In the case entitled *In the Matter of Lexington Avenue*, 30 App. Div. (N. Y.) 602, a lien for services was claimed by an attorney upon an award in favor of his client in a street-opening proceeding. The Court held that no lien existed, and said, referring to section 66:

"The lien given by this section appears to apply only to causes of action to enforce which an action had been commenced or to recover which an answer containing a counterclaim had been served. The distinction between actions and special proceedings is recognized all through the Code." (P. 606.)

This decision was affirmed in the Court of Appeals upon the opinion below. 157 N. Y. 678.

The Montana Code distinguishes as clearly between actions and special proceedings as does the New York Code.

Section 3471 thus defines an action:

"An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a

right, the redress or prevention of a wrong, or the punishment of a public offence."

Section 3472 declares that:

"Every other remedy is a special proceeding."

The same distinction exists elsewhere. Under the statutes of the United States relating to the removal of actions a probate proceeding is not deemed a suit of a civil nature at common law or in equity.

Reed v. *Reed*, 31 F. R. 49.
In re Cilley, 58 F. R. 977.
Wahl v. *Franz*, 100 F. R. 680.

The appellant has argued that because the Montana laws provide that a will contest shall be conducted in some respects in the form of an action by the contestants against the proponents, therefore the contest is a "cause of action" to which the lien can attach, and that the result is a lien on the property to which the contested will relates. The form and terminology of the proceeding cannot affect its substance. The same provisions relied on are equally applicable in divorce proceedings. The objection to the existence of a lien is not a matter of form, but of substance. The proceeding does not result in any judgment constituting an obligation which can be reached and applied to the satisfaction of the attorney's claim.

The bill itself shows the inapplicability of the statute relied on. The relief sought is the foreclosure of the lien. If the lien were in fact upon a judgment the relief upon foreclosure would be enforcement of a judgment already existing, requiring the payment of money to the present defendants. The relief actually asked is the seizure of certain property and the entry of a decree establishing that the respondents are entitled to certain shares in that property and the transfer of those shares to the appellant. The bill does not seek to enforce a lien upon a judgment or cause of action at all, but to establish and enforce a lien on property.

2. *There is no attorney's lien apart from the statute.*

Counsel for the appellant in this court have contended strenuously for an "equitable" lien in favor of an attorney to secure payment of fees and disbursements.

Two so-called attorneys' liens have been recognized apart from any statute: a retaining lien and a charging lien. The former exists only as to papers or property of the client in the hands of the attorney and cannot be here in question; the latter so far as recognized is a claim for payment from the judgment recovered.

The attorney's charging lien, existing independently of statute, is a mere claim to the intervention of the court in which a judgment has been recovered so to control its process as to secure payment to the attorney.

Lord Mansfield in *Welsh* v. *Hole*, 1 Douglas, 238, asserted the existence of a right on the part of an attorney to retain from money coming into his hands the amount of his bill, and said the attorney might stop *in transitu* money recovered in any action brought by him, or even apply to the court for an order to prevent its being paid over.

Baron Parke in *Barker* v. *St. Quinton*, 12 Mees. & W. 451, said:

> "The lien which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression) is merely a claim to the equitable interference of the Court to have that judgment held as security for his debt."

In *Mercer* v. *Graves*, L. R. 7 Q. B. 499, 503, the Court said:

> "although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs."

All the English cases referred to by the appellant are to the same effect. In all of them the enforcement of the so-called lien was merely the intervention of the Court in

which a judgment had been recovered for the protection of the attorney who had brought the proceeding.

In the United States the lien has in some jurisdictions been enlarged by statute and made a claim upon the judgment debt or upon the property recovered in the sense of creating a title. The weight of authority is against such an effect unless provided for by statute.

Fillmore v. *Wells*, 10 Col. 228, 231.

In *Humphrey* v. *Browning*, 46 Ill. 476, the Court held that an attorney could claim no lien on land recovered for his client by ejectment proceedings.

Similar decisions were rendered in:

McCullough v. *Flournoy*, 69 Ala. 189.
Cozzens v. *Whitney*, 3 Rh. I. 79.
Smalley v. *Clark*, 22 Vt. 598.

In *Forsythe* v. *Beveridge*, 52 Ill. 268, the Court held that if a judgment was assigned the assignee could not be defeated by the attorney; and in *Braden* v. *Ward*, 42 N. J. L. 518, a release by the judgment creditor was held to cut off the attorney's lien. The Court said that the lien was effectual only so far as the attorney received money or property or stopped it *in transitu*.

In *Goodrich* v. *McDonald*, 112 N. Y. 157, the Court laid down the same doctrine, and said that such a lien could not be made the basis of a proceeding in a different court.

In *McDonald* v. *Napier*, 14 Ga. 89, 110, cited by the appellant as supporting the so-called lien, the Court held a sum paid an attorney in satisfaction of a judgment could not be recovered on the ground that the judgment had previously been discharged by the creditor. The Court said as to the attorney's lien:

"The lien amounts to this: that he has a right to control it for collection of fees through an order of the Court directing its use for that purpose in the exercise of an equitable power which appertains to it over its own process and over the lien of its officers." (P. 108.)

In a number of the State courts the existence of an attorney's charging lien even in the limited form allowed in England is, in the absence of statute, denied.

Frissell v. *Haile*, 18 Mo. 18.
Ward v. *Sherbondz*, 96 Iowa, 477.
Wells v. *Hatch*, 43 N. H. 246.
Baker v. *Cook*, 11 Mass. 236.

In the courts of the United States no such lien is recognized.

In *Gregory* v. *Pike*, 67 F. R. 837, an attempt was made to establish a lien on money in the Registry of the Court in favor of an attorney who had been employed to collect the notes which produced the fund. Mr. Justice Putnam, delivering the opinion of the Circuit Court of Appeals for the First Circuit, said:

"There is no federal case establishing a lien at common law in behalf of an attorney beyond that given by the local law." (P. 843.)

Counsel for the appellant have cited in support of a general attorney's lien cases arising under express local statutes, cases arising under special agreements between the attorney and his client, and cases for the enforcement merely of the attorney's charging lien. They have not referred to any case in which a simple attorney's lien was made the basis of a suit in a different court to obtain payment out of property that was never within the jurisdiction of the court in which the services were rendered.

II

THERE IS NO EQUITABLE LIEN CREATED BY CONTRACT.

The appellant's bill contained no allegation that the letter written by Root and Coram on August 17, 1891, to Colonel Ingersoll created lien. The bill set out the statutes of Montana, and claimed under those provisions a statutory lien in favor of Colonel Ingersoll and his legal

representatives. (Par. 19, Rec. pp. 22–24.) The bill also set out a variety of acts done by Root after Colonel Ingersoll's death as creating an equitable lien in favor of the appellant in addition to the statutory lien in favor of the intestate. (Par. 22, Rec. pp. 25–29.) There was no suggestion in the bill of an equitable lien created by the letter. The claim to such a lien was only made after the judge of the Circuit Court, disregarding the omission from the bill of any such claim, had overruled the defendant's demurrer on the ground that such a lien existed.

Assuming that the appellant is entitled to rely on the letter as creating a lien, notwithstanding the omission to make such a claim in the bill, the letter is insufficient, because it not only contains no assignment, but does not even contain a promise to pay from the particular fund.

1. *In the present case there was not even a promise to pay from a particular fund.*

The letter of August 17, 1891 (Rec. p. 45), on which alone the Circuit Court rested its opinion was in the following terms:

"Butte City, Mont., August 17, 1891.

"R. G. Ingersoll, Esq., Butte City, Montana.

"*Sir*, — We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

"There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

"Henry A. Root,
"J. A. Coram."

At the time this letter was written, Colonel Ingersoll had been employed by Mr. Root as counsel to contest the will. (Compl. Ex. I., Rec. p. 468.) So far as appears, no agreement had been made as to the amount of compensation to be paid for his services.

If the letter could be held to create a lien it would have to be on one of two theories: Either that any agreement making payment conditional on recovery creates a lien on what is recovered, or that any agreement designating a fund from which payment is to be made creates a lien on that fund. The first theory would give every attorney who worked upon a case for a contingent fee a lien upon the amount recovered in the suit. No authority for such a rule can be shown. The second theory treats any promise to pay from a fund as equivalent to an assignment of that fund, a proposition directly contrary to the decisions of this Court.

The letter provided for two distinct matters. First, it fixed the amount of Colonel Ingersoll's fee for services, made the payment of the fee contingent, and determined the conditions upon which the fee should become payable. Second, it provided that under no circumstances should there be any personal liability on the part of Coram, and that his only obligation should be to pay from funds actually received.

The first paragraph of the letter dealt exclusively with the nature and amount of Colonel Ingersoll's compensation. There is no word of promise to pay from a particular fund, still less any word indicating an assignment of such fund. A fee of $100,000 was agreed upon, conditional on the defeat of the will, and payment of expenses and disbursements was promised in any event. There was no suggestion that payment was to be made from the shares of the estate.

The second paragraph of the letter dealt exclusively with the liability and obligations of Coram. It declared that Coram in the event of failure was to be under no per-

sonal obligation, and that in no event was he to be bound except to pay out of funds actually received. The sole object of this paragraph was the protection of Coram from personal liability. There is not a word indicating an intention to protect Colonel Ingersoll, or to give him any additional rights or any additional security for payments. A promise in this paragraph to pay from the fund received would at least have indicated an intention in this paragraph to create an obligation in favor of Colonel Ingersoll. But this paragraph of the letter contains no such promise. It does not state what Coram's obligation shall be, but what shall not be. The paragraph cuts down the obligation otherwise created against Coram by the first paragraph to pay the full fee in case of success, and limits his liability to payment only in case sufficient funds are received.

This is the construction which Colonel Ingersoll himself put upon the letter. He wrote in 1896 to his associate in the case, Mr. Clayberg (Rec. p. 510), inquiring as to the possibility of filing a claim of lien. Evidently he referred to a statutory lien, as he spoke of Mr. Clayberg doing the same thing. Had he understood the letter as giving him a lien by contract he would not have needed Mr. Clayberg's advice, nor would he have referred to the latter as in a similar position.

The situation is plain. Colonel Ingersoll had been retained as counsel to contest the will, but without any agreement as to compensation. During the progress of the trial the agreement embodied in this letter was made. The purpose was to fix the amount of the fee, to make the fee contingent, and to relieve Coram from all liability except so far as he received funds to satisfy his liability. The first part of the agreement fixed the fee and made it contingent. The second part released Coram from any liability beyond the amount he might receive. The only promise made to Colonel Ingersoll was the promise to pay him his contingent fee in case of success; the only

reference to the fund as the source from which payment should be made was by way of limiting the amount for which one of the parties interested might be held liable.

The letter added nothing to the obligations already existing on the part of Root and Coram. They had already retained Colonel Ingersoll as counsel and become liable to pay his just compensation and expenses. The letter merely liquidated the amount of the compensation in case of success and relieved them from liability in case of defeat. As to Coram, the letter had the further effect of relieving him from personal liability in any event for any sum beyond the amount he might receive. There is no indication that Colonel Ingersoll was desirous of obtaining security for his fee, or was dissatisfied with his position so far as security was concerned. There is every indication that the letter was a bargain by which in return for an increase in the amount of his fee if successful Colonel Ingersoll gave up any claim to compensation in case of defeat. To make such a bargain required no new promise to pay on the part of Root and Coram, and no promise to pay from a particular fund. The letter was the natural and apt expression of such a bargain: it is inconceivable that a lawyer of Colonel Ingersoll's experience, if desirous of obtaining a lien on the fund, should have accepted such a letter as sufficient.

Giving the most forced construction to the instrument, it cannot be read as evidence of anything except a conditional promise by Root to pay generally in case of success without reference to the fund from which payment was to be made, and a conditional promise by Coram to pay generally with a proviso limiting his obligation to payment out of a particular fund. Both promises were conditional on defeat of the will, and actual receipt of the shares of the estate, but this does not make them payable from the shares. Coram's obligation, if it accrued, became by force of the proviso a promise to pay only to the extent of the shares, and only in that sense a promise to pay from them: but the proviso shows clearly enough that

the only purpose was to limit Coram's liability and not to increase Colonel Ingersoll's right.

No administrator of the estate of Andrew J. Davis, having this letter before him as his sole warrant, could have safely paid to Colonel Ingersoll the amount specified. Had the letter contained a direct and specific promise to pay from the shares when received, the letter would not have served as a voucher for such payment by an administrator. *A fortiori*, when the letter as here, contains no such direct promise, but merely limits Coram's liability, the provision cannot warrant a payment. Yet the test of whether an instrument creates an equitable lien is whether it gives such a right in the fund as will warrant a direct payment.

2. *An equitable lien is not created by a promise to pay from a specified fund unaccompanied by some sort of assignment.*

A lien to which equity will give effect may sometimes be created by the acts of the parties without any transfer of possession; but, to create such a lien, there must be the intention to create and the actual creation of a right to the property which is to be the subject of the lien. A promise, however solemn, to make payment of a debt from a particular fund does not evince and does not give effect to any intention to create a right over the fund in favor of the creditor. Such a right can be created only by some act of a debtor giving his creditor some power or control over the designated property. The creditor must be put in such a position that he can require the application of the property to his benefit directly and without the intervention of his debtor. If the property in question is in the hands of a third person, the creditor, in order to establish a lien, must show a right to demand payment from the third person, and an obligation on the part of the third person to comply with such demand.

At law, in the absence of express statute, possession of property over which a lien is created must be given to

and retained by the person in whose favor the lien is created. Equity permits the creation of liens where a transmutation of possession is impossible; but it requires that the debtor should actually declare, and, so far as he can, effectually create a right in the property. If the lien is to be created upon a fund in the hands of a third person, there must be an appropriation of the fund in whole or *pro tanto*, by giving an order or otherwise transferring it.

(a) This rule has long been the settled law of this Court.

In *Wright* v. *Ellison*, 1 Wall. 16, a suit was brought for services in recovering a claim, and a lien on the sum recovered was alleged. The Supreme Court said the case was a meritorious one for compensation, but that the doctrine of equitable assignments, though comprehensive, was not broad enough to include the case.

"It is indispensable to a lien thus created, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." 1 Wall. 22.

In *Christmas* v. *Russell*, 14 Wall. 69, one Christmas, having induced one Yerger and another to become sureties on a bond in favor of Russell by promising to give security, and having given such security which Yerger had surrendered, wrote several times declaring that he held and would hold a certain mortgage note "sacred for the payment of" and "subject to" the debt, and would "protect" Yerger with the note. Subsequently he transferred the note to his son, and two suits were brought, of which one had resulted in a judgment, and the other was pending. Russell brought a bill alleging that Christmas had so assigned and set apart the mortgage note as to give Yerger a lien upon the debt, and seeking to restrain the payment of the indebtedness, and to have it applied to his claim. The Court below made a decree in favor of the complainant. On appeal the Supreme Court held that the citizenship of the parties deprived the Court below

of jurisdiction, and that in any event there was no lien. The Court, after reciting "the evidence relied upon to support the alleged lien," said:

"These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold, to Yerger.

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund — any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund-holder is bound from the time of notice. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee. But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfil all the requirements of the law. These views are fatal to the claim asserted by the complainants in behalf of the sureties on the bond." 14 Wall. 83, 84.

In *Trist* v. *Child*, 21 Wall. 441, an attempt was made to establish an equitable lien. Trist, having a claim against the United States, made a contract with one Child to prosecute the claim for a contingent fee of twenty-five per cent of whatever sum Congress might allow in payment of the claim. Child died, but his son and personal representative continued the work, and eventually an act was passed appropriating a sum to pay the claim. Trist refused to pay the stipulated compensation, and Child the younger thereupon brought a bill on which a decree was entered restraining Trist from recovering the fund until he had paid Child, and ordering such payment. On appeal this Court reversed the decree, and ordered the bill dismissed. The Court said:

"The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. *Yeates* v. *Groves*, 1 Vesey, Jr., 280; *Lett* v. *Morris*, 4 Simons, 607; *Bradley* v. *Root*, 5 Paige, 632; 2 Story's Equity, § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. *Field* v. *The Mayor*, 2 Selden, 179. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. *Wright* v. *Ellison*, 1 Wallace, 16; *Hoyt* v. *Story*, 3 Barbour's Supreme Court, 264; *Malcolm* v. *Scott*, 3 Hare, 39; *Rogers* v. *Hosack*, 18 Wendell, 319.

"Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. *Wright* v. *Ellison*, 1 Wallace, 16. If there was no lien, there was no jurisdiction in equity." 21 Wall. 446, 447.

In *Dillon* v. *Barnard*, 21 Wall. 430, the same rule was laid down. A contract was made between a railroad company and the complainant for constructing part of the road. The work being completed and the corporation in bankruptcy, the complainant sought to establish a lien on the proceeds of certain bonds secured by a mortgage made prior to the construction contract. The mortgage provided that the expenditures of all sums realized from the sale of mortgage bonds should be subject to approval by at least one of the trustees under the mortgage, "whose assent in writing shall be necessary to all contracts made by the company before the same shall be a charge upon

any of the sums received from such sales." The construction contract, having been approved as required, was claimed to be a charge upon the proceeds of the bonds. The Court said:

"The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment by the employer of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed." 21 Wall. 439.

In *Removal Cases*, 100 U. S. 457, it was contended that a construction company had received collateral security from a railroad company for the work to be done, and could not claim a mechanic's lien. The contract provided "all the money for the work hereinbefore specified to be paid by the citizens of Delaware County," referring to subscriptions made by such citizens for stock. The Court held that this created no lien on the money received from subscriptions, and therefore gave no collateral security.

"The additional clause does not purport to transfer to the construction company the moneys that are due or that may become due from the citizens of Delaware County. No control is given the construction company over these moneys. The most that can be said of the clause is that it contains an implied obligation on the part of the railroad company to use the money which came into its hands from the citizens of Delaware County to discharge its obligations under the contract, and a corresponding obligation on the part of the construction com-

pany to wait a reasonable time for the collection of these moneys before putting the railroad company in default for non-payment." 100 U. S. 476.

(b) The rule laid down by this Court in the foregoing cases has been followed as the established law of the federal courts.

In *Ex parte Tremont Nail Co.*, 24 Fed. Cas. 183, decided in 1877, it was held that a promise, made as part consideration for a loan, to repay the amount from the first money received from a specified debtor did not constitute an equitable assignment or create a lien, and the creditor could not recover the fund from an assignee in bankruptcy. The late Judge Lowell said:

"In the United States, it was held many years ago that a mere promise to pay out a particular fund, when received, the promisor retaining control over the fund and no notice being given to the person who is to pay it, would not work an equitable assignment. *Rogers* v. *Hosack*, 18 Wend. 319. This case was remarked upon by the Chancellor in *Richardson* v. *Rust*, 9 Paige, 243; but it has been followed in all the cases which I have seen, and appears to be the settled law of this country." (P. 184.)

In re Butler's Estate, 105 F. R. 549, was a case in which a contractor promised to file a lien, and to pay the appellant from the proceeds. The contractor filed a lien, and a judgment was recovered. The Circuit Court of Appeals for the Second Circuit held that the appellant had no equitable lien on the fund, and could only share as an ordinary creditor. The Court said of the transaction:

"It was, at most, a promise to pay the four appellants from the proceeds of the judgment their debts against Butler Bros. for work and materials which had been placed upon the hotel. This agreement created no lien upon the fund." (P. 550.)

See also

Strang v. *Richmond P. & C. R. Co.*, 101 F. R. 511.
Columbus, S. & H. R. Co. Appeals, 109 F. R. 177, 197.
Cushing v. *Chapman*, 115 F. R. 237.
Boyle v. *Boyle*, 116 F. R. 764.

(c) The law is the same in other jurisdictions.

As long ago as the time of Lord Hardwicke, it was decided in *Bradley's Case*, Ridgeway's Reports, 194, that a promise to pay a debt out of a specific fund does not create a lien on the fund.

In *Newell* v. *West*, 149 Mass. 520, an agreement was made with an attorney by which a sum as compensation for services in collecting Alabama claims was to "be charged upon or paid out of any sums to be recovered." The attorney as administrator of the other party to this agreement claimed a right to retain the amount from sums so received on the ground of a lien. The court held that no lien was created, saying:

"Independently of the statutes of the United States, such an agreement would not authorize a payment to West of any portion of the debt due to Taylor, so as to discharge the debtor. Such a case is quite distinguishable from *Pinch* v. *Anthony*, 8 Allen, 536, relied on by West, where it was expressly agreed, not merely that a party advancing money on lands should have an interest in the proceeds hereof when sold, but that the amount due should be 'a charge on the joint estate of the parties, in proportion to their respective interests.'" (P. 524.)

In New York the question arose in *Rogers* v. *Hosack's Executors*, 18 Wend. 319. In that case an executor claimed a right to retain for his own debt from the proceeds of claims of his testator against France. Certain persons asserted that a lien in their favor had been created by a covenant of the testator to pay from the proceeds of these claims unpaid balances due the claimants from a former firm. The Court of Errors held that no lien was created by the covenant, because it was merely a promise to pay from a particular fund.

The rule thus laid down was expressly approved in the later case of *Williams* v. *Ingersoll*, 89 N. Y. 508, relied upon by the appellant, but the Court there held that on the facts before it an assignment, and not a mere promise, was shown. In that case one Heath, having various actions

pending, including a suit for malicious prosecution, agreed with his attorneys that they should be paid from any moneys recovered in any of the proceedings, and

"should have a lien for all sums that might be owing or due them for their said services, . . . upon any sum he might obtain or become entitled to from the said defendants, . . . superior to any right the said Heath might have thereto, and which should be paid to them before the said Heath should have or be entitled to receive any part thereof, or right thereto." 89 N. Y. 515, 516.

The Court said that this constituted an effective transfer, and entitled the attorney as against an attaching creditor to a sum awarded to Heath. Mr. Justice Earl said:

"The agreement was not alone that the plaintiffs should be paid out of any sum recovered. Such an agreement, as I have above shown, would not have been sufficient to give the plaintiffs any claim upon the award. But there was also proof tending to show that it was the intention to assign to the plaintiffs or to give them a lien upon any sum recovered, and that plaintiffs were to receive the sum recovered and retain out of it their compensation, and to pay the balance, if any, to Heath; and for the purpose of upholding the judgment we may assume that the trial judge found any facts which the evidence tended to establish." 89 N. Y. 521.

In *Cameron* v. *Boeger*, 200 Ill. 84, it was held that an agreement, by which attorneys were to receive a percentage of whatever was recovered in the suit, did not prevent the client from making a settlement at pleasure, because the agreement transferred no interest in the subject-matter of the suit. The Court said that the agreement was to pay compensation out of the proceeds of the litigation, and that this depended for its performance upon the mere personal responsibility of the promisors and did not operate as an equitable assignment.

See also

Silent Friend Mining Co. v. *Abbot*, 7 Col. App. 73.
Story v. *Hull*, 143 Ill. 506.
Ford v. *Garner*, 15 Ind. 298.

Seymour v. *Aultman*, 109 Iowa, 297.
Phillips v. *Hogue*, 63 Neb. 192.
Thomas v. *N. Y. & G. L. R. Co.*, 139 N. Y. 163.
Christmas's Adm. v. *Griswold*, 8 Oh. St. 558.
Commercial Nat. Bank v. *Portland*, 37 Ore. 33.
Eib v. *Martin*, 5 Leigh, 132.
Hicks v. *Roanoke Brick Co.*, 94 Va. 741.
Hossack v. *Graham*, 20 Wash. 184.

3. *None of the acts set out in the bill of complaint done after Colonel Ingersoll's death created a lien.*

The bill of complaint alleges (Par. 22, Rec. pp. 26–28) various acts done after Colonel Ingersoll's death which are declared to have created an equitable lien in favor of the appellant. The substance of all the allegations is that both Root and Coram on several occasions acknowledged an indebtedness and expressed a desire that it be paid, and that on five specified occasions Root made representations to the appellant or her agent as to such payment.

Acknowledgment of an indebtedness cannot create a lien for its payment, however ardent a desire to make payment may be expressed. Nothing further than such an acknowledgment and expression of a wish to pay is alleged against Coram.

The representations made by Root, on which reliance is placed as creating a lien, were as follows:

(1) In a letter dated September 2, 1899, he wrote to the appellant:

"Now let me say that Davis Estate matters, though moving with criminal delay, are still slowly and surely reaching a conclusion that will bring substantial results to you. I wish to assure you that I shall personally look after your interests and as faithfully as would have been done by the good Colonel." (Rec. p. 565.)

(2) In a letter dated September 26, 1899, he wrote to C. P. Farrell, the appellant's agent:

"You may be sure I shall do the very best I can for Mrs. Ingersoll as regards the Davis Estate." (Rec. p. 560.)

(3) In a letter dated May 7, 1900, he wrote to Farrell:

"Since seeing you, I have received your letter of March 3rd, which was sent to me in Montana, and I hasten to reply to it.

"With you I am also desirous that Mrs. Ingersoll should realize out of the Davis Estate as much as possible, and to that end I shall myself bend every effort in my power, regardless of any personal interest that I might sacrifice by so doing.

"I want to wait until I see Mr. Coram, in Boston, where I am going the first of next week, before writing the letter to Mrs. Ingersoll which you suggested I should do, and which will cover the whole situation." (Rec. p. 562.)

(4) In a letter dated May 21, 1900, he wrote to the appellant at length, detailing the original agreement and an understanding arrived at with Colonel Ingersoll before the latter's death for a reduction in his fee. In the course of the letter Root said, referring to the estate in Massachusetts:

"I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money." (Rec. p. 568.)

(5) In a letter dated September 25, 1900, he wrote to Farrell:

"I have your letter of September 20th, and hasten to reply.

"I see I did not make myself understood to you. You say: 'You stated that, if an application was made to the Court on Mrs. Ingersoll's behalf at the time of the distribution, there would be no objection raised,' etc.

"Now what I thought I said to you was this: That I would do everything I could at the time of an actual distribution of the Boston money for Mrs. Ingersoll, and all I can do is to say to you in the first place that she may rely upon it that that money, if distributed to our people, will not be distributed until after she has had an opportunity to have a hearing upon the claim of the Colonel for services rendered, and I will at that hearing do all that I can do which will tend to increase the amount to be paid to her for such services." (Rec. p. 564.)

The bill alleges no other act done by Root as a basis for a lien in the appellant's favor. On the sufficiency of these

acts to create a lien, therefore, the appellant's case must depend.

In *Christmas* v. *Russell*, 14 Wall. 69, a debtor wrote to his creditor in respect to a particular fund, the Lyons note:

"I have ever held the Lyons note as sacred for the payment of this debt. . . . If not sold I will send it to you as soon as I return." (P. 71.)

"I could not safely send you Lyons's note by mail, as it is payable to me or bearer. . . ." (P. 72.)

"You may rest assured I will protect you with the Lyons note." (P. 72.)

This Court said, after quoting these passages:

"These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold to Yerger." 14 Wall. 83, 84.

The strongest statement made by Root is in the letter of May 21, in which he says, referring to the fund in Boston:

"I will do everything in my power to see that you receive as much from that fund as I can."

This Court found the language under consideration in *Christmas* v. *Russell* insufficient to create a lien because at most it was evidence of a promise to pay from a particular fund. The language used by Root does not at most amount to more than a general expression of good will and desire to help Mrs. Ingersoll.

In a case before the Circuit Court of Appeals, *In re Butler's Estate*, 105 F. R. 549, the Court held that no lien was created by a statement by debtors to their creditor that

"they would make an effort to get this money for all parties interested; that they would put on a lien to cover the amount, and when they win the case, and get the money, he says, you will get your share." 105 F. R. 550.

This language definitely promised a payment to the creditors from the fund when realized. Root at most expressed an intention to assist the appellant in recovering from the fund.

Nowhere in the letters relied on is there a statement by Root that he will personally from such part of the fund as he may be entitled to pay the appellant any specified sum. Such a statement might, except for the want of consideration, have constituted a promise to pay from the fund. As such a promise it would by the decision of this Court have been insufficient to create a lien. Much less can the expressions actually used create a lien.

Not only do the letters contain no promise to pay from the fund, but they are inconsistent with any idea of creating rights in the fund. The letter of May 21, besides the passage already quoted, contains the following:

"There is now a substantial fund in Boston, amounting to between $400,000 and $500,000, which I am using every effort in my power to get. An application to distribute that came before the Probate Court in Boston yesterday. I was present and urged that the cause be heard, but the other side secured a postponement of it until the 5th day of September, but the judge said then he surely would dispose of the matter, and I would suggest to you that you have somebody on your own account take an interest in that and ascertain all of the facts in regard to it; ascertain how much money will be then or whenever it is, distributed to our side; see what the claims on it are, and I can assure you now, as I said before, I will do everything in my power to see that you receive as much from that fund as I can. This money is practically all the money." (Rec. p. 568.)

Here is an express statement that the amount to be paid for Colonel Ingersoll's services is uncertain and a matter for future adjustment; yet the writer states that on that day he had urged an immediate distribution. Clearly he had not in mind that a distribution should be made to Mrs. Ingersoll as a part owner, since he desired to adjust the amount to be paid.

Even if the expressions used in these letters were the

equivalent of express promises to pay from the fund, and even if such an express promise could create a lien, there would be no lien in the present case. The only theory on which such a promise can be supposed to create a lien is that a binding contract arises so to make payment, and that a court of equity will give effect to this contract. Where there is no contract but a mere nude pact, equity will not interfere. Even in the case of an assignment a court of equity will only recognize the right of the assignee if there has been an actual transfer or an attempted transfer made for a valuable consideration.

In re Earl of Lucan, L. R. 45 Ch. D. 470.
Addison v. *Enoch*, 48 App. Div. (N. Y.) 111; affirmed 168 N. Y. 658.

A gift if unaccompanied by transfer of possession has never been effectual to transfer an interest or to create a trust. The so-called promises made by Root were all without consideration. There is no allegation in the bill that any consideration moved from the appellant or to Root on account of anything said in the letters referred to, or that the appellant in any way altered her position, if an alteration of position would be material, by reason of any of these statements. Any "promise" contained in these letters therefore can have no greater effect in creating a right in the property than a parol gift would have, and that cannot support a claim of lien.

In considering whether an equitable lien has been created by act of the parties, it is perfectly immaterial whether the services for which a lien is claimed were meritorious or not, or whether the services were those of an attorney or a mechanic. A lien may be created by statute for legal as for any other kind of services. Within its scope the statute is decisive and the character of the services consequently immaterial. A lien may exist for legal services under some conditions and in some jurisdictions by way of charging a judgment; such a lien depends on the nature of the services. But if it is sought to establish a lien by

contract, the whole question is whether the instrument or the acts relied on are sufficient to constitute such a contract as will create a lien; the nature of the services to which the contract relates is of no consequence. In determining the effect of the contract, or of the acts relied upon as creating a lien, the nature of the demand to be secured is irrelevant. Language or acts which will not create a lien in favor of one claimant will not create a lien in favor of another on the ground that his demand is of a different kind.

To create a lien in favor of the appellant by his correspondence with her Root must in effect have given her an assignment; in fact the language he used did not in its natural sense import a promise, was not used by way of promise or contract, and was volunteered without consideration so that it could not constitute a contract.

4. *The authorities cited by the appellant do not support the contention that an equitable lien exists.*

Counsel for the appellant have cited a number of decisions as showing that the letter of August 17, 1891, or letters written by Root after Colonel Ingersoll's death, or the nature of the services rendered, or some or all of these things together, created an equitable lien. Examination of those cases shows that they do not support this proposition but belong to one or another of several classes of wholly distinct cases.

(1) Cases in which a Court directs payment of counsel fees from a fund in its possession.

It is very common for a Court having the administration of property in his hands to direct payment of counsel fees due for services in connection with that property, to be made from the fund. The course is based, not on any lien, but on the ordinary rules relating to the administration of trust property. The Court exercises its power over a fund already in its custody for administration, to pay the just charges of its officers. The Court does not take jurisdiction over the property merely for the sake of granting relief by directing payment from the fund. To this class belong all of the following cases:

Cowdrey v. *Galveston, etc. R. R. Co.*, 93 U. S. 352.
Central R. R. Co. v. *Pettus*, 113 U. S. 116.
Meddaugh v. *Wilson*, 151 U. S. 333, 359.
Frink v. *McComb*, 60 F. R. 486.
United States v. *Boyd*, 79 F. R. 858.
Barden Central S. R. Co. v. *Ferris S. M. Co.*, 87 F. R. 810.
Tuttle v. *Claflin*, 88 F. R. 122.
Elk Fork O. & G. Co. v. *Foster*, 99 F. R. 495.
Andrews v. *Morse*, 12 Conn. 444.
Abend v. *Endowment Fund Commission*, 174 Ill. 96.
Justice v. *Justice*, 115 Ind. 201.
Weeks v. *Wayne Circuit Judges*, 73 Mich. 256.
McKelvy's and Sterrett's Appeals, 108 Pa. St. 615.
Potter v. *Ajax Mining Co.*, 19 Utah, 421.

In *Gregory* v. *Pike*, 67 F. R. 837, 843, Mr. Justice Putnam, delivering the opinion of the Circuit Court of Appeals, referred to *Meddaugh* v. *Wilson*, 151 U. S. 333, and other cases of this class, and said:

"All the cases cited by Mr. Talbot to establish a lien relate to the compensation of a trustee or his attorneys, or otherwise to the administration of a trust estate, or are of that kind wherein one person in a class of persons interested, having secured the fund for the common benefit, is entitled to be reimbursed his legal expenses out of it, and there seems to be no other lien in equity. *Meddaugh* v. *Wilson*, 151 U. S. 333, 14 Sup. Ct. 356, is the latest case of this class."

In such cases it is plainly immaterial whether when relief is granted the Court has specific property in its hands, or proceeds of property sold under its order, or has charged upon the purchaser of such property the obligation to pay such claims as the Court may direct. In *Louisville, etc. Railroad Co.* v. *Wilson*, 138 U. S. 501, relied on by the appellant, the Court, pursuant to a right reserved in the decree ordering sale of a railroad, required the purchaser to pay the claim of an attorney for services deemed to be a claim upon the original property superior to the lien of the mortgage. The situation was precisely the same as if the property had still been in the custody of the Court.

(2) Cases of statutory liens.

It is of course undisputed that a lien may be given by statute, and so far as the statute is applicable will be enforced. In accordance with such a statutory provision, an attorney may be entitled to seize the proceeds of a judgment which he has secured. The enforcement of such a statutory lien has no tendency to prove the existence of a lien independently of statute.

Semmes v. *Whitney*, 50 F. R. 666, was a case of such a statutory lien. The Court said (p. 666): "The lien, being that of a solicitor who has recovered a judgment, upon that judgment springs both from the doctrine of the equity courts and from a statute of the State of Louisiana."

(3) Cases of equitable lien created by assignment or transfer.

If property is actually transferred, or if a third person having custody of property is in effect directed to hold it for another than the owner, there is an assignment. The test is whether in any form the power of disposition over the property has been parted with.

In *Chambrun* v. *Cox*, 60 F. R. 471, and *Chester* v. *Jumel*, 125 N. Y. 237, there were express assignments and declarations of a lien.

In *Dowell* v. *Cardwell*, 7 Fed. Cas. 990, and *Commercial Bank* v. *Rufe*, 92 F. R. 789, there were irrevocable powers of attorney given to collect the claims; such a power was rightly held to be the equivalent of an assignment.

In *Holmes* v. *Evans*, 129 N. Y. 140, the Court interpreted an agreement by which attorneys were to receive a percentage in kind of any recovery as constituting an equitable assignment of part of the fund, but held the right of the assignee forfeited. In *Lanigan's Adm.* v. *Bradley & Currier Co.*, 50 N. J. Eq. 201, the Court held that an agreement amounted to an equitable assignment on the ground that payment was to be made to the assignee without further action by the assignor. Each case turned

wholly upon the interpretation of the particular instrument before the Court; in each *Christmas* v. *Russell* was referred to as laying down the authoritative rule of decision.

The appellant has referred to the following cases in this Court as sustaining the contention that an equitable lien was created. None of those cases support the contention.

(a) *Wylie* v. *Coxe*, 15 Howard, 415, the earliest case cited, was a suit in equity to recover a contingent fee for services in prosecuting a claim. The plaintiff alleged that by agreement he was to have five per cent out of any sum awarded, and nothing if no award was made. The main defences were that the contract was illegal, and that the employment had been terminated by death. The Court held that the contract was not illegal, and that the plaintiff as legal representative of the attorney was entitled to recover the fee, and incidentally that it could be recovered in that suit on the ground of a lien.

The terms of the contract by virtue of which a lien was deemed to exist do not appear in the report, and neither the opinion nor the arguments, so far as reported, contain any discussion of the question of a lien. If the decision means that any agreement for payment as compensation of a percentage of the award recovered creates a lien, it is opposed to *Trist* v. *Child*, 21 Wall. 441, and even if followed does not support the appellant here, because the fee to be paid to Colonel Ingersoll was not a percentage on the recovery, but a lump sum not dependent on the amount recovered. Any rule which would cover the present case would make every contingent fee a lien.

Wylie v. *Coxe* has, in fact, never been cited in this Court as an authority on the existence of an equitable lien. The cases of *Wright* v. *Tebbitts*, 91 U. S. 252, *Stanton* v. *Embrey*, 93 U. S. 548, and *Ball* v. *Halsell*, 161 U. S. 72, referred to by the appellant as approving the doctrine alleged to be established by *Wylie* v. *Coxe*, were all actions at law to recover contingent fees. In no one of them did

any question of lien arise, and in each of them *Wylie* v. *Coxe* was referred to only in support of the legality of a contract for a contingent fee. In *Stanton* v. *Embrey* reference was made in like manner (93 U. S. p. 557) to *Trist* v. *Child* as an example of an illegal contract for fees. There was no occasion in any of these cases to consider the question of lien, and in none of them did the Court undertake to do so. In two cases, *Seymour* v. *Freer*, 8 Wall. 202, and *Townsend* v. *Vanderwerker*, 160 U. S. 171, *Wylie* v. *Coxe* has been cited in support of claims based upon a trust attached to property, and in three cases, *Reynes* v. *Dumont*, 130 U. S. 354, *Tyler* v. *Savage*, 143 U. S. 79, and *Insley* v. *United States*, 150 U. S. 512, it has been cited in support of the proposition that a defendant by failing seasonably to raise the objection that there was an adequate remedy at law waived the defence of want of equity.

(b) The case of *In re Paschal*, 10 Wall. 483, came before this Court on a motion for a summary order, requiring a former agent and counsel of the State of Texas to pay over money in his hands, collected in behalf of the State. This Court held that the power asked for was applicable only in case of professional misconduct, and that as the claim of the attorney to retain the fund as compensation appeared to be made in good faith, no summary order would be made even if he had no lien. The Court further said that in its judgment the attorney had a lien on the fund in his hands. The Court did not discuss what acts would be sufficient to create an equitable lien. The fund on which the lien was claimed was actually in the possession of the claimant, and the Court rested its opinion that there was a lien wholly on such possession, saying that according to the prevailing rule in this country

"we are of opinion that the respondent has a lien on the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds." (P. 496.)

(c) In *Mackall* v. *Willoughby*, 167 U. S. 681, the plaintiff sought to recover a specific sum as compensation for re-

covering certain real estate, and to have the amount declared a lien on the real estate. The agreement on which the plaintiff based his claim fixed the compensation, and declared that he shall "have a lien therefor upon said judgment and deposits as may be recovered against the said Richards." The Court below decided in favor of the plaintiff. This Court affirmed the decision. The agreement expressly declared a lien, and was thus in substance an assignment. This Court did not in its opinion discuss the question of a lien, but considered only the amount of compensation. Nothing in the facts or in the opinion suggests the possibility of creating a lien without an express assignment or its equivalent.

(d) In *McPherson* v. *Cox*, 96 U.S. 404, a suit was brought to recover from McPherson, an attorney, a bond in his possession, on which he claimed a lien for services, and to remove him from his position as trustee under the deed securing the bond. The Court below removed the trustee, and ordered the bond to be delivered up and held subject to further order. On appeal this Court reversed the decree, denied the prayer for removal of the trustee, declared that the complainant was entitled to the bond on payment of the sum of five thousand dollars, for which McPherson rightly held it as security, and gave leave to McPherson to file a cross-bill, if so advised to establish his debt and lien, and enforce the same. As to the existence of a lien for services on the bond, which represented the proceeds of a sale of real estate, the Court said:

"We are also of opinion that this obligation on the part of complainant to pay $5,000 to Carlisle and McPherson was, and is now, a lien on the bond in McPherson's possession. It is so by the express contract of the parties, as admitted by Mrs. Cox. It was to be paid out of the proceeds of the sale of the land recovered by the suit in equity in which they were employed. The first sale of the land was in a lump, and this bond for $38,000 represents the proceeds of that sale. It is the only proceeds of the sale. It is also a very fair inference, from the fact that the bond was left in McPherson's possession, that it was done as a recognition of the lien. There is no other reason why

it should have been left with him. It was no part of his right or his duty as trustee to hold it. Its possession was in no way essential to any of the very few acts which, as trustee, McPherson could be called on to do under the deed of trust. It is, therefore, manifest that it was left with him as her attorney, or as a security for his debt. It is none the less clear to us, that, apart from the express agreement for a lien, the same result follows from his relation to her as attorney, and the possession of this bond as a paper coming to him in the course of his employment in that character. We have decided, in the case of Paschal (10 Wall. 483), that an attorney has a lien by law, under circumstances similar to these, for all that is due him as attorney or counsellor, on the papers of his client in his hands." 96 U. S. 417.

The report does not indicate how or whether any lien was originally created upon the land, and the Court did not consider that question. The existence of a lien on the bond in McPherson's possession was the only material question, and the Court was satisfied that the bond was left with him "as a recognition of the lien." Even if there were only a promise to pay from the proceeds of the sale of the land and no lien on the land, yet if upon the sale the proceeds represented by securities passed into and were left in the attorney's hands in pursuance of the agreement to pay from the proceeds, there was then an effectual transfer, a parting with control over the securities, sufficient to create a lien. The case decides nothing else, and clearly belongs to the class in which the attorney actually has the property in his possession by agreement for a lien and is in a position to claim a lien at law.

(c) In *Walker* v. *Brown*, 165 U. S. 654, the respondent Brown had lent bonds belonging to him to a firm of Lloyd & Co., which had pledged them for a debt. To induce the complainants to sell goods to Lloyd & Co., Brown wrote a letter saying that the bonds should not be returned to him until all liabilities to the complainants were paid, and that the bonds should remain at the risk of the business, so far as claims in favor of the complainants were concerned. The Court said that this letter created

an equitable lien by providing for keeping the bonds out of the owner's possession till the complainants were paid, and by dedicating the bonds exclusively to the payment of the debt. (165 U. S. at p. 665.) This constituted an effectual transfer. After the letter was written and the advance made on faith of it, the creditor had a right to insist that the bonds should not be returned to the owner until the debt was paid. It explicitly appears from the report (165 U. S. 665, 666) that before the letter relied on as creating a lien was written the bonds had been "delivered" by the owner to the company which according to the terms of the letter was to hold them. This obviously was a transfer.

This Court in *Trist* v. *Child*, 21 Wall. 441, laid down authoritatively what was needful to create an equitable lien. That case was referred to in *Peugh* v. *Porter*, 112 U. S. 737, 742, and in *Porter* v. *White*, 127 U. S. 235, 245, as declaring the established law as to such liens. None of the cases referred to by the appellant have departed from the rules so laid down, or are inconsistent with those rules. *Trist* v. *Child* declared that a mere promise to pay from a particular fund did not give a lien on that fund. In the case at bar there was not even such a promise either to Colonel Ingersoll in his lifetime or to the appellant after his death. Unless this Court is prepared to say that the doctrine laid down in *Trist* v. *Child* is wrong, and that a mere statement of intention to pay from a fund is sufficient to create a lien in favor of the creditor, or to say that every agreement for a contingent fee, although the fee is a fixed amount and not a percentage of the sum recovered, creates a lien, the appellant's claim to a lien must be denied.

PART SECOND

The Appellant failed to show that there is any Property in Massachusetts that can be subjected to a Lien for the Alleged Debt.

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The suit was brought pursuant to section 738 of the Revised Statutes of the United States. The provisions of that statute are the sole warrant for entertaining a suit against such of the defendants as were not and could not be served with process. (Putnam, J., Rec. p. 959.) Unless, therefore, the suit can be maintained under the statute as a suit to enforce a pledge covering property within the jurisdiction of the Court, it must fail.

I

THERE IS NO PROPERTY OF THE DEFENDANTS IN MASSACHUSETTS.

Andrew J. Davis died a resident of Montana. At the time of his death he owned property in Massachusetts. On August 24, 1897, pursuant to the agreement to compromise the contest over the probate of the will, all the contests having been finally settled, a decree was entered in Montana, confirming the probate of the will and directing the distribution of the estate in accordance with the settlement agreed on. This decree is annexed to the bill

of complaint as Exhibit C (Rec. p. 46), and is the foundation of the plaintiff's claim.

On October 8, 1897, Leyson, who had been appointed administrator with the will annexed in Montana, filed a petition in the Probate Court for Suffolk County, Massachusetts, praying that the will of Andrew J. Davis, admitted to probate in Montana, be allowed and recorded, and that letters testamentary issue to him. To this petition was annexed a copy of the will and of the decree of March 25, 1895, not of the final decree of August 27, 1897. (Rec. p. 889; see also p. 739.) On December 9, 1897, this petition was granted. On an appeal taken the decree was subsequently affirmed. (Rec. pp. 733, 735, 753.)

The appellant has assumed that the decree of the Montana Court entered on the final probate of the will takes effect upon the allowance of the will in Massachusetts. No warrant exists for this assumption. The will was filed in Massachusetts pursuant to Public Statutes, chap. 127, secs. 15–17, which provide that "any person interested in a will proved and allowed in any other of the United States" may produce a copy of the will and probate: if the Court finds that the will ought to be allowed in Massachusetts it so decrees and grants letters. The appellant contends that the will was defeated, and yet relies upon it as "proved and allowed." No authority has been cited to show that under these provisions of the Massachusetts law a decree for distribution may be substituted for a will. The statutes of Massachusetts contain no provisions contemplating administration according to a decree made by a foreign court for the distribution of an estate. Either the last will of a deceased non-resident is allowed as such or administration is granted on his estate. The Probate Court might and did accept the decree of the Montana Court as proof that the will ought to be allowed. It could not and did not accept the decree as establishing that the property in Massachusetts should be disposed of otherwise than as the will provided.

The will of Andrew J. Davis, unaffected therefore by any decree carrying out the compromise agreement, was admitted to probate in Massachusetts, and remains the only authority by which to determine the disposition to be made of the estate of the deceased in Massachusetts. The decree of the Court in Montana, giving effect to the compromise agreements, was not filed with the will but only at a subsequent hearing; the decree actually filed with the will was entitled to no effect and has received none. The Court in Montana cannot direct how the estate in Massachusetts shall be disposed of. Whatever the administrator in Massachusetts does as to the estate there under the direction or by authority of the Probate Court, or of the laws of the State, is binding, and he cannot be held to account in Montana for the property so disposed of.

Boston v. *Boylston*, 2 Mass. 384.
Clark v. *Blackington*, 110 Mass. 369.
Courden v. *Jacobson*, 165 Mass. 240, 243.
Holcomb v. *Phelps*, 16 Conn. 127.

If the will had been admitted to probate in Montana, and had not been admitted to probate in Massachusetts, the property in the latter State would have been distributed as intestate property, and persons claiming under the will could not have recovered the property so distributable.

Walton v. *Hall*, 66 Vt. 455.

To determine the title to the estate in Massachusetts in the present stage of the proceedings, it is necessary to look at the laws of Massachusetts applicable to the facts as they now are and to those laws only.

When the will was admitted to probate in Massachusetts, Public Statutes, c. 138, sects. 1 and 2, were in force, and re-enacted without substantial change in Revised Laws, c. 143, sects. 1 and 2, are now in force. These sections of the Public Statutes are as follows:

COPY BOUND C

"SECTION 1. When administration is taken in this commonwealth on the estate of a person who was an inhabitant of any other state or country, his estate found here shall, after payment of his debts, be disposed of according to his last will, if he left any duly executed according to law; otherwise his real estate shall descend according to the laws of this commonwealth, and his personal estate shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant.

"SECTION 2. Upon the settlement of such estate, and after the payment of all debts for which the same is liable in this commonwealth, the residue of the personal estate may be distributed and disposed of in manner aforesaid by the probate court; or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicil, to be there disposed of according to the laws thereof."

According to these provisions the Probate Court in Massachusetts can follow either of two courses, and must follow one or the other. It may order distribution of the estate to the residuary legatee named in the will or it may order the estate to be transmitted to Montana for distribution. The Probate Court in Massachusetts cannot distribute the estate to the persons and in the shares provided by the Montana decree giving effect to the compromise agreements, because that decree has no effect in Massachusetts, and no similar decree has been, or, without further proceedings, can be, made in Massachusetts. The laws of Massachusetts provide, it is true, for compromise agreements settling disputes over wills; but those provisions at the time the will was proved, Public Statutes, c. 142, sect. 14, gave effect to such agreements only when confirmed by the Supreme Judicial Court. The provisions of the Statute of 1903, c. 222, allowing confirmation by the Probate Court, even if applicable, afford no assistance, because there is no suggestion that any compromise agreement has been made satisfying the Massachusetts statute, and the provisions of that statute are strictly construed.

Elder v. *Adams*, 180 Mass. 303, 306.

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No part of the property in Massachusetts can therefore in any sense be said to belong to the defendants in this suit. All of it must by law either be paid over according to the will or be transmitted to Montana, to be distributed as the Court there may direct.

Upon a distribution according to the will, all the property in Massachusetts would go to John A. Davis, the residuary legatee. John A. Davis died in 1893. No administrator of his estate has been appointed in Massachusetts. No administrator appointed elsewhere could act as to his estate in Massachusetts. His next of kin did not acquire any direct right to his property entitling them to collect it. The personal property of a decedent vests in the executor or administrator, and not in the next of kin.

Lawrence v. *Wright*, 23 Pick. 128, 129.

If a legatee dies before receiving his legacy, the next of kin cannot recover it. The legacy belongs to the legal representatives of the deceased legatee.

Clapp v. *Inhabitants of Stoughton*, 10 Pick. 462.

Even if there are no debts, and but a single person entitled as next of kin, such person cannot dispose of any of the property, and, therefore, cannot give a valid receipt for it. The right of the next of kin is absolutely limited to requiring an administrator to collect and account for the property.

Pritchard v. *Norwood*, 155 Mass. 539.
Flynn v. *Flynn*, 183 Mass. 365.

These principles are elementary in the law of administration of decedents' estates, and are universally recognized.

See *Duchesse d'Auxy* v. *Soutter*, 35 F. R. 809.
Gardner v. *Gantt*, 19 Ala. 666.
Dugger v. *Taylor*, 60 Ala. 504.

Costephens v. *Dean*, 69 Ala. 385.
Hickox v. *Frank*, 102 Ill. 660.
Alexander v. *Stewart*, 8 Gill & J. 226.
Downing v. *Porter*, 9 Mass. 386.
Stills v. *Harmon*, 7 Cush. 406.
Taylor v. *Brooks*, 3 Dev. & Bat. 139.
Bradford v. *Felder*, 2 McCord, Ch. 168.
Kaminer v. *Hope*, 39 So. Car. 253.
Strickland v. *Bridges*, 21 So. Car. 21.

All property in Massachusetts, therefore, which by the will would go to John A. Davis as residuary legatee, belongs to and is recoverable only by an administrator of John A. Davis's estate in Massachusetts, when one shall be appointed, and the Probate Court in Massachusetts, if it should see fit to distribute according to the will, could distribute only to such an administrator, and could distribute the whole estate to him. Any property in Massachusetts not so distributed can be disposed of only by transmission to Montana, to be distributed as the Court there shall determine. In neither case is there any property in Massachusetts that can be subjected to a lien in favor of the creditors of these defendants or upon which these defendants could create a lien.

II

IT IS IMMATERIAL WHAT CONTRACTUAL RIGHTS NOT AMOUNTING TO A TITLE THE DEFENDANTS MAY HAVE IN RESPECT TO THE ESTATE IN MASSACHUSETTS.

The real effect of the compromise agreement made April 28, 1893 (Rec. p. 598), upon the estate in Massachusetts, unless and until it was transmitted to Montana, could only be to give the defendants a contractual right as against the next of kin of John A. Davis to receive from them what they might receive from the administrator of John A. Davis. The next of kin could not, as has been

shown, transfer any title to the specific property, because they had none. The administrator of John A. Davis could not transfer any title to the estate which he, being administrator in Montana only, would never receive if the Massachusetts Court saw fit itself to distribute the estate of Andrew J. Davis within its jurisdiction. The next of kin could and did bind themselves by the compromise agreement to pay over what they might receive out of the Massachusetts property of Andrew J. Davis to the contestants, but no property has as yet been so received.

The utmost right that can be claimed for these defendants in the Massachusetts property is the contractual right against those persons who as next of kin of John A. Davis are entitled to receive such part of the property as may come to an administrator of his estate.

The contractual right is immaterial in the present suit. The plaintiff has not sought to enforce any such contract, and has not even alleged its existence. The bill relies upon a supposed title acquired by the defendants in the property now in Massachusetts by virtue of the decree of the Montana Court, entered on August 24, 1897. (Bill, Par. 11, Rec. p. 14; Par. 15, Rec. p. 19.) The bill nowhere alleges the contents of the compromise agreement of April 28, 1893, but expressly declares that the defendants are entitled to shares of the fund in Massachusetts "by virtue of said decree of said District Court in the State of Montana determining said will contests." (Par. 23, Rec. p. 29.) The prayer of the bill (Rec. p. 39) in like manner asks for satisfaction from the shares acquired by the decree.

The whole basis of the suit is the existence of a lien, an actual right of property in the estate situated in Massachusetts. The relief asked is the foreclosure of the alleged lien on such property.

The appellant has founded her case upon rights assumed to have been acquired by the defendants to share directly in the fund in Massachusetts. She cannot now

ask relief upon the basis of an indirect right in the defendants to receive from the next of kin of John A. Davis what the latter may get, either from an administrator of John A. Davis's estate appointed in Massachusetts or from a distribution by the Montana Court in case the fund is transmitted. There are no allegations in the bill to support such a claim, and her right to relief must be determined by the case she has stated.

See *Eyre* v. *Potter*, 15 How. 42.
Grosholz v. *Newman*, 21 Wall. 481.
Andrews v. *Farnham*, 2 Stockton, 91.
Stucky v. *Stucky*, 30 N. J. Eq. 546, 554

But, if the bill stated such a case, it would not avail. To a bill seeking relief by way of specific performance of the compromise agreement for the benefit of the plaintiff, the parties to perform the agreement would obviously be necessary parties, and none of the next of kin of John A. Davis are joined as defendants. Moreover, the Circuit Court would have no jurisdiction of such a suit. Only on the ground of enforcing a lien on property within the jurisdiction of the Court can the suit be maintained. If the suit were converted into an attempt to obtain satisfaction out of the obligations of third persons toward the defendants, it would be no more than an equitable trustee process, which, of course, would not be within the equity jurisdiction of the Circuit Court.

The objection to the maintenance of the plaintiff's bill that there is no property in Massachusetts subject to the lien, does not rest upon any strained or technical construction of the facts. It really arises because the plaintiff is making an attempt so to interpret the past transactions relating to the Davis estate as to enable her to maintain a suit in the Circuit Court, and seize funds in Massachusetts when the transactions, in fact, are not such as to warrant the procedure. It is not a matter of form to be brushed aside as one with which equity does not scri-

ously concern itself. The rights and disabilities of next of kin as to property of a decedent have been long established. It is not possible to grant the plaintiff the relief asked without deliberately violating the rules that have been laid down and have become rules of property. To grant the relief asked, this Court must declare the existence in the defendants of an actual title in the property in question, although it is clear that any direct proceeding by the defendants founded on the assertion of such a title would fail. The plaintiff asks that the whole legal and orderly course of administration should be set at naught merely to enable her to maintain this suit.

PART THIRD

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I

HARRIS AS ANCILLARY ADMINISTRATOR IN MONTANA HAD POWER TO BRING THE SUIT.

1. *The suit was brought by Harris as ancillary administrator, with full knowledge, consent, and authority of the principal administratrix.*

The appellant has argued that the decision in the suit brought by Harris as ancillary administrator in Montana is ineffectual because the suit was an unauthorized act on the part of Harris. It is contended that the title to the claim against Root and Coram belonged to the principal administratrix, that Harris as ancillary administrator had no title, and that no suit by him could therefore affect the principal administratrix.

Suit in Montana was originally brought in July, 1901, by Eva A. Ingersoll, the present appellant, suing as administratrix of Robert G. Ingersoll, against the present appellees and others to recover the fee alleged to be due. (Rec. p. 902.) Objection was taken to the maintenance of that suit, because the administratrix had been appointed only by the Surrogate's Court in New York. Thereupon Harris was appointed administrator in Montana and " was substituted as plaintiff " in that suit " to assert said claim existing in favor of the estate and legal represen-

tatives of Robert G. Ingersoll, deceased." (Bill, par. 20; Rec. pp. 34–36.)

The substitution of Harris as plaintiff was made on December 6, 1901, "on motion of counsel for plaintiff" and for John S. Harris as administrator. An order was entered substituting as plaintiff Harris as administrator of Robert G. Ingersoll, and amending the complaint by inserting his name as plaintiff and striking out the name of Eva A. Ingersoll as administratrix. (Rec. p. 932.)

The suit in the name of Eva A. Ingersoll as administratrix had been brought by E. N. Harwood and John Lindsay as her attorneys (Rec. p. 924); an amendment to the complaint in pursuance of the order of the Court was filed by E. N. Harwood and John Lindsay as attorneys for Harris, the substituted plaintiff (Rec. p. 934); subsequent amendments and a reply were filed by the same attorneys appearing for Harris (Rec. pp. 830, 833, 863). Negotiations for a settlement were referred to Mrs. Ingersoll's representatives. (Rec. p. 822.)

When the original bill of complaint in the present suit was filed, counsel for the appellant evidently felt no doubt that the Harris suit was to be regarded as in effect the act of the principal administratrix. Paragraph 25 of the bill (Rec. p. 34) states:

> "That your orator has not been guilty of laches in respect to asserting and making effort to enforce payment of said indebtedness owing by said Henry A. Root and Joseph A. Coram to the estate and legal representatives of Robert G. Ingersoll, deceased;" . . .

There follows a detailed statement of the proceedings in Montana. The proceedings by Harris are set up in the bill as an anticipatory replication to a charge of laches; yet in her petition for *certiorari* the complainant seeks to show that the proceedings by Harris did not and could not have any effect. The petition for *certiorari* alleges that as ancillary administrator Harris could have no title to a

chose in action except by an assignment from the principal administratrix, and that no such assignment was made. If such were the law it is difficult to see how those proceedings could afford any excuse for delay in pressing the claim.

It is apparent from the record of the proceedings in Montana, as well as from the allegations of the bill of complaint in the present suit, that the prosecution by Harris as administrator in Montana of the suit begun by Mrs. Ingersoll as administratrix in New York was for her benefit, and with her full knowledge, consent, and authority. No question can arise, therefore, as to a conflict of rights between a domiciliary administrator and an ancillary administrator. Unless the appellant can establish that an administrator appointed in Montana could not, by reason of some absolute rule of law, maintain a suit there on a simple contract debt owing to the deceased without a formal assignment from the domiciliary administratrix, the argument that the Harris suit was a nullity must fail. It will be shown that there is no such rule of law, and that the judgment in the Harris suit is entitled to whatever effect is due to a judgment secured against an ancillary administrator in a suit duly brought by him to enforce the same cause of action on which the principal administrator later sues.

2. *The suit was maintainable by an ancillary administrator without any assignment from the domiciliary administratrix.*

The appellant contends that the suit brought in Montana was ineffectual because the contract on which the suit was founded was a chose in action which had its *situs* in New York, belonged to the administrator appointed in New York, and could not be sued on by an administrator elsewhere without an actual assignment from the administrator in New York. This position is wholly untenable.

At the death of Robert G. Ingersoll he had a claim

against Root and Coram for ninety-five thousand dollars. This claim, if well founded, was a simple contract debt. The letter signed by Root and Coram on August 17, 1891, was evidence relied on to sustain the claim, but did not constitute a promissory note and obviously was not a specialty.

The alleged obligation of Root and Coram was enforceable both before and after Colonel Ingersoll's death wherever the alleged debtors could be found and served with process. It was a contract made in Montana, and like any contract for the payment of money to be performed wherever payment was demanded after liability accrued. Root was a resident of Montana (Bill, par. 1, Rec. p. 1), and both Root and Coram were subject to the jurisdiction of the Montana Court in the suit brought there by the appellant and prosecuted by Harris.

The simple contract claim against Root and Coram, if well founded, was assets for purposes of administration at the domicil of the debtors.

(a) The doctrine that personal property has a *situs* only at the domicil of the owner is a rule of convenience that never applied to the question of *situs* for purposes of administration, and that for all purposes is limited in its scope.

The actual *situs* of tangible personal property is recognized wherever it becomes practically important.

See *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22.

The same is true of intangible personal property. Even for purposes of taxation debts due by residents to nonresidents may be recognized as property of the creditor within the jurisdiction where the debtor is found.

Board of Assessors v. *Comptoir National*, 191 U. S. 388.

This does not rest upon the ground that if notes have been given, the physical presence of the notes determines the *situs* of the debt; for the physical presence in one State of notes made by citizens of another State payable to the

citizen of a third State does not warrant taxation where the notes are found.

Buck v. *Beach*, 206 U. S. 392.

For all practical purposes the presence of the debtor within a State establishes the existence of property of the creditor within that State.

By garnishment process such a debt may be seized at the domicil of the debtor and applied to the satisfaction of the claim of a non-resident creditor; such seizure must be recognized and given effect in other jurisdictions.

Chicago, R. I. & P. R. R. Co. v. *Sturm*, 174 U. S. 710.

"Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us." (P. 716.)

(b) Upon the death of the creditor the *situs* of the debt for purposes of dealing with it as property is recognized as at the domicil of the debtor precisely as if the debt were a chattel.

In *Blackstone* v. *Miller*, 188 U. S. 189, this Court held that in case of a non-resident creditor's death the State where the debtor resided might compel payment of legacy or transfer tax on the ground that the property in the debt passed by virtue of the laws of that State.

Mr. Justice Holmes in his opinion said:

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way." 188 U. S. 206.

It has never been seriously doubted that for purposes of founding administration a debt constitutes assets of the deceased at the domicil of the debtor.

In *Wyman* v. *Halstead*, 109 U. S. 654, 656, this Court said:

"The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable."

In *Cunnius* v. *Reading School District*, 198 U. S. 458, 467, the Court said as to a debt due to an absentee by a school district in Pennsylvania:

"It would undoubtedly have been subject to administration under the laws of Pennsylvania had the absentee been in fact dead."

In *New England Mutual L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, an administrator appointed in Illinois upon the estate of a deceased resident of New York sued a Massachusetts corporation in the Federal Court in Illinois upon a policy insuring the decedent. The defendant contended among other things that the appointment of an administrator was invalid because there were no assets in Illinois. This Court held that if the appointment was open to attack yet it appeared by the record that there were assets in the State, because the insurance company being subject to suit in Illinois its liability on the policy constituted property within the State. The Court said:

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this Court has recently affirmed in *Wyman* v. *Halstead*, 109 U. S. 654." (P. 145.)

The same principle is laid down in the State courts:

Murphy v. *Creighton*, 45 Iowa, 179.
Moore v. *Jordan*, 36 Kan. 271.
McIlvoy v. *Alsop*, 45 Miss. 365.
Partnership Estate of Henry Ames & Co., 52 Mo. 290.
Walton v. *Hall's Estate*, 66 Vt. 455.
Church's Executor v. *Church's Estate*, 78 Vt. 360.

To say that debts for purposes of administration are assets at the place of residence of the debtor means that such debts are property which an administrator there appointed has authority to deal with and dispose of according to law. The very purpose of appointing an ancillary administrator is that there may be someone authorized to deal with the property. The ancillary administrator does not derive his power over assets within the jurisdiction of his appointment from any act on the part of the principal administrator. His authority is derived from the power which appoints him, the State within whose jurisdiction the property which he is to administer is situated. Indeed the appointment of an ancillary administrator may precede the appointment of a principal administrator or executor.

Boxdoin v. *Holland*, 10 Cush. 17.

In such event no limitation of power results.

(c) By virtue of his appointment an ancillary administrator acquires power to deal with the assets within his jurisdiction.

Payment of a debt to him by a person at the time within the jurisdiction of the ancillary appointment is valid.

In *Wilkins* v. *Ellett*, 108 U. S. 256, an administrator was appointed in Alabama and received payment from a debtor in Tennessee. Subsequently an administrator was appointed in Tennessee who sued the debtor there. The jury found that the domicil of the deceased was at his

death in Tennessee, so that the administration in Alabama was necessarily ancillary. Nevertheless this Court held that the debt was satisfied by the payment to the ancillary administrator appointed in Alabama.

The Court said as to the effect of payment to an administrator:

"If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere." (P. 258.)

In *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, an ancillary administrator appointed in Illinois was held entitled to recover there upon a policy of life insurance.

The Court said:

"There is nothing in the foregoing views which is in conflict with what was decided in *Wyman* v. *Halstead*, *ubi supra*. In consonance with what was said in that case, payment of this debt to the administrator appointed in Illinois will be good against any administrator appointed elsewhere; and the defendant will be protected in paying this judgment, especially as the husband is the exclusive beneficiary under the policy, and is the administrator and the plaintiff, and the money paid cannot be liable for any debts of the wife." (P. 147.)

(d) An ancillary administrator may bring suit against persons within his jurisdiction to collect simple contract debts due the deceased without requiring or receiving any assignment or authority from the principal administrator.

This follows necessarily from the fact that, as shown above, the purpose of appointing an ancillary administrator is to enable him to deal with assets within the jurisdiction; that he derives his authority not from any act on the part of the domiciliary administrator, but wholly from his appointment, which may even precede the appointment of the domiciliary administrator; that simple contract debts due from persons within the jurisdiction

are assets there for the purposes of administration; and that a payment to an ancillary administrator is valid.

The right of the ancillary administrator to sue without an assignment has been uniformly recognized by the Courts.

In *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, suit was brought in Illinois by an administrator there appointed on the estate of a deceased resident of Michigan to recover on a policy of life insurance issued in Michigan by a corporation organized under the laws of Massachusetts. This Court held that the suit was properly brought and was maintainable. It does not appear whether administration on the estate of the deceased had been taken out elsewhere or not. No assignment of the policy by a domiciliary executor or administrator was deemed necessary. The Court said that if an administrator was to be the plaintiff in a suit in Illinois, such administrator must be appointed in Illinois, and that on the face of the policy an executor or administrator must be the plaintiff. Except for the accident that the defendant in the case could be served with process in other jurisdictions than Illinois, there could have been no suit except by an administrator in Illinois.

In *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, the Court approved the foregoing decision.

In *Noonan* v. *Bradley*, 9 Wall. 394, a domiciliary administrator appointed in New York attempted to sue in Wisconsin upon a bond. An ancillary administrator had been appointed in Wisconsin who had the bond in his possession. The Court held that although by statute in Wisconsin a foreign administrator could sue there without an ancillary appointment, this did not apply when an ancillary administrator had been appointed. The Court said:

"The bond in suit was *bona notabilia* in Wisconsin, and a plea that the subject of action constituting such *bona notabilia* was, on the death of the decedent, in another jurisdiction than the one which appointed the administrator suing as plaintiff, has always been a good answer to the action." (P. 405.)

The bond in that case might have been *bona notabilia* in Wisconsin either because a specialty and physically present there or because the obligor resided there. In either event the application of the decision is the same; the Court held that a plea alleging the appointment of an ancillary administrator in whom upon such appointment the right to deal with the effects of the deceased in Wisconsin vested, was good, that such appointment disabled the domiciliary administrator from suing even if he otherwise might have done so. The ancillary administrator was held to be the person to sue not by reason of any assignment but by virtue of his appointment. No transfer of title from the domiciliary administrator appears. If such transfer had been necessary, the suit by the ancillary administrator would have been futile for want of it.

In *Pinney* v. *McGregory*, 102 Mass. 186, the Supreme Judicial Court of Massachusetts affirmed the right to appoint an ancillary administrator although the only assets consisted of debts due the deceased. Mr. Justice Gray, afterwards a member of this Court, delivering the opinion, said that ancillary administration was originally granted in order that debts due to non-residents might be collected, because otherwise no suit could be brought upon them, and approved an earlier dictum that ancillary administration might be granted although no principal administration had been taken out.

In *Sulz* v. *Mutual Reserve Fund*, 145 N. Y. 563, the Court of Appeals refused to maintain an action by an ancillary administrator in New York upon an insurance policy on which a domiciliary administrator in Washington had already brought suit. But as to the right of the ancillary administrator to sue the Court said:

"In this case we do not assert that the Courts of this State might not have had jurisdiction to entertain this action even though the policy were in the State of Washington, provided the Courts of that State had not appointed an administrator, and the administrator thus appointed had not commenced an action on the

policy prior to the action in this State. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the Courts here." (P. 572.)

Nothing was said as to the necessity in order to sustain such a suit of an assignment from the domiciliary administrator, and obviously there could be no such assignment if no domiciliary administrator had been appointed.

In *Fox* v. *Carr*, 16 Hun, 434, an ancillary administrator in New York of a deceased resident of North Carolina recovered against another resident of North Carolina temporarily in New York. The Court rested the right to sue on the presence of the debtor in New York. It does not appear that there was any assignment from the principal administrator.

In *Traflet* v. *Empire Life Insurance Co.*, 64 N. J. L. 387, the domiciliary administrator in New Jersey sued on a policy of insurance issued by a New York corporation. The widow of the deceased had obtained letters of administration in New York and brought suit there six days before the suit in New Jersey was begun. The Supreme Court of New Jersey held that a judgment recovered in the New York suit was a good defence. The Court said:

"The New York Courts had, unquestionably, jurisdiction of the suit that was brought against the defendant to recover this money, and the suit brought by the New York administrator was first in point of time." (P. 390.)

The administrators in New York and in New Jersey were different persons, acting adversely to each other; there could have been no assignment by the principal administrator to the ancillary administrator; yet the Court held that the ancillary administrator had power to sue and that a judgment recovered in such suit was a bar to an action by the principal administrator.

The argument of the petitioner in the present case rests upon the assumption that on the appointment of a principal administrator there is a vesting of title such that an

ancillary administrator can sue only as assignee of the principal administrator. The argument attributes to an administrator a title which would make it possible for him to sue in any jurisdiction.

An administrator by his appointment acquires a title which within the jurisdiction of his appointment is good as against all the world. So far as he can get possession of and bring within that jurisdiction personal property of the deceased he is invested with a full title. So far as personal property is within the jurisdiction of his appointment he may dispose of it, and such disposition is good everywhere because the property is subject to the jurisdiction of the sovereignty by which the appointment was made. But an administrator has not a title that will be recognized outside of the jurisdiction. If he had he could maintain actions outside the jurisdiction. The distinction is shown by his right to sue upon a judgment recovered by him in his representative capacity although he could not have sued upon the original cause of action. The judgment belongs to him by a title independent of his appointment and that title will be recognized everywhere.

(c) So far as property in a foreign jurisdiction is concerned, the domiciliary administrator has no right nor title that can conflict with the title of the ancillary administrator.

The meaning of the rule that an administrator cannot act in a foreign jurisdiction is that he has not a title which is recognized there.

It is perfectly consistent with these principles that payment to a domiciliary administrator should be a valid payment though made by a non-resident, so long as an administrator has not been appointed in the foreign jurisdiction where the non-resident lives and where, therefore, his debt has for these purposes its *situs*. By such a payment the domiciliary administrator merely gets possession of the property without the need of asserting his title

and brings it within the jurisdiction where his authority exists.

For the same reason, if a domiciliary administrator makes an assignment of a debt due from a non-resident, such assignment may be a valid transfer and entitle the assignee to sue so long as an ancillary receiver has not been appointed in the jurisdiction of the debtor's residence. The right to collect and transfer debts due from non-residents exists in the absence of an ancillary administrator. (See statement of Court in *Gove* v. *Gove*, 64 N. H. 503.) But the sovereignty of the jurisdiction where the debtor resides has full capacity to deal with the debt there, and if, so long as the debt remains undisposed of, that sovereignty appoints an ancillary administrator, the latter is at once vested with exclusive power over this asset.

The appellant has cited no authority denying these principles. The only cases referred to deal with the effect of transfers made by the principal executors or administrators where there was no ancillary appointment. In none of those cases is any doubt suggested as to the power of an ancillary administrator when appointed or any hint given that before he can act he must have an assignment from the principal administrator.

No system of administration by which debts due from non-residents could be collected only pursuant to assignment from a domiciliary administrator would be tolerated. One foundation for the refusal to recognize the extra-territorial effect of the appointment of an administrator is the necessity of reserving in each jurisdiction power over the disposition of the assets situated there for the protection of local creditors. To make the right of an ancillary administrator to collect the assets dependent on a transfer from the principal administrator would defeat this purpose. In *Bowdoin* v. *Holland*, 10 Cush. 18, 21, the Court asked:

"If the will is never proved in the place of the testator's domicil, and is purposely withheld from probate, have creditors

in this State no means of procuring administration on their deceased debtor's estate, and thereby reaching his property here?"

The answer must be that the creditors have no power whatever if title to the debts so as to make them collectible can be obtained only by appointment at the domicil of the deceased.

(f) The presence in New York of the letter of August 17, 1891, is immaterial.

It appears to be urged by the appellant that the alleged liability sued on in the present case had its *situs* in New York, the place of Colonel Ingersoll's residence at his death. This contention apparently rests on the ground that the letter of August 17, 1891, was, so far as appears, physically in New York at that time. (Petition for *Certiorari*, p. 44.)

A distinction has sometimes been taken as to specialties and they have been regarded as having a *situs* for purposes of administration where the instrument is actually found. The distinction exists "by a tradition which comes down from more archaic conditions."

Blackstone v. *Miller*, 188 U. S. 189, 206.

As to debts other than specialties no such question arises. The nature and extent of the distinction was recently stated by this Court as follows:

"A distinction has sometimes been taken between bonds and other specialty debts belonging to the deceased on the one hand, and simple contract debts on the other, for the purpose of probate jurisdiction, and the Probate Court, where the bonds are found, has been held to have jurisdiction to grant probate, while in the other class of debts (including promissory notes) jurisdiction has attached to the Probate Court where the debtor resided at the death of the creditor."

Buck v. *Beach*, 206 U. S. 392, 403.

The same distinction was adverted to in *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, 145. The Court there said:

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found."

No inquiry was there made as to where the policy was at the death of the insured.

The distinction between a specialty and a simple contract debt in theory of law is fundamental. A specialty is not merely evidence of a debt, but is deemed to be the property itself. For purposes of administration as well as of taxation a specialty is deemed to have a *situs* of its own like tangible property determined by the physical presence of the instrument. A transfer of a specialty operates as a transfer of the indebtedness. A simple contract debt on the other hand exists wholly independently of the papers that may furnish evidence of its existence. An open account or contract contained in a letter is not transferred by delivery of the paper in which the terms of the contract may be set out. Physical possession of a letter containing a promise is not even *prima facie* evidence of ownership or of an interest in the contract. To maintain a suit on such a contract, production of the paper is necessary only so far as rules of evidence may call for such production. The presence in or absence from New York of the letter stating the terms agreed upon between Colonel Ingersoll and the defendants could have no bearing on the question of the *situs* of the debt, if any existed, or of the title to the debt, and right to enforce it.

The change from the "more archaic condition," in which the distinction as to specialties arose, has no tendency to liken simple contract debts to specialties, but puts the latter in the same position as the former.

Counsel for the appellant have referred in support of their theory to *Noonan* v. *Bradley*, 9 Wall. 394, 405. That case unqualifiedly sustains the right of the ancillary administrator to sue without any assignment. A plea was there filed in a suit brought in Wisconsin by the principal

administrator appointed in New York, alleging that the deceased at his death had effects in Wisconsin, "among which was the bond in suit," and that an administrator of those effects had been appointed in Wisconsin. This Court said that the bond was *bona notabilia* in Wisconsin and hence that the domiciliary administrator could not sue.

The appellant seeks to distinguish between a question of title and a question of *situs*. But when once it is admitted, as it must be, that possession of the paper which is evidence of a contract does not, except in the case of a specialty and a negotiable instrument, affect the question of title to the contract itself, the distinction fails. If a simple contract debt is assets for purposes of administration at the place where the debtor is, no question of title remains. The most that appellant has ventured to claim is exclusive title to and dominion over personal property in the possession of the deceased at his domicil. In the case of a simple contract debt it is immaterial where the evidence of the debt may be. Such a debt due from a nonresident is not and cannot be at the domicil of the creditor, since it is assets at the residence of the debtor.

"Debts cannot be assets at the domicil of the debtor if their locality is fixed at the domicil of the creditor," . . .

Chicago R. I. & P. Ry. Co. v. *Sturm*, 174 U. S. 710, 714.

The appellant has referred (Brief, p. 96) to the case of *St. John* v. *Hodges*, 9 Baxter (56 Tenn.), 334, as showing that a domiciliary administrator gets title to a simple contract debt as against an ancillary administrator appointed where the debtor resides. In that case the court held a domiciliary administrator appointed in Alabama where certain notes due from residents of Arkansas were at the decedent's death could set aside a compromise made by an ancillary administrator appointed in Arkansas who wrongfully got possession of the notes. But the case wholly repudiates the doctrine for which the appellant contends. The Court said that the *situs* of the notes at the owner's

death was the decisive point, and on this ground distinguished its earlier decision in *Young* v. *O'Neal*, 3 Sneed, 5 which held that a domiciliary administrator could not receive payment of and give a good discharge for notes which at the owner's death were physically in another state.

The case at bar certainly cannot depend in any way on where the letter may have been at the time of Colonel Ingersoll's death. Possession or ownership of the paper has no bearing on the title to or on the right to collect the claim.

It cannot be doubted that had Colonel Ingersoll in his lifetime brought suit in Montana on this claim an administrator in Montana could have revived the suit independently of any domiciliary administrator in New York. Had an ancillary administrator been appointed in Montana and this claim then been garnished as the suit of a creditor in Montana, the courts everywhere must have given effect to the garnishment. Had payment of the claim been made to such an ancillary administrator the payment would have been a valid discharge; yet in each of these cases the domiciliary administrator, according to the argument of the appellant, would have had sole and exclusive title to the chose in action. If that title vests in the domiciliary administrator by virtue of her appointment as such, or by virtue of the presence in New York of the paper on which the letter of August 17, 1891, was written, title cannot be divested merely by action taken by the Courts of Montana, whether for the protection of its own citizens or otherwise.

The appellant has contended that to support the right of an ancillary administrator to sue entails the possibility of many suits and many recoveries. The apprehension is unfounded. It is true after the death of a creditor as before that if there is more than one debtor there may be several suits and several recoveries any one of which will operate as satisfaction. It is also true that if the same debtor is amenable to process in more than one jurisdiction he may be subjected to more than one suit. It is not true that by

reason of attributing to an ancillary administrator power to collect a debt due from a resident of the jurisdiction making the appointment any additional burden is imposed on the debtor. The case of *Traflet* v. *Empire Life Insurance Co.*, 64 N. J. L. 387, already referred to, is a sufficient example of how the possibility of conflict between the rights of several administrators each able to maintain a suit is dealt with. Equally unfounded is the fear expressed of collusive suits by administrators appointed at the instance of debtors to the estate resulting in judgments extinguishing the indebtedness. Debtors are not given the privilege of selecting administrators for the estates of their creditors. Administrators must be appointed upon the petition of persons interested in the estate, either as creditors or next of kin.

It ill becomes the appellant to raise at this time objection to the right of Harris to sue. The whole argument advanced is an afterthought. The record shows, and the appellant has not ventured to deny, that the proceeding by Harris was instigated and authorized by the appellant. When it became apparent that the failure of that suit might bar further litigation, the appellant for the first time suggested incapacity on the part of Harris to maintain a suit, and by innuendo lack of authority on the part of her attorneys to have Harris substituted as plaintiff. If it were necessary in order to prevent such trifling, the Court would no doubt imply the existence of an assignment of the cause of action to Harris. But the appellant's objection is in fact wholly unsupported. Not an authority has been referred to even suggesting that an ancillary administrator requires such an assignment, although on the appellant's theory an ancillary administrator can never sue without one.

The suit in Montana was fully warranted by the authorities. The claim sued on was against Root and Coram for payment of a sum of money as a fee for services. The alleged promise to pay was contained in the letter dated

August 17, 1891. (Rec. p. 45.) The undertaking created, if valid, a simple contract debt, made in Montana by Root, a citizen of Montana, and Coram, a citizen of Massachusetts. (Rec. p. 1.) Both Root and Coram appear to have been amenable to process in Montana, and appeared and answered. (Rec. p. 837.) The *situs* of the debt, therefore, was in Montana; as to one, because he lived there; as to the other, if a distinction is to be made, on the principle of *New England Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 138, because he was amenable to suit there. The administrator appointed in Montana not only had title and authority to sue, but was the only person who could sue. A judgment in the suit prosecuted by him must be given all the effect to which a judgment in a suit by an ancillary administrator fully authorized to sue is entitled.

3. *The argument of the appellant to the contrary is fatal to her claim in suit.*

The argument of appellant is that exclusive title to the contract on which a recovery is sought vested in the domiciliary administrator appointed in New York, and that no other administrator could sue without showing a transfer of title from the domiciliary administrator.

The present suit is brought by an ancillary administrator appointed in Massachusetts. The plaintiff here bears precisely the same relation to the principal administrator as did Harris, the plaintiff in the Montana suit. The plaintiff here is indeed the same natural person as the administrator in New York; but this can serve only to show the acquiescence of the principal administrator in the proceeding, and like acquiescence in the Harris suit is plainly shown. So far as title is concerned Mrs. Ingersoll as administratrix appointed in Massachusetts has no greater privity with Mrs. Ingersoll as administratrix appointed in New York than has a third person. In each case the only title recognized outside of New York is the title derived

from the ancillary appointment or from some act *in pais*.

It is immaterial for legal purposes whether executors or administrators appointed by different states are the same or different persons.

"They act in each state in a different capacity, and are in law regarded as different persons."

Emery v. *Batchelder*, 132 Mass. 452, 453.

If then it was necessary to warrant the maintenance of a suit by Harris in Montana that he show a transfer of title from the administratrix in New York, it is equally necessary in the present case that the plaintiff show such a transfer in order to establish his right to the alleged indebtedness which she seeks to recover. Nowhere in the record is such a transfer alleged or proved. If, therefore, the appellant's argument to show that the Harris suit was a nullity is sound, for the same reason the present suit must be dismissed.

II

THE SUIT IN MONTANA WAS UPON THE SAME CAUSE OF ACTION AND UPON THE SAME FACTS SET UP IN THE PRESENT SUIT.

In July, 1901, the present plaintiff, suing as the administratrix appointed in New York of the estate of her deceased husband, Colonel Ingersoll, brought a suit in the District Court of Montana for the County of Silver Bow against Root, Coram, and the other defendants in the present suit. In that suit the plaintiff alleged that Root and Coram employed Colonel Ingersoll to contest the will of Andrew J. Davis; that they made the contract embodied in the letter of August 17, 1891, on which the present suit is founded; that Colonel Ingersoll did act for them in contesting the will with the results set forth in the present bill; and that by reason of these facts Colonel Ingersoll became entitled to a fee of one hundred thousand dollars,

of which only five thousand dollars had been paid, and that he also became entitled to a lien upon the portion of the Davis estate which under the compromise in the will contest passed to the present defendants. The relief sought was the recovery of the balance of ninety-five thousand dollars alleged to be due, and the appointment of a receiver to receipt for and hold the portion of the estate payable to Root and Coram until satisfaction of the demand. (Rec. p. 902.)

Objection was taken to the maintenance of that suit on the ground that the plaintiff as administratrix appointed in New York could not maintain an action in Montana. On November 30, 1901, John S. Harris was appointed ancillary administrator in Montana, and on December 2, 1901, by order of Court entered upon motion of the original plaintiff he was substituted as plaintiff. (Rec. p. 931.)

An amended complaint was afterwards filed (Rec. p. 784), joining as defendants sundry other persons who claimed liens on the property or were otherwise interested in the suit, and omitting as a defendant Herbert P. Cummings, as executor of the will of Sarah Maria Cummings; by further amendment Gideon Wells, who had died before the action was brought, was omitted as a defendant. The facts alleged in the amended complaint and the relief sought were substantially the same as in the original complaint. The defendants by their answer to the amended complaint denied the validity of the claim. (Rec. p. 837.)

When the Montana suit came on for trial, the defendants objected to the admission of any evidence in behalf of the plaintiff, on the ground that the complaint did not set forth a cause of action. This motion was granted, the complaint was not amended, and a final judgment was entered dismissing the suit with costs. (Rec. p. 868.) On appeal the Supreme Court of Montana affirmed this judgment. (Rec. p. 869.)

Two tests will determine the identity of the cause of

action sued on in Montana and the present cause of action. If the relief sought is the same and the facts alleged are the same, the identity is established.

The amended complaint in the suit prosecuted by Harris prayed for relief substantially as follows (Rec. pp. 818–823):

1. Judgment against Root for $95,000 and interest; judgment against Coram to the extent of his interest in the shares of Root, Cummings, Ladd, Cornue, and Dunbar; that the debt and judgment be declared a lien on all interest of Root, on one-third of all interest of Cummings, Ladd, Cornue, and Dunbar assigned by them to Root and Wells as trustees, and on all the interest of Coram in the shares of Cummings, Ladd, Cornue, and Dunbar; that all the foregoing interests be by proper proceedings applied to satisfaction of the judgment, interest and costs.

2. That interest of Coram be ascertained and applied to the satisfaction of the claim.

3. That the administrator with the will annexed of the estate of Andrew J. Davis be directed to retain the shares in the estate above referred to for satisfaction of the judgment.

4. That Palmer and Davis as trustees be requested to reserve for satisfaction of the judgment property coming into their hands.

5. For appointment of a receiver to take charge of all property subject to the alleged lien.

6. For the establishment of priority of the plaintiff's alleged lien over lien claimed by one of the defendants.

7. For general relief.

The bill of complaint in the present suit prayed for relief substantially as follows (Rec. pp. 39–41):

1. For an order restraining the administrator with the will annexed from distributing the shares on which a lien was claimed, the appointment of a receiver to take these shares upon and in case of a distribution in the Probate Court, and an injunction against demanding these shares.

2. For discovery as to amounts received by Coram and judgment against him to the amount of all shares assigned to him and for all amounts received by him and the establishment of a lien

for such judgment on the parts of these shares remaining to be distributed.

3. For judgment against Root, for $95,000, and interest, and the establishment of a lien for such judgment on all interest of Root in the estate.

4. For judgment requiring the administrator with the will annexed and Palmer and Davis as trustees to apply all property coming into their hands subject to the lien in favor of the plaintiff to the satisfaction of the judgment in his favor.

5. For general relief.

From the foregoing summary it appears that the suit in Montana and the present suit both seek the recovery from Root of $95,000 and interest, and from Coram of the same amount up to the value of his interests, and that all the rest of the relief asked is merely incidental to this for the purpose of obtaining satisfaction. The ultimate cause of action, therefore, as tested by the relief sought is in each case the alleged liability for the amount named.

Comparison of the amended bill of complaint in Montana (Rec. p. 784), and the bill of complaint in the present case (Rec. p. 1), shows the same facts set out as a basis for relief in each, with no substantial difference. The appellant in the petition for *certiorari* denied such identity and contended that by reason of "additional facts" not in the Montana complaint "an entirely different case from that set up in" Montana was presented. (Petition for *certiorari*, p. 62.) The only allegations of fact thus specified in the petition or in the brief filed for the appellant as being additional are the following:

1. Allegations that there was no compromise on the part of Colonel Ingersoll or his clients. (Petition, p. 62; Brief, p. 41.)

The complaint in the Montana suit set out in detail (Pars. IX *et seq.*; Rec. pp. 791 *et seq.*) the proceedings by which the will controversy was ultimately disposed of. The same proceedings were set forth in the present bill of complaint. (Pars. 11 *et seq.*; Rec. pp. 12 *et seq.*). No

compromise was alleged in the Montana suit other than the proceedings by which a settlement was finally reached. Whether these proceedings constituted a compromise was a matter of law. In the present suit the same proceedings and settlement were alleged and proved in evidence. The allegation in the bill that there was no compromise added no new facts. If legally the proceedings constituted a compromise then there was a compromise notwithstanding that allegation: if legally the proceedings did not constitute a compromise then there was no allegation of a compromise in the Montana suit, and the denial of a fact not alleged added nothing new or material.

2. Allegations that all of Colonel Ingersoll's clients "agreed to, sanctioned, approved, and acquiesced in each and all the stipulations, arrangements, and proceedings" by which the will contest was determined. (Petition, p. 62; Brief, p. 41.)

The complaint in the Montana suit set out the effect of these stipulations, arrangements and proceedings. It alleged specifically the execution of the instruments by Colonel Ingersoll's clients. (Pars. IX *et seq.*; Rec. pp. 791 *et seq.*) The allegation that the persons who executed a stipulation "sanctioned, approved, and acquiesced in" it adds no additional fact.

Acquiescence by the person interested was the very essence of the transactions set forth in the Montana complaint, and was the foundation of the opinion rendered by the Montana Supreme Court. On what ground the appellant asserts that the "showing of acquiescence" is a new fact or presents a new case, it is impossible even to conjecture.

3. Allegations (Par. 22; Rec. p. 25 *et seq.*) of promises and pledges made by Root and Coram and acknowledgments since Colonel Ingersoll's death of the alleged indebtedness. (Brief, pp. 41, 43.)

So far as these allegations relate to matters supposed to create a lien, they are obviously immaterial on the ques-

tion whether there was a debt. So far as they are supposed to bear on the existence of a debt, they must be deemed either to be alleged as facts creating an indebtedness or as evidence of the alleged indebtedness. They cannot create an indebtedness, among other reasons, because no consideration is alleged. They cannot be effective as proof of the indebtedness sued on, among other reasons, because they do not contain such admissions, and because the facts alleged in the present suit and in the Montana suit as creating the indebtedness were not put in issue by the disposition made of that suit. None of these allegations therefore are material.

4. The allegations contained in paragraph 24 of the bill. (Brief, p. 43.)

Paragraph 24 of the bill (Rec. p. 31 *et seq.*) contains no allegations in any way bearing upon the existence of an indebtedness from the defendants to the plaintiff. The allegations are all to the effect that Root and Coram have conspired to prevent recovery by the plaintiff, and that the estate in Massachusetts should be applied to satisfy her claims. It cannot be seriously contended that these allegations can affect the question of whether an indebtedness exists.

None of the facts referred to by the appellant distinguish the present bill in any particular now material from the Montana complaint. The two suits were brought to establish the existence of the same alleged debt; in each the same facts were relied on to establish this debt; the changes made in the present bill of complaint consist wholly of allegations of conclusions of law and of facts immaterial to the existence of the debt, and allegations relating solely to the recovery of satisfaction if the alleged debt is established. The Montana suit and the present suit must therefore be taken as identical, and the judgment in Montana be given whatever effect results from such identity.

III

THE JUDGMENT IN MONTANA WAS VALID.

1. *The order of dismissal was pursuant to the ordinary practice.*

The appellant has contended that the proceedings before the Montana Courts were not merely erroneous, but were invalid and a nullity. This extraordinary proposition appears to be based on the theory that an answer having been filed and issues of fact joined, the Court could not entertain a motion to dismiss founded on the insufficiency of the facts alleged in the complaint to warrant a recovery. No authority supporting this doctrine was referred to in the petition for *certiorari* or in the Court below. So far from being irregular, the course pursued was in accordance with common practice.

The suit in Montana was begun by a complaint filed by Eva A. Ingersoll, administratrix appointed in New York. (Rec. p. 902.) On December 6, 1901, by order of Court, John S. Harris, administrator appointed in Montana, was substituted as plaintiff. (Rec. p. 932.) The complaint was afterwards amended in particulars not now material. (Rec. pp. 830, 833.) Root, Coram, and the other defendants beneficially interested in the property filed an answer (Rec. p. 837) denying performance by Colonel Ingersoll of the special contract sued on and denying the existence, therefore, of the liability, alleging that the action was barred by the Montana Statute of Limitations, and alleging a rescission of the special contract by Colonel Ingersoll in his lifetime. On July 7, 1902, the plaintiff filed a reply denying all affirmative allegations in the answer. (Rec. p. 865.)

On December 10, 1902, the suit came on for trial before a jury. The plaintiff opened his case and began the introduction of testimony; thereupon the defendants ob-

jected to the introduction of any testimony "upon the grounds that the complaint does not state facts sufficient to constitute a cause of action." After argument, the Court sustained the objection subject to the plaintiff's exception, and "upon motion of counsel for the defendants the complaint herein is by the Court ordered dismissed." (Rec. pp. 866, 867.) On the following day a formal order was entered dismissing the action and awarding costs to the defendants. (Rec. p. 868.) An appeal was taken by the plaintiff from this judgment to the Supreme Court of Montana, which on May 11, 1903, affirmed the judgment of the Court below (Rec. p. 868).

The motion made by the defendants asked the judgment of the Court whether, if all the allegations of the complaint were proved, the plaintiff would have shown a cause of action. The right to question the sufficiency of the facts alleged to warrant a recovery was not waived by filing an answer. The Montana Code of Civil Procedure contains the following provision:

"Section 685. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

This section expressly reserves, if such reservation were needed, the right to object at any stage of the proceedings, even after trial and an appeal, to the sufficiency of the complaint. If such objection is taken by motion to exclude all evidence and the motion is denied, the denial is error if the complaint is in fact insufficient.

In *Wyman* v. *Jensen*, 26 Mont. 227, the defendant, as here, objected at the trial to the admission of any evidence, on the ground that the complaint was insufficient. The objection was overruled. On appeal from a judgment for the plaintiff the Supreme Court held that the complaint lacked material facts necessary to support a recovery, and

that overruling the defendant's objection was error. The Court said:

"In a case in which the complaint wholly fails to state a cause of action, the question of its sufficiency may be presented in this Court for the first time by assignment in the brief, even though no attack has been made in the trial court by demurrer or otherwise. . . . In any case the same question may be presented by appeal from the judgment when timely objection to the introduction of evidence is made in the Court below, and exception is reserved and incorporated in a bill, as provided by the statute." (Pp. 239, 240.)

In *Wilson* v. *Harris*, 21 Mont. 374, and *Haupt* v. *Ind. Tel. M. Co.*, 25 Mont. 122, a similar view of the statute was expressed.

The provision of the Montana Code reserving the right at all stages to object to the sufficiency of the complaint follows the New York Code of Civil Procedure, sect. 499, practically verbatim; like provisions are found in California and in Georgia. Under those provisions it is the ordinary practice for a defendant at the opening of the trial, or even later, to ask that a case be dismissed because the plaintiff has failed to state a cause of action.

In *Coffin* v. *Reynolds*, 37 N. Y. 640, such a motion was held to have been properly made when the case was opened before a referee.

In *Tooker* v. *Arnoux*, 76 N. Y. 397, the defendant moved at the trial, before any evidence was admitted, that the case be dismissed for insufficiency of the complaint. The motion was overruled. The Court of Appeals held that, as the complaint was insufficient, it was error to deny the motion.

In *Pope* v. *Terre Haute Car. & Mfg. Co.*, 107 N. Y. 61, objection to the sufficiency of the complaint was made by motion to dismiss upon the opening of the trial, on the ground that the complaint did not allege when the contract on which recovery was sought was performed, or that an offer was made to perform. It was held that the complaint should have been dismissed.

In *Weeks* v. *O'Brien*, 141 N. Y. 199, such an objection was made at the opening of the defendant's case. The Court of Appeals held that this was allowable.

In California a motion by the defendant for judgment in his favor because of the insufficiency of the complaint may be made at any time.

King v. *Montgomery*, 50 Cal. 115.
Hibernia S. & L. Co. v. *Thornton*, 117 Cal. 481.

In *McCook* v. *Crawford*, 114 Ga. 337, the Court held an oral motion made at the trial term to dismiss the complaint for insufficiency proper, and said that it was settled that under the Code a motion to dismiss for insufficiency could be made at any time.

The same course is recognized where the Code system of pleading does not prevail. In *Green* v. *Sanborn*, 150 Mass. 454, an action was brought in the District of Columbia. The defendant in that action pleaded a set-off and offered evidence in support of his plea. The Court ruled that, as matter of law, the facts pleaded in set-off did not establish a claim, and excluded the evidence. Judgment was recovered in the District of Columbia, and an action was brought on that judgment in Massachusetts. The defendant in the Massachusetts suit pleaded as a set-off the same facts that he had pleaded and offered to prove in the former suit. The Supreme Judicial Court of Massachusetts held that the decision of the Court of the District of Columbia was a conclusive adjudication that the facts alleged in set-off did not constitute a cause of action. The Court said:

"The defendant certainly regarded the issue upon the plea of set-off as upon trial, for he offered evidence to prove the plea. The defendant argued that the evidence may have been excluded because issue was not joined on the plea, or because the plea did not set out a demand in its nature a matter of set-off. It seems that issue was joined on the plea, and that a demand for money had and received is matter of set-off. If the Court had excluded

the evidence on either ground, it seems that it would have been an erroneous ruling in the course of the trial, for which the defendant's remedy would be by exception. But the natural meaning of the language is that the ruling was upon the merits of the defendant's claim, and that the facts relied upon to prove it would not sustain a claim for money had and received. It is not suggested that the plea was not a valid plea of set-off, and the record shows that the ruling was made in the course of the trial of the issue joined upon it.

"The rejection of evidence offered, and the ruling that upon the statement of a party his action or defence cannot be sustained, are ordinary incidents of a trial; and that appears to be all that was done in this case.

"The defendant did not become nonsuit in his plea of set-off. He did not withdraw his plea. It does not appear that he could have done either. The ruling only affected the verdict. If it was wrong, the verdict would have been set aside had the defendant prosecuted the exceptions which he took." 150 Mass. 457.

2. The filing of an answer could not disable the Court from dismissing the suit for want of a sufficient declaration.

Although the method and time of questioning the sufficiency of the complaint in the Harris suit were in accordance with the common practice in Montana and elsewhere, the appellant has vehemently contended that the judgment of the Montana Court was not due process of law because the plaintiff there was deprived of the opportunity to prove his case, and because the Supreme Court of Montana in its decision assumed facts not set forth in the complaint.

No authority has been referred to even remotely suggesting that the ordinary practice of dismissing a suit at the opening of or during the trial for insufficiency of the complaint is a failure of due process of law. The fundamental right of a plaintiff to be heard and to introduce evidence no one contests. But this right does not extend to the proof of immaterial facts. A litigant has a right to be heard in order that the tribunal may fairly decide the case. He has a right to introduce evidence in order

that the facts necessary to support his claim for relief ma
be proved. He has no right to determine whether pa
ticular facts if proved entitle him to relief. The right
the Court to decide upon the sufficiency in law of th
plaintiff's statement of his claim to relief has always bee
recognized. The decision may be made upon demurre
or it may be made after verdict upon a motion in arre
of judgment, or it may be made during the trial upo
the question being properly raised. The fact that an an
swer has been filed raising issues of fact does not in an
way affect the right of the Court to decide, or the necessit
for it to decide, whether if the issues are determined i
favor of the plaintiff any right to relief is shown. When
ever the question is raised, it must be decided by the Court
The Court may err in such a decision as in any other, bu
error does not show failure of due process of law. Th
decision of the Court, right or wrong, can prejudice
plaintiff no more if rendered on motion to dismiss afte
joinder of issue than if rendered on demurrer. Because
it is convenient to require certain objections to a complain
to be taken by demurrer does not make it incumbent tha
all objections should be so taken, and in point of fact, a
appears above, where the code has been adopted, such
course has not been followed.

It is said in condemnation of the course pursued by the
Montana Court that it is one thing to hold against a plain-
tiff on demurrer and quite a different thing to ignore an
answer and the replication, and to deny the plaintiff all
opportunity of explaining and sustaining his allegations,
and to render judgment against him upon the ground that
the complaint in the abstract did not state a cause of ac-
tion. The difference, however, if any there be, is one of
form only. In each case the Court decides the same ques-
tion with the same effect. The Montana Court did not
deny the plaintiff opportunity to maintain the action. If
the plaintiff had evidence of facts not alleged in the com-
plaint which, if proved, would establish a cause of action,

he could ask leave to amend in order to introduce those facts. He had no right to insist upon going to a trial on a complaint which did not allege facts sufficient to entitle him to recover.

To assert that if once an answer is filed the plaintiff acquires an inalienable right, guaranteed by the Constitution, to compel the Court to hear evidence to prove the facts he has alleged, is to assert a right founded neither in reason nor authority and calculated to secure no result except a waste of judicial energy.

Whether, as the appellant asserts, the practice followed at the trial of this case is condemned in North Dakota or elsewhere is a wholly irrelevant inquiry. The case was taken by appeal to the Supreme Court of Montana and the judgment affirmed. The appellant cannot ask this Court to say that the procedure was contrary to the statutes and practice in Montana. Unless this Court finds that dismissal of an action for insufficiency of the complaint after an answer has been filed is prohibited by the Constitution of the United States, it cannot inquire into the propriety of such dismissal in the particular instance. The claim of any such constitutional prohibiton is fantastic and utterly unsupported by authority.

3. *The Montana Court did not base its decision on the assumption of any facts not in the complaint.*

The appellant asserts that in addition to violating the "fundamental right" of a plaintiff to introduce evidence of immaterial facts, the Montana Court in its opinion assumed the existence of facts alleged in the answer, and that this was not due process of law. The argument mistakes the question now before the Court.

It is perfectly immaterial in the present connection whether the decision of the Montana Court was right or wrong. If it was wrong, the remedy, if any, was by proceedings to correct the error. The judgment could be a nullity only by reason of some fundamental defect in

the procedure, and if such defect existed the judgment was equally a nullity whether the decision was right or wrong.

However erroneous the reasoning by which the Montana Court reached its decision, there would be no lack of due process of law, if the Court had a right to determine the question decided.

In point of fact the appellant's argument wholly misconceives the opinion delivered by the Supreme Court of Montana. That opinion assumed nothing as to the facts alleged in the answer.

Chief Justice Brantley, delivering the opinion of the Court, said that the ruling at the trial raised the question of the sufficiency of the complaint; that the complaint alleged the making of a special contract and sought to recover for its performance; but that the facts alleged in the complaint failed to show performance.

The complaint in the Montana suit set out precisely what took place in the contest over the Davis will. It recited the successive agreements between the original contestants, the proponent of the will, and the other next of kin, by which a final settlement was made. The Court said that "counsel for the defendants contended"

> "that as the complaint itself shows that the contestants and their associates succeeded by means of a compromise of the litigation in negotiating which Mr. Ingersoll took part, instead of by a contest which Mr. Ingersoll did not conduct to successful termination, the contract for the contingent fee was abandoned by the parties." (Rec. p. 877.)

With this contention the Court declared its concurrence, on the ground that the agreements of settlement made were not valid unless expressly authorized or ratified by Colonel Ingersoll's clients, and that such authority or ratification, shown by the agreements being in fact carried out, necessarily displaced the original agreement, since it substituted for the services originally contempiated other services. In conclusion the Court said:

"The allegations of the complaint fall very far short of showing an entire performance of the contract." (Rec. p. 879.)

The appellant in her petition charged the Court with assuming as to Colonel Ingersoll five issuable facts:

"(1) That he made a compromise of his client's interests; (2) that he had no authority so to do; (3) that special authority to make a compromise of his client's interests was conferred on him; (4) that such special authority was accepted; (5) that Colonel Ingersoll abandoned all his rights to compensation for his labors in said will contests under the contract promising payment therefor." (Petition for *certiorari*, p. 27.)

The Court in reality assumed none of these facts.

(1) The complaint before the Court alleged the execution of a certain agreement described in the complaint itself as "a compromise contract" made "for the purpose of compromising and settling" the contest (Rec. pp. 791, 792), and of the subsequent agreements also described as "compromise" contracts; it was no assumption for the Court to treat these contracts as constituting a compromise, since counsel for the plaintiff had so described them, and in any event the legal effect of the instruments was for the Court.

(2) The complaint alleged no special authority given to Colonel Ingersoll to make the agreements; the Court therefore had a right and was bound to act on the assumption that there was no special authority; whether such authority was shown by a general employment was purely a question of law.

(3) There was no assumption that general authority was conferred on Colonel Ingersoll. The Court said that if the compromise agreements were the work of Colonel Ingersoll and were valid as alleged, he must have received additional authority. If there were no authority it was unauthorized, and could not be taken as performance of the special contract.

(4) There was no assumption that any special authorit was accepted. On the reasoning adopted by the Court was immaterial whether there was authority and whethe it was accepted. In either alternative performance of th special contract was rendered impossible.

(5) The Court made no assumption of abandonmen The opinion declares that if special authority was given that constituted an abandonment of the original contrac because it called for other services than those agreed on.

The argument of the Montana Court is very simple. I brief the Court says that the plaintiff to recover must show performance of a special contract; as showing such per formance he has alleged a settlement that made such per formance impossible; if such settlement was not specially authorized it was invalid and therefore could not take the place of the services contracted for; if it was specially authorized the authority must have been by a special agree ment, and that agreement displaced the original contract; it is not alleged that such an agreement was made provid ing that the substituted services were to be taken as per formance of the original contract, therefore the original contract was not performed and could not have been per formed. This reasoning may be sound or unsound, but it contains no assumption of any facts not set out in the com plaint, and no usurpation of authority.

It is futile to argue that because the plaintiff says no compromise was made, while the Court says there was a compromise, therefore the Court assumed a fact not al leged. It would be equally cogent to contend that because the plaintiff says Colonel Ingersoll performed his contract and the Court holds that he did not, therefore there is an assumption of a vital fact by the Court. It was for the plaintiff to allege the facts relied on to show performance; it was for the Court to decide whether these facts were sufficient to show performance; error, if there were any, in such decision, did not invalidate the judgment.

IV

THE JUDGMENT IN THE MONTANA SUIT WAS A CONCLUSIVE JUDGMENT ON THE MERITS.

1. *A judgment rendered on an issue of law is conclusive as to the questions involved.*

Final judgment may be rendered upon the determination of a question of law or of a question of facts. A judgment rendered upon a determination of facts, by a jury or by the Court if a jury is waived, is a conclusive adjudication of those facts. The same facts cannot afterwards be litigated between the parties. A judgment rendered upon the determination of a question of law is an equally conclusive determination of that question. In each case the judgment is conclusive as to what was adjudicated, and as to nothing else.

An issue of law is, of course, most often presented by a demurrer. A judgment following the demurrer is conclusive of the issue thus raised. If the demurrer was special, the only thing as to which the parties are bound is the special defect to which objection is taken, because that is the only thing put in issue and adjudicated. If the demurrer was general, the issue raised is the sufficiency of the facts to support the action, that is the issue adjudicated, and the decision of the Court is conclusive in that and all future proceedings as to the sufficiency of those facts.

These principles are the settled law of this Court and of all other Courts.

In *Gould* v. *Evansville & C. R. R. Co.*, 91 U. S. 526, this Court held a final judgment on demurrer in a prior suit between the same parties a conclusive bar, because upon a comparison of the pleadings it appeared (p. 535) that the defects in the declaration in the former suit were not supplied by new allegations. The Court said that one of the rules as to the effect of a final judgment on demurrer was

"that if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless." (P. 534.)

In *Bissell* v. *Spring Valley Township*, 124 U. S. 225, the question again arose, and the Court said:

"The final judgment entered upon that demurrer is a bar to any further action upon the specific coupons in suit. This is conceded; their validity cannot be again litigated in any form between the parties." (P. 231.)

In *Northern Pacific Railway Co.* v. *Slaght*, 205 U. S. 122, the plaintiff brought suit to recover certain land, and in reply to a claim made by the defendant relied on a judgment on demurrer in a previous suit brought by the Spokane & Palouse Railway Company, the defendant's predecessor in interest. This Court held that the judgment was conclusive. The Court said:

"It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould* v. *Evansville & Crawfordsville R. R. Co.*, 91 U. S. 526; *Bissel* v. *Spring Valley Township*, 124 U. S. 228; Freeman on Judgments, section 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated." (Pp. 130, 131.)

Referring again to the effect of the demurrer the Court said:

"The Spokane and Palouse Railway Company alleged a title in fee simple, and the truth of the allegation could be determined as well by demurrer as by proof, and the same legal consequences fol-

low from it. . . . The record shows that the demurrer was not upon merely formal or technical defects, but went to the merits." (P. 132.)

In *Bouchaud* v. *Dias*, 3 Denio, 238, the Court said:

"But it can make no difference in principle, whether the facts upon which the Court proceeded were proved by deeds and witnesses, or whether they were admitted by the parties. And an admission by way of demurrer to a pleading in which the facts are alleged, must be just as available to the opposite party as though the admission had been made *ore tenus* before a jury. If the plaintiff demurred for want of form, or if for any other reason he wished to controvert the facts alleged in the plea, he might, after learning the opinion of the Court, have asked leave to withdraw the demurrer and reply. But he suffered a final judgment to be entered against him. He probably thought that the facts were truly alleged in the plea, and therefore did not wish to amend. But, however that may be, the judgment is a bar to this action." (P. 244.)

The law of Montana as to the effect of a judgment on demurrer is the same.

In *Kleinschmidt* v. *Binzel*, 14 Mont. 31, a previous adjudication on demurrer was set up as a bar to a cross bill. It appeared that the demurrer alleged these grounds: (1) Insufficiency of the facts to constitute a cause of action; (2) misjoinder of causes; (3) misjoinder of parties. The Supreme Court of Montana laid down the rule as to the finality of a judgment on demurrer, as follows:

"The authorities support the proposition urged by respondent that if the alleged cause of action is submitted on the merits by demurrer, admitting the facts alleged, but placing over against them in the judicial scale the proposition of law that the facts pleaded and thus admitted are insufficient to warrant judgment in favor of the pleader; and upon due weighing of the law and the facts, those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand; those facts thereby pass under the rule of '*things adjudicated;*' and the party

against whom such adjudication proceeds, as well as his privies and representatives, are thereby barred from again asserting the same facts in another action pertaining to the subject as effectually as though such facts were found from the proof or admitted *ore tenus* in the course of the trial." 14 Mont. 52, 53.

The Court held, however, that a judgment on demurrer must appear to have been rendered on the merits, that there was no presumption that on a demurrer for several causes all were sustained, but rather it would be presumed the objections to form were the basis of the judgment, and that, as in the case before it there were objections not going to the merits, it did not appear that the judgment was on the merits. The Court did not, as stated in the petition (p. 57), hold that the provisions of the Montana Code as to rendering judgment on the merits was inapplicable to all judgments on demurrer, but only that it was inapplicable to a judgment which was or might have been entered on a demurrer which did not go to the merits.

The same principles that determine the effect of a judgment on demurrer as an adjudication apply to any other judgment that is rendered upon an issue of law. Under the Code system of pleading it is common practice to ask for judgment on the pleadings. Such a judgment has the same effect. "A judgment on the pleadings is the same as a judgment on demurrer." *Glass* v. *Basin & Bay State Mining Co.*, 34 Mont. 88, 94.

A motion to exclude evidence because the facts alleged if proved are insufficient is precisely the same in its effect. Such a motion raises directly for the decision of the Court a question of law as to the legal effect of the matters alleged. There is a submission to the Court of an issue of law. The decision of the Court is an adjudication of that issue. The decision concludes the parties as to the sufficiency of those facts for precisely the same reason and to precisely the same extent as if the question had been submitted to the Court by a demurrer.

It is argued by counsel for the appellant that a judg-

ment entered on such a motion to exclude evidence is not a binding adjudication, because of some supposed want of "mutuality" or of a conclusive admission of the facts. It is no objection that on such a motion there is no final admission of the facts alleged. Upon a demurrer the defendant makes no admission of facts conclusive except for the purpose of deciding the question of law. In neither case does the judgment establish the existence of the facts if the question of their existence becomes material for any other purpose. In neither case is the defendant debarred by his admission from contesting the facts in the same proceeding if the Court decides against him.

The objection as to want of "mutuality" presumably means that while if the defendant's objection is sustained a final judgment may result in his favor, there is no judgment rendered if the objection is overruled. So far as this statement of the position is true the fact is immaterial. There is no rule of law establishing any such requirement of "mutuality." The appellant does not apparently deny that a judgment on the pleadings may be final and conclusive. If a plaintiff moves for judgment on the pleadings and the motion is denied, there is no rule requiring judgment to be entered for the defendant. On the contrary, in the usual course the case proceeds to trial. See for example *Forrester* v. *Flores*, 64 Cal. 24. Yet such a motion is precisely parallel to a defendant's motion to dismiss for insufficiency of the complaint. The Courts habitually permit a plaintiff to amend his declaration if a demurrer is sustained, and a defendant to answer over if his demurrer is overruled. In like manner the Court could and no doubt would permit a plaintiff to amend his declaration after its insufficiency had been determined on a motion to exclude evidence.

In *Green* v. *Sanborn*, 150 Mass. 454, this point was involved. The Court there held that a ruling excluding evidence in support of a plea of set-off, on the ground that the facts pleaded did not establish a claim, constituted a conclusive adjudication of the insufficiency of the facts.

All of these cases depend on the same principle. If the parties have once submitted for decision a question whether of fact or of law, and there has been a decision rendered on this question, that decision if unappealed from and unreversed is binding upon the parties to the cause. The doctrine is as old as the maxim *interest reipublicae ut finis sit litium*. The effect of the adjudication is coextensive with the question decided. If the question is whether specified allegations set forth a cause of action, and the decision by whatever process invoked is against the sufficiency of the allegations, and the decision forms the basis of a final judgment, then the question of the sufficiency of these facts to support that cause of action can never again be open between the same parties. It is perfectly immaterial how the opinion of the Court is invoked or how its action is taken, if it appears that there has been a decision and following the decision a final judgment. If a new proceeding between the same parties is afterwards brought and it appears that no material allegations have been added, the same question is again presented, and the former decision must necessarily be conclusive against the plaintiff.

2. *It appears in compliance with the requirements of the Montana law that the judgment against Harris was a final judgment upon the merits.*

The record of the Montana suit shows that upon the trial the defendants objected to the admission of any evidence in support of the complaint "upon the grounds that the complaint does not state facts sufficient to constitute a cause of action." After argument the motion to exclude testimony was sustained "and upon motion of counsel for defendants the complaint herein is by the Court ordered dismissed." (Rec. p. 867.)

On the following day a formal judgment was entered reciting the foregoing proceedings and dismissing the action with costs. (Rec. p. 868.)

The Montana Code of Civil Procedure provides:

"§ 1007. A final judgment dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits."

Counsel for the appellant contends that this section prevents judgment in the Harris suit from operating as a bar to this proceeding.

It is clear that a judgment of dismissal in Montana or elsewhere may be a judgment upon the merits and therefore a final adjudication. Prior to 1895 the provisions of the Montana Code as to dismissals were the same as the provisions of the Nevada Code. Under the latter this Court held in the case of *United States* v. *Parker*, 120 U. S. 89, that a judgment of dismissal in an action on a bond, entered because the plaintiff agreed that the claim on the bond had been ratified, was a bar to a subsequent action.

The Montana Supreme Court fully recognized the same rule. In *Kleinschmidt* v. *Binzel*, 14 Mont. 31, decided before 1895, it was held that a judgment of dismissal entered on demurrer was not a bar where the demurrer alleged defects some of which were matters of substance and some matters of form. The decision was put on the ground that the demurrer might have been sustained for a defect of form, and that it did not therefore appear that the judgment was on the merits. The Court very clearly pointed out the conclusive effect of a judgment on a general demurrer.

In adopting the provision of the Code above set forth the legislature did not in any respect alter the rule as to the conclusive effect of judgments. The effect of section 1007 of the Code was considered in *Glass* v. *Basin & Bay State Mining Co.*, 34 Mont. 89. An action was there brought to recover a sum of money; the defendant set up a judgment on the pleadings rendered in a prior suit alleged to have been for the same cause of action. The Court held that the former judgment was not a bar, because as the pleadings in the former suit were not before

the Court, and as the judgment did not state that it was on the merits, the Court could not say that the defect in the pleadings had not been remedied. The Court pointed out (p. 94) that this was the same ground on which the decision in *Kleinschmidt* v. *Binzel* was based, and as to the effects of the provision of the Code said:

"Judgments on demurrer or on the pleadings which result in the dismissal of the action are not enumerated in section 1004. As will be seen by an examination of the case of *Kleinschmidt* v. *Binzel*, *supra*, and the authorities cited, it was a matter of dispute when that decision was made, as to what presumption should attach to them when pleaded in bar. That case declared the rule which controlled in this State until the adoption of the Code in 1895, which, besides bringing forward in sections 1004 and 1005 the provisions of the Compiled Statutes, *supra*, added section 1007. This provision, construed with the others, means nothing more nor less than that judgments of dismissal, whether included in the enumeration in 1004 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll. In other words, such a judgment must show of itself, or by aid of the judgment-roll, that it concludes the merits of the controversy, or it is no defence. The judgment relied on here shows upon its face that it belongs to the class referred to in section 1007. It does not declare that it adjudicates the merits, and, since the judgment-roll was not before the District Court, no presumption can be indulged that it was rendered on the merits. In so far, therefore, as the action of the District Court was based upon such presumption, it was erroneous."

From this decision as well as from the words of the statute it appears that this section of the Montana Code provides only what effect shall be given a judgment of dismissal when it does not appear whether the judgment was entered on a ground going to the merits. In *Kleinschmidt* v. *Binzel*, 14 Mont. 31, the demurrer was both special and general; the Court could not tell whether the thing adjudicated was merely a defect in form, or the merits of the claim. In *Glass* v. *Basin & Bay State Min-*

ing Co., 34 Mont. 89, the pleadings in the former suit were not before the Court. Counsel in that case argued that

"it cannot be presumed that the allegations of the complaint in the first case are the same or substantially the same as the allegations of the complaint in the case before the Court, and as the complaint in the former case was not before the lower Court, there was no basis for holding the judgment in the former case a bar." (P. 91.)

The Court decided in accordance with this argument that

"since the judgment-roll was not before the District Court, no presumption can be indulged that it was rendered on the merits." (P. 95.)

In both cases the Court recognized that if the prior judgment of dismissal was rendered on the merits that judgment was conclusive. In both cases the decision was merely that the Court could not presume that the former judgment was on the merits. The most that can be said as to the effect of the provision of the Montana Code and of the decision is that the judgment relied on as a bar must be shown to be an adjudication on the merits, and that this must be shown either by the judgment itself or by production of the judgment-roll.

In the case at bar these requirements were fully satisfied. The judgment by production of the judgment-roll is shown as required by the Montana Code to have been a judgment on the merits. The judgment sets out that it was rendered on the ground that "the complaint did not state facts sufficient to constitute a cause of action." (Rec. p. 868.) The journal of the court, a copy of which was put in evidence as part of the judgment-roll (Rec. p. 866), shows the same thing. The judgment-roll in the Harris suit was put in evidence by the defendant (Rec. p. 758) and forms a part of the record (Rec. pp. 784 *et seq.*). This

judgment-roll sets out the amended complaint which was held to be defective as not stating a cause of action.

The objection to the sufficiency of the complaint on the ground that it did not state a cause of action was an objection to the merits. The question raised was precisely the same as on general demurrer. Judgment was rendered on the ground that, and constituted an adjudication that, the complaint in the Harris suit did not state a cause of action.

As the cause of action now alleged is the same, that is to say, as the same facts relied upon in the former complaint are relied on here, and no material facts have been added, the former judgment is necessarily a bar to the present proceeding.

3. *The judgment was not as appellant contends a mere nonsuit constituting no adjudication.*

The appellant contends that the judgment entered in the Harris case was in effect a nonsuit and therefore not an adjudication. Authorities are cited to show that a nonsuit is not a final judgment binding on the plaintiff.

The Montana Code provides for nonsuits as follows:

"§ 1004. An action may be dismissed or a judgment of nonsuit entered in the following cases:

"1. By the plaintiff himself, at any time before trial, upon payment of costs; *provided*, a counterclaim has not been made or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

"2. By either party upon the written consent of the other.

"3. By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

"4. By the Court, when upon the trial and before the submission of the case the plaintiff abandons it.

"5. By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

"6. By the Court, when after verdict or final submission, the

party entitled to judgment neglects to demand and have the same entered for more than six months.

"7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced, shall be dismissed by the Court, in which the same shall have been commenced, on its own motion or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years."

The judgment in the Harris case falls within none of the foregoing provisions. It was not entered on motion of the plaintiff, or on written consent, or for the plaintiff's failure to appear, or upon an abandonment of the case by the plaintiff, or upon the plaintiff's failure to prove his case, or for delay in taking judgment, or for want of service. Judgment for failure to prove a case is entered when the plaintiff fails to produce evidence,

Herbert v. *King*, 1 Mont. 475,

not where he fails to state a case. The judgment in the Harris case cannot, therefore, have been entered pursuant to Section 1004 of the Code, but was entered precisely as if the defendant had demurred, and the demurrer had been sustained, and according to the opinion in *Kleinschmidt* v. *Binzel*, 14 Mont. 31, such a judgment is not entered under Section 1004 and is final if based on a ground of demurrer involving the merits.

At common law a nonsuit might be ordered either voluntarily when the plaintiff did not desire to proceed, or involuntarily when he failed to proceed, or proceeding failed to introduce any evidence sufficient to go to the jury. In the case of a voluntary nonsuit clearly nothing is decided. In the case of an involuntary nonsuit for failure of the plaintiff to proceed equally nothing is

decided, and in case of an involuntary nonsuit for failure to introduce sufficient evidence to go to the jury the only thing decided is that the evidence is insufficient, a matter not affecting in any way the merits of the case. When on the other hand the Court refuses to allow evidence to be introduced because the complaint does not state facts constituting a cause of action, there is necessarily an adjudication of the sufficiency of the complaint, and the adjudication has binding force precisely as if made on demurrer.

All the authorities referred to by the appellant are in accordance with these views.

In *Gilman* v. *Rives*, 10 Pet. 298, this Court in a suit against one of two joint obligors sustained a demurrer for want of parties. In considering the form in which judgment should be entered Mr. Justice Story said that a judgment for this cause would not be a bar to a subsequent suit against both obligors, and added that a judgment for defect in a declaration was never a bar to a good declaration for the same cause of action. The opinion contains no suggestion that the sufficiency of the facts alleged in the first declaration can be reconsidered in a second suit.

In *Homer* v. *Brown*, 16 How. 354, the defendant pleaded in bar a "judgment of nonsuit" entered on an agreed statement of facts. (P. 357.) This Court held that the former judgment was not a bar because it had been submitted under an agreement that the suit should be *nonpros'd* if the facts were insufficient to maintain the claim. Mr. Justice Wayne delivering the opinion of the Court said:

"A judgment of nonsuit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not followed the remedy to which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *nonpros'd*, and is liable to pay the costs. But as nothing positive can be implied from

the plaintiff's error as to the subject-matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not. Blackstone, 295; 1 Pick. (Mass.) 371; 2 Mass. 113.

It is not, however, only for a non-appearance, or for delays or defaults that a nonsuit may be entered. The plaintiff in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may concur to take it from the jury with the view to submit the law of the case to the Court upon an agreed statement of facts with an agreement that the plaintiff shall be *nonpros'd*, if the facts stated are insufficient to maintain the right which he claims. The Court in such a case will order a nonsuit, if it shall think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same and no more than if he had been *nonpros'd* for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent. The Supreme Court of Massachusetts, in deciding the cause submitted to it, did so in conformity to an agreement between the parties, but its judgment cannot be pleaded as a bar to the suit, though in giving it an opinion was expressed upon the merit of the demandant's claim under the will of his grandfather, William Brown." (P. 365.)

In *Manhattan Life Insurance Co.* v. *Broughton*, 109 U. S. 121, the plaintiff was nonsuited for failure to prove an essential fact. The Court held, strictly in accordance with the principles above contended for, that this was no bar to a future suit in which that fact was shown.

In *Gardner* v. *Mich. Cent. R. R. Co.*, 150 U. S. 349, the plaintiff had in a former action become nonsuit on his own motion, such nonsuit "not to prevent the right of the plaintiff to bring any suit in any court." (P. 352.) This Court held that, as there was no final adjudication, the former suit was no bar.

In *Canal Co.* v. *Gordon*, 6 Wall. 561, the former suit, which was relied on by the defendant as a bar, was voluntarily discontinued by the plaintiff. (P. 564.) Counsel for the appellant is in error in asserting (Brief, p. 68) that this does not appear from the report.

In *Hughes* v. *United States*, 4 Wall. 232, the Court held a former suit dismissed for defect of parties and for insufficiency of the facts alleged not a bar, apparently because the decision might have been on the first ground only. The Court stated the rule applicable to such cases to be, —

"If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." (P. 237.)

None of the California cases referred to by the appellant (Brief, p. 66) support the proposition that a judgment of dismissal cannot bar another suit. In each of the cases cited the ground of the former dismissal did not affect the merits. Thus in *Davenport* v. *Turpin*, 43 Cal. 597, the former suit was dismissed on the plaintiff's own motion; in *Rosenthal* v. *McMann*, 93 Cal. 505, for failure to give security for costs; in *Oakland* v. *Oakland*, 118 Cal. 160, for want of jurisdiction in equity. (See p. 217 *et seq.*)

The cases of *Cook* v. *Morris*, 66 Conn. 196, *Jones* v. *Foster*, 67 Wis. 296, and *Boyer* v. *Com. Bld. Inv. Co.*, 110 Iowa, 491, are cited as holding that a judgment entered upon an objection to the introduction of evidence is not on the merits. In each case the Court disapproved of the practice of testing the sufficiency of the declaration by objection to introducing evidence; in no one of them was the effect of a dismissal on such an objection involved. In *Cook* v. *Morris* the record (p. 202) did not disclose the ground of dismissal below; the Court held that the evidence might have been believed and might have supported an action and therefore ordered a new trial. In the other two cases objections to the introduction were not sustained and the courts merely expressed disapproval of the practice. The expediency of permitting such a practice does not affect the result of sustaining the objection if as in Montana the practice is sanctioned.

V

A JUDGMENT ON THE MERITS AGAINST AN ANCILLARY ADMINISTRATOR IN A SUIT BROUGHT BY HIM IS CONCLUSIVE AS TO THAT CAUSE OF ACTION AGAINST THE DOMICILIARY OR ANY OTHER ANCILLARY ADMINISTRATOR.

1. *The authorized act of an ancillary administrator as to property of the intestate within his jurisdiction is binding everywhere.*

An administrator is an agent appointed by law to collect and administer the assets of a deceased intestate. Because he derives all his authority from the law, and because the laws of a State cannot have extra-territorial effect, the authority of an administrator to act does not extend beyond the territorial limits of the jurisdiction in which he is appointed. Because the assets of a deceased person may be scattered through several States, it is necessary to provide for ancillary administrators to act in jurisdictions other than that where the original appointment is made as to the assets of the estate in such other jurisdictions. Ancillary administrators are the agents appointed by law to deal respectively with such assets as are within the territorial limits of the jurisdiction by which each is appointed.

The domiciliary administrator and each ancillary administrator is within the limits of the jurisdiction by which he is appointed, not only supreme, but wholly independent. An ancillary administrator is appointed because the domiciliary administrator is not recognized as having any power to act outside the domiciliary jurisdiction. The ancillary administrator derives his power from the sovereign authority of the State in which he is appointed over persons and property within its jurisdiction.

The effect of any act of an administrator depends upon whether it was done in the exercise of the power conferred upon him by his appointment with relation to persons or

property subject to the power of that sovereignty. So far as an act is one thus supported by the power of the State over whatever is within its territorial limits, that act is valid everywhere.

If an ancillary administrator in the course of his administration and in accordance with the local law sells property of the estate situated within the jurisdiction, the title of the purchaser is not open to attack elsewhere.

See *Holcomb* v. *Phelps*, 16 Conn. 127.
Wells v. *Wells*, 35 Miss. 638.
Walton v. *Hall*, 66 Vt. 455.

If a debtor within the jurisdiction of an ancillary administrator's appointment pays to him a debt due the estate, such payment is a valid discharge from all liability there or elsewhere.

Slocum v. *Sanford*, 2 Conn. 533.
Stevens v. *Gaylord*, 11 Mass. 255.

If an ancillary administrator pursuant to authority conferred on him according to law of the place of his appointment compromises a claim in favor of the deceased against a person there resident, such a compromise is binding everywhere.

If an ancillary administrator under the authority of his appointment brings suit upon a claim in favor of the estate and against a person within the jurisdiction, and recovers judgment, that judgment is a merger of the claim and no suit can thereafter be brought upon the same claim in that jurisdiction or elsewhere, and the ancillary administrator can in his own name sue to enforce the judgment in any other jurisdiction without the necessity of taking out administration there.

Biddle v. *Wilkins*, 1 Pet. 686, 693.
Wilkins v. *Ellett*, 108 U. S. 256.
Talmage v. *Chapel*, 16 Mass. 71, 73.

In each of the instances mentioned, the real ground, and the only intelligible ground, for giving effect elsewhere to the act of the ancillary administrator is that he, having the lawful control for the time being of the particular asset, has as the lawfully constituted agent of the estate, or as lawfully appointed trustee for the next of kin, done an act affecting that asset, by sale, discharge, compromise, or merger, as the case may be, and that, because the property was at the time subject to the laws and jurisdiction of the State in which the ancillary administrator was appointed, therefore that act must be recognized as valid everywhere if due faith and credit are to be given to the laws of that State.

In the case of transmissible assets the necessity of such a principle is obvious. If the title to chattels duly sold in one jurisdiction by an administrator, domiciliary or ancillary, there appointed, could be attacked whenever the chattels passed into another jurisdiction, no one could safely purchase of an administrator. If payment by a debtor in one jurisdiction to an administrator there appointed served as a discharge only within that jurisdiction, no debtor could safely pay. To make possible the settlement of the estate of a deceased person, it is necessary that someone take the place of the decedent. Since no one State can by its laws exercise dominion over persons or property in another State, no one State can appoint a universal administrator. Principles of territorial jurisdiction and the practical necessity for final and complete administration of estates alike lead to the conclusion that as to all matters concerning the estate within the jurisdiction of his appointment an ancillary administrator has power which so far as it is exercised on such matters within that jurisdiction must be recognized everywhere.

This result does not depend on any doctrine of privity. There is no privity of title between one ancillary administrator and another, or between an ancillary and a domiciliary administrator of the same estate. So far as prop-

erty which has been under the dominion of one ancillary administrator passes into the hands of another, there is not privity but successorship. By operation of law one succeeds the other in the exercise of rights over the property.

Wherever there is successorship of title by operation of law it is the law that although there is no privity the acts of the former owner in respect to the property are binding on his successor.

(a) An administrator *de bonis non* takes the title of the deceased in succession to the preceding administrator.

United States v. *Walker*, 109 U. S. 258, 261.
Waterman v. *Dockray*, 78 Me. 139.

There is no privity of estate between him and his predecessor, but whatever the predecessor has lawfully done as to that property which passes to the administrator *de bonis non* is binding on the latter.

"It is well settled, both at common law, and in all the States, that acts binding upon the original administrator as acts of administration, by which the right of a debtor, creditor, legatee, or distributee against or in favor of the estate of the deceased is affected, are equally binding upon all successors. To this extent, the privity between them is complete, because what an administrator does lawfully within the sphere of his powers is in law the same as if his testator or intestate had done it, and not to be questioned by any one representing him. This privity does not arise out of any relation between *them* to each other, but is the result of the relation of each of them to the testator or intestate, which, to the extent to which property left by him may come into their hands respectively, is the same in both." Woerner's American Law of Administration, 2d ed., sect. 353.

Bell v. *Speight*, 11 Humph. 451, 453, 454.

Thus payment to a former administrator is binding upon an administrator *de bonis non*,

Eckel v. *Triplett*, 48 Ind. 174,

or upon an executor if a will is afterwards found,

Benson v. *Rice*, 2 Nott & McCord, 577.

If a claim has become barred by the statute of limitation against an original administrator, the administrator *de bonis non* is equally barred.

Wych v. *East India Co.*, 3 Peere Williams, 308.
Heard v. *Meader*, 1 Me. 156.

(b) In the case of succeeding trustees there is the same absence of privity in any legal sense; but the holding and administration of property by trustees would become impossible if, whenever a new trustee was appointed, the acts of his predecessor in the lawful administration of his trust could be ripped up.

(c) The rule is the same in the case of successive receivers. A receiver appointed in supplementary proceedings who brings suit is barred by the result of a former suit brought by a former receiver.

Verplanck v. *Van Buren*, 76 N. Y. 247.

The principle was in that case explained by Judge Folger as follows:

"True, the parties plaintiff in the two actions differ in name of person; but their representative character is the same, in that each stands for the estate and right of Thomas W. Chrystie. True, they were appointed at the instance of different creditors; but one succeeded the other in title, and took into possession the same estate and right, — that of Thomas W. Chrystie. Monell took all that Chrystie owned; so did Verplanck; and both took the agreement with the defendants." 76 N. Y. 256.

(d) In the case of ancillary receivers an act done by one is binding so far as it affects property within his jurisdiction upon the principal and all other ancillary receivers of the same estate.

In *Reynolds* v. *Stockton*, 140 U. S. 254, 272, this Court stated the rule as to ancillary receivers and also recognized the exact analogy in this respect between the position of an administrator and that of a receiver. Mr. Justice Brewer delivering the opinion of the Court said:

"Where a receiver or administrator or other custodian of an estate is appointed by the laws of one State, the courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments, or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness."

It is apparent from a consideration of the nature of the office that such a rule must apply to administrators.

According to the conception of the civil law the administrator continues the existence of the deceased. Whatever the administrator within the limits of his jurisdiction does has the same effect as if done by the deceased. Whatever was done by the deceased is binding upon all the administrators into whose hands successively the property affected may come.

Every administrator acts in a purely representative capacity as trustee or agent for the creditors and next of kin as to matters within his jurisdiction.

Yonly v. *Lavender*, 21 Wall. 276, 280.
Tate v. *Norton*, 94 U. S. 746, 752.
Cowen v. *Adams*, 78 F. R. 536, 543, 544.
Blood v. *Kane*, 130 N. Y. 514.

Whatever the agent or trustee does within the scope of his authority is binding upon his principal or *cestui que trust*.

In *Mecks* v. *Olpherts*, 100 U. S. 564, an administrator in California made an invalid sale of real estate. Subsequently other administrators were appointed, and upon a distribution the lot sold was set off to the plaintiff. The Supreme Court held that the plaintiff could not recover the land. Mr. Justice Miller for the Court said:

"The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him

and against all whose rights he represents. 'In all suits for the benefit of the estate he represented both the creditors and the heirs,' said the Supreme Court in *Beckett* v. *Selover*, 7 Cal. 215." (P. 569.)

If a suit is brought against the administrator the judgment recovered cannot so far as the property within that jurisdiction is concerned be attacked by the creditors or next of kin.

Pickens v. *Yarborough*, 30 Ala. 408.
Morris v. *Murphey*, 95 Ga. 307.
Fraser v. *Charleston*, 19 S. C. 384.

In all these instances the act is binding because it is done by the lawfully authorized representative. The administrator's authority is limited to the property within his jurisdiction. His right to represent is as to that property only. But to the extent of his right to represent, his acts must be binding on the principals, else there is no representation. All that is meant by representation is that his acts are binding. If then the acts of the administrator are binding upon those who are his principals, such acts must be equally binding upon others who succeed him as agents, whether the succession is by transmission of his office or by transmission of the property affected; otherwise the extraordinary anomaly must exist that the principal is bound while the new agent is not.

2. *A suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property.*

An ancillary administrator can deal with property of the deceased territorially within his jurisdiction, and his acts are binding as to that property wherever it may afterwards be found, and although it comes into the jurisdiction of the domiciliary administrator. The same principle necessarily applies to acts lawfully done by the ancillary administrator affecting choses in action.

If an action is brought against an ancillary administrator and he successfully defends it, the judgment is not conclusive in a suit brought elsewhere, because the first suit was and could be only a proceeding to enforce satisfaction against the assets in the hands of that administrator. His authority extended only to those assets. The judgment is conclusive therefore only as to those assets. No subsequent administrator of those assets could be sued on the same cause of action, but obviously to an administrator elsewhere of other assets the judgment affords no defence.

If an action is brought and judgment recovered against an ancillary administrator, that judgment is not binding on another administrator elsewhere. The reason is the same. Only as to the assets in his jurisdiction did the administrator have any authority to represent the estate. As to those assets he had authority and as to them the judgment is conclusive as against a subsequent administrator *de bonis non*.

If an action is brought by an ancillary administrator against a debtor within his jurisdiction, the judgment merges the cause of action, not only as to the administrator who sued, but for all purposes. The administrator acting within the scope of his authority has done an act affecting a particular asset of the estate and the effect of that act on that asset is recognized elsewhere, precisely as in the sale of a chattel.

If, finally, an ancillary administrator properly brings suit on a claim in behalf of the estate and fails on the merits so that judgment is rendered against him, it must logically follow, for the same reasons as in the other cases, that the judgment against him is a bar to any future action by any representative of the estate on that cause of action. The cause of action is an asset of the estate. It is within the jurisdiction of the administrator who brings suit, at least when the defendant is personally within the jurisdiction. As to such cause of action therefore the administra-

tor who brings suit is the authorized representative of the deceased's estate. His acts affecting such cause of action are of the same quality and should be given the same effect as his acts with reference to tangible property. For the same reason that his transfer of title to a chattel, his receipt of payment and discharge of a debt, his compromise of a disputed claim, is as binding as if done by the deceased, so what he does with reference to the chose in action is binding. Just as a successful prosecution of the suit merges the cause of action in the judgment, not only with reference to the administrator suing but with reference to all administrators, so upon an unsuccessful prosecution of the suit the adverse judgment is binding, as far as concerns the cause of action, on all other administrators. The adverse judgment is not binding in the sense of creating a personal liability for costs, if costs are awarded, or otherwise, but it is binding in the sense that the cause of action has been effectively disposed of.

In all of the instances considered, as well as in all cases of tangible property, the same principle controls. That principle is that whatever assets are in the control, because within the jurisdiction, of an administrator, ancillary or domiciliary, that administrator can deal with in accordance with the law of the jurisdiction of his appointment, and whatever he so does with reference to those assets is in its effect upon the assets wherever afterwards found conclusive everywhere and upon every person.

This court in *Reynolds* v. *Stockton*, 140 U. S. 254, 272, clearly affirmed the foregoing principles. Dealing with the case of an ancillary receiver the Court said:

"If Parker had still remained the ancillary receiver in the State of New York, a judgment rendered against him as such would bind only that portion of the estate which came into his hands as ancillary receiver, and would not be an operative and final adjudication against the receiver appointed by the Court of original administration. Where a receiver or administrator or other custodian of an estate is appointed by the laws of one State, the courts of that State reserve to themselves

full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments, or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness."

The foregoing statement precisely sets forth the doctrine here contended for. A judgment against an ancillary administrator on a claim against the estate is not binding upon any other administrator because of necessity it does not and cannot affect assets outside the jurisdiction where it is recovered. On the other hand, a judgment for or against an ancillary administrator on a claim in favor of the estate is as to all administrators a final disposition of that claim, because the judgment is an act done with reference to an asset within the jurisdiction of the ancillary administrator, as to which his power to represent the estate is complete.

A judgment in favor of an administrator on a cause of action belonging to the estate indisputably produces a merger; thereafter there can be no recovery except in an action on the judgment.

Biddle v. *Wilkins*, 1 Pet. 686.

A cause of action may be merged as effectually and in the same sense legally by a judgment for the defendant as by a judgment for the plaintiff.

Sweet v. *Brackley*, 53 Me. 346.
Weeks v. *Harriman*, 65 N. H. 91.

The ground on which a judgment rendered in favor of an ancillary administrator for a debt due the estate prevents a suit by other administrators is not privity or that the judgment as such is of any binding effect upon the other administrators. The judgment cannot be sued on by them as administrators. The judgment prevents an-

other suit, because by the act of the ancillary administrator the chose in action belonging to the estate has been so affected that it will no longer support a cause of action. If in such a suit by an ancillary administrator judgment is rendered against the administrator, the situation is precisely similar. There is but one cause of action: an administrator authorized to represent the estate as to that particular asset has done an act with respect to it the result of which is that the cause of action is gone. The effect of this act on the particular asset should be recognized everywhere, because it is an act done by authority of the sovereignty within whose jurisdiction the property at the time is situated. The effect is to prevent any future suit on that cause of action, whether circumstances thereafter arise under which but for this bar another administrator could have sued or not. Other effect the judgment has none so far as other administrators are concerned.

In the present case, if the plaintiff had, after judgment against Harris in Montana, been herself appointed there in his place as administrator *de bonis non*, she certainly could not have sued as administratrix. In her individual capacity as one of the next of kin, for whose benefit the Harris suit was brought, she cannot dispute the judgment. Except for the accident that she can get jurisdiction over the same defendants in another State, the cause of action would confessedly be concluded. Yet it is said that, because the cause of action is transitory, and can be prosecuted as well in some other State as in Montana, she can disregard the result of the suit originally brought by her and later prosecuted in the name of Harris with her full consent and authority, and by removing the cause of action from Montana maintain a second suit on it in Massachusetts, and in case of failure here continue to bring still other suits as often as she can find a fresh jurisdiction in which process can be served on the defendants.

Again, if by the laws of Montana an administrator appointed in New York had been able to sue without ancil-

lary appointment, as is the law in some States, and the plaintiff had herself prosecuted the suit to the end without the intervention of Harris, it is clear that she could not afterwards have sued on the same cause of action in New York. The judgment would have been binding upon her as principal administratrix.

Lawrence v. *Nelson*, 143 U. S. 215.

Yet it is said that the suit brought under her authority after an ancillary appointment is less conclusive.

Such conclusions, involving the result that a cause of action in favor of a deceased person can never be concluded against his representatives as long as a jurisdiction remains somewhere in which suit has not been brought, are as opposed to any orderly administration of justice or reasonable theory of law as they are shocking to the moral sense and inconsistent with a practical system of administration.

It is contended by the appellant that the suit brought by Harris in Montana was unauthorized, because he had no title to the cause of action sued on, and that therefore the judgment against him cannot have effect. The fallacy of this argument has already been shown.

If the case were one in which either the ancillary administrator in Montana or the domiciliary administrator in New York could have obtained jurisdiction over the defendants, the administrator first bringing suit would probably be held entitled to recover the judgment. But the case is not one of rivalry between different administrators to enforce the same claim. So far as appears it was not possible to enforce the claim in New York; therefore only an ancillary administrator could sue. There was no conflict between Harris and the domiciliary administrator. Harris was appointed when it appeared that there must be an ancillary administrator to prosecute the suit. He was substituted as plaintiff in the suit brought by the present appellant at the instance of her counsel. So far from acting

independently of the domiciliary administrator, he acted merely as a figurehead. Mr. Harris himself testified that he "should not like to say what was done in" his name, that "there was probably such a suit instituted" (Cr. Int. 56, Rec. p. 318); that he never considered he had authority to settle the claim for less than the full amount (Cr. Int. 68, Rec. p. 321); and that he forwarded to Mrs. Ingersoll a proposition made for a settlement (Cr. Int. 72, Rec. p. 322). It is apparent that Harris acted purely as a representative of the domiciliary administratrix to carry on the litigation which the latter had inadvisedly begun in her own name. In every sense therefore the suit was authorized and the matter litigated one which the principal administratrix and the Court which appointed her "permitted to be litigated in the Courts of another State."

3. *All the authorities support the conclusion that the judgment is a bar.*

There is no authority to support the doctrine for which the appellant contends, that one administrator after another in different jurisdictions can sue upon the same cause of action, as long as no one of them succeeds. On the contrary, the authorities recognize that if an administrator having the right to do so has brought suit the result of that suit must be final.

In *Reynolds* v. *Stockton*, 140 U. S. 254, 272, already referred to, this Court affirmed such a rule.

In *Sulz* v. *Mutual Reserve Fund*, 145 N. Y. 563, an action was brought in New York by an administrator appointed there to recover upon a life insurance policy. The defendant set up in defence that a suit had been brought in Washington on the same policy by an administrator appointed there, and was pending. This defence was sustained, and the suit dismissed. The Court said:

"In this case we do not assert that the courts of this State might not have had jurisdiction to entertain this action, even though the policy

were in the State of Washington, provided the Courts of that State had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this State. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the Courts here. But in the case of administrators duly appointed in each State, when the foreign administrator first duly commences an action by the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign State at the death of the assured in that State, we think the Courts of the foreign State have obtained jurisdiction, and, therefore, could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the Courts of this State upon the same policy. In such a case as this we think that the principle of comity between the States calls for the refusal on the part of the Courts of this State to entertain jurisdiction." 145 N. Y. 572, 573.

Clearly, if a judgment for the defendant in the Washington suit would not have prevented the maintenance of the New York suit, the defence set up showed no bar to that action, but at most a ground for continuing the suit to await the result of the suit in Washington.

So in *Merrill* v. *New England Mutual Life Ins. Co.* 163 Mass. 245, the principal administrator, appointed in Illinois, brought suit there on a policy of insurance, and an ancillary administrator, appointed in the interest of a pledgee, brought suit on the same policy in Massachusetts. The Supreme Judicial Court of Massachusetts, while holding that by reason of the presence of the debtor in Massachusetts the Court there had jurisdiction, and that by reason of the pledge the general administrator was not entitled to sue, recognized that, but for these facts, the pendency of the suit in Illinois would have been a bar. Mr. Justice Wells said:

"If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the Courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have

been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it." (P. 249.)

The cases relied on by the appellant are entirely consistent with the rule laid down, and are based upon the application of that rule.

In *Aspden* v. *Nixon*, 4 How. 467, a suit was brought in England against the executor of a domiciled Englishman to recover property there, the plaintiff claiming to be devisee. That suit was dismissed. Subsequently a suit was brought in Pennsylvania by the same plaintiff against the same person as administrator with the will annexed there, seeking to recover on the same ground property of the testator in Pennsylvania. The Court held that the decree dismissing the English suit was not a bar. The Court said that the executor resisted the suit in England in a representative capacity, and was restricted to the limits of the county to which his letters extended, that he could not deal with the Pennsylvania assets by virtue of his appointment in England, and that, therefore, the decree in England could not affect the Pennsylvania assets. No other decision was possible. The executor in England was authorized to represent only the assets in England. He could defend against a claim to those assets and the judgment would be conclusive on all persons as to those assets; but the decision would have no effect against a claim to the assets in America, because as to the latter the English executor had no authority to represent the estate.

In *Stacy* v. *Thrasher*, 6 How. 44, judgment was recovered in Mississippi in a suit against the administratrix of a deceased resident of Mississippi. Subsequently administration was taken on the estate of the deceased in Louisiana. An assignee of the Mississippi judgment brought suit on that judgment in Louisiana against the ancillary administrator appointed there. This Court held that the suit could not be maintained. The only effect of the judgment in Mississippi was to establish the obligation of the

administratrix there to pay the debt from the assets committed to her hands. This was the only question as to which she was authorized to represent the estate. The judgment could not therefore go further than to require satisfaction from those assets.

The Court said as to the effect of the judgment:

"The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." (P. 60.)

In *Johnson* v. *Powers*, 139 U. S. 156, a suit in equity was brought in New York to reach property alleged to have been fraudulently conveyed by a deceased resident of Michigan. The plaintiff sued as administrator and a creditor of the deceased. He introduced evidence of his appointment in Michigan as such administrator and of the allowance by commissioners appointed by the Probate Court in Michigan of a claim in his behalf against the estate. This Court held that he could not maintain the suit in either capacity. The appointment in Michigan did not authorize him to sue as such in New York. The allowance of his claim by the commissioners, if considered as a judgment, must either be limited as a judgment *in rem* to the assets in Michigan, or be limited as a judgment *in personam* to the person sued. In neither case did it establish a debt payable from assets in New York or lay a foundation for proceedings against such assets. The decision was limited to precisely the same point settled in *Stacy* v. *Thrasher*, on which the Court relied.

In *Carpenter* v. *Strange*, 141 U. S. 87, a suit was brought in New York by a devisee under the will of a deceased resident of New York against the executrix, to recover certain money due from the deceased as trustee for the plaintiff's benefit, to establish the invalidity of a condition attached to a devise made to the plaintiff, and

to declare void a conveyance of land in Tennessee made by the testator to the defendant. The plaintiff obtained a decree in her favor for recovery of the money and avoidance of the conveyance. Subsequently the will was allowed in Tennessee, and the defendant received letters testamentary there also. The plaintiff brought a second suit in Tennessee seeking the same relief as in the New York suit. The Tennessee Court decided adversely to the plaintiff. This Court held that the judgment in New York was conclusive in the plaintiff's favor, and distinguished the case from that of two administrators, on the ground that an executor takes what the will gives and an administrator only what the law of the place of his appointment gives. The view expressed in this distinction is entirely in harmony with the principle above contended for.

In *Taylor* v. *Barron*, 35 N. H. 484, it was held that a decision by a Probate Court in Vermont on a claim presented against the estate there was not binding on the estate in New Hampshire.

In *Brown* v. *Fletcher's Estate*, 146 Mich. 401, a case now pending in this court on writ of error, it was held that a decree in Massachusetts against an ancillary administrator was not binding upon the domiciliary administrator in Michigan.

The reasoning of the Court in each of the foregoing cases is based on the principle contended for; namely, that the distinction between administrators in different jurisdictions is that they represent different assets, and that no act of one can have any effect except upon the assets in his possession, but that full effect is to be given everywhere to acts done by an administrator in dealing with an asset properly in his possession, although that asset subsequently passes into another jurisdiction. Courts and text-writers have recognized that for this reason a judgment against an administrator may be binding upon an administrator of the same estate in another jurisdiction if the latter holds assets received from the former.

Cherry v. *Speight*, 28 Tex. 503, 516.
Carrigan v. *Semple*, 72 Tex. 306, 308.
Schouler on Executors, 3d ed., sect. 178.
Black on Judgments, 2d ed., sect. 922.

The same reasons leading to the conclusion that an administrator cannot affect assets outside his jurisdiction logically lead to the conclusion that whatever acts he has done pursuant to his authority in relation to the assets within the jurisdiction of his appointment should be given full force everywhere. He cannot affect assets outside the jurisdiction because they are not in his control, and as to them he does not represent the estate — that is, the creditors and next of kin — and so can do no act to bind them. His acts are everywhere conclusive as to assets inside the jurisdiction because such assets are in his control, and as to them he is authorized fully to represent and bind the estate. If, therefore, having the requisite authority, he brings a suit upon a cause of action that existed in favor of his intestate, and fails so that a judgment is rendered against him, that cause of action is extinguished for all purposes and as to all persons who might otherwise as representatives of the same estate be entitled to sue upon it.

PART FOURTH

The Appellant did not establish the Existence of any Debt Due from the Defendants or any of them.

SYNOPSIS OF ARGUMENT

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I

TO ESTABLISH THE DEBT SUED FOR THE APPELLANT MUST SHOW THAT THE WILL WAS DEFEATED AND THAT THE DEFENDANTS GOT THEIR SHARES.

The bill of complaint is brought to recover the sum of ninety-five thousand dollars, as the balance of the stipulated fee to be paid under the agreement of August 17, 1891, made by the defendants Root and Coram with Colonel Ingersoll. The plaintiff to succeed in this suit must establish a right to recover under that agreement.

The contract of August 17, 1891, was made while the trial of the contest over the will was in progress. That trial resulted about September 3, 1891, in a disagreement of the jury. (Bill, par. 10; Rec. p. 11.) After this, negotiations were opened as to settlement, and finally, on April 28, 1893, an agreement was made by which the will was to be admitted to probate with a provision for distribution of the estate as provided in the agreement; namely, two-elevenths to the persons representing John A. Davis, deceased, the residuary legatee in the will, two and a half elevenths to the defendant Root and his asso-

ciates, one-eleventh to trustees for Root and his associates, and the balance to trustees to be divided equally between the persons representing John A. Davis and Root and his associates. Other contests instituted against the will were subsequently settled, and a complete settlement was finally reached, pursuant to which a decree was entered on August 24, 1897, confirming the probate of the will and directing distribution in specified shares, according to which Root and his associates, some of whom Coram now represents by assignment, became entitled to receive directly and through trustees five hundred and fifteen and one-half eleven-hundredths of the estate, and the representatives of John A. Davis three hundred and sixty-five and one-half eleven-hundredths. (Rec. p. 46.)

The actual result of the proceedings thus was that the will was admitted to probate, but the defendants by contract with the persons entitled to the residuary legacy and devise made in the will became entitled to a share of the estate about fifty per cent greater than the proportion to which they would have been entitled as heirs at law.

All these negotiations and the final settlement were, as appears from the allegations of the bill and from the letters put in evidence by the plaintiff, carried out and made with Colonel Ingersoll's full knowledge and consent, and indeed by his advice. The defendants did not prevent the services contemplated by the original contract from being rendered, and they do not undervalue the services that Colonel Ingersoll actually did render.

This suit is brought to recover the stipulated fee of one hundred thousand dollars. It cannot be maintained to recover the reasonable value of services actually rendered, for the bill contains no allegations under which the value of the services was put in issue, and no prayer for a determination of their value, nor did the Circuit Court attempt to find the value of services rendered as upon a *quantum meruit*.

It is important that the precise issue should be borne in

mind, because the rule of evidence in the Federal Courts which prevents the defendants from showing any oral agreement made with Colonel Ingersoll in his lifetime rescinding the express contract, effectually precludes them from establishing a modification of the contract based upon the great shrinkage in the value of the estate and the change of plan by which a compromise was made, and makes it necessary for them to insist that the right to enforce the special contract be clearly established. The question is not whether any compensation is fairly payable, nor as to how much the services were reasonably worth. The sole question is whether the plaintiff has shown such a performance of the written contract as to entitle her to recover on that instrument.

The contract on which the plaintiff seeks to recover provided that Colonel Ingersoll's fee for services rendered and to be rendered "in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will" should be one hundred thousand dollars "in case the will is defeated, and our clients get their shares." (Rec. p. 45, Ex. B.) The payment of this fee was made contingent upon two events: (1) that the will be defeated; and (2) that the contestants get their shares. Unless these conditions were satisfied or waived, Colonel Ingersoll did not become entitled to recover the fee stipulated under this contract, whatever other rights he might have. The bill contains no suggestion of a waiver by the defendants, therefore the question is solely whether there was full performance and satisfaction of the condition.

II

THE WILL WAS NOT "DEFEATED" EITHER IN FORM OR IN SUBSTANCE.

The services which Colonel Ingersoll undertook to render were to prosecute the contest of the will. By defeat of the will was meant the successful prosecution of that contest. The proceeding was one expressly pro-

vided for by the laws of Montana. From 1887 to 189 the Compiled Laws of Montana were in force. Th "Probate Practice Act," contained in the Compiled Laws stated the procedure for contesting the probate of a wi and for trial of such contests by a jury. Section 22 that Act provided:

"The jury, after hearing the case, must return a special verdi upon the issues submitted to them by the court; upon which th judgment of the court must be rendered, either admitting the wi to probate or rejecting it."

In the Davis will case the jury disagreed, and there was no second trial. The Court did render a judgment however, on March 27, 1895, admitting the will to pro bate (Rec. p. 574), and this was confirmed by the decree of August 24, 1897. (Rec. p. 580.) Obviously, upon the face of the record, therefore, the will had not been defeated, and the first condition necessary to entitle Colonel Ingersoll to his fee had not been satisfied, and it was so decided by the Supreme Court of Montana in the suit upon the contract brought there. (Rec. p. 872.)

The appellant argues with much warmth that this conclusion should not be accepted, that while a decree was entered allowing the will this was a mere form, that Colonel Ingersoll made no compromise, and that the result actually obtained was more than the full equivalent of a defeat of the will and therefore constituted a substantial performance of the contract.

The argument of the appellant would be entitled to much consideration if the issue before the Court was whether Colonel Ingersoll became entitled to any compensation for his services. The defendants have never denied that as their counsel he gave valuable and loyal service. The sole issue, however, is whether he fulfilled the terms of the special contract so as to become entitled to the compensation therein provided. The appellant has consistently refused to base her claim upon a determination of the fair value of the services rendered, and

has insisted on claiming a sum payable only upon fulfilment of express conditions.

The special contract provided that Colonel Ingersoll was only to receive his fee "in case the will is defeated." The agreement of April 28, 1893, shows the meaning to be put upon those words. That instrument was drawn or approved by Colonel Ingersoll. Section V of that agreement (Rec. p. 603) provided that "In case said will is defeated, and said first parties obtain said estate or any part thereof" by assignment from or agreement with any heir, the agreement shall be considered as in full force "as though the parties of the first part procured such estate under and by virtue of the terms and conditions of said will." Section VII of the same agreement provided that "if said will be probated the judgment and decree probating said will" should be on the terms of the agreement. The two alternatives are clearly presented; on the one hand defeat of the will, meaning a decree refusing probate and distributing the estate as intestate property, although by collateral agreement all of it might go to the proponent of the will; on the other hand probate of the will, although by the compromise agreement the estate in that case was to be distributed in part to the contestants.

The use of the same phrase "in case the will is defeated" in two instruments both drawn or approved by Colonel Ingersoll is significant. The compromise agreement amounts to a construction of the phrase by the parties themselves. Certainly there is no reasonable basis for giving the words a different meaning in the one instrument from that which is put upon them in the other. The compromise agreement explicitly shows that a defeat of the will meant a decree of disallowance, however the property might be distributed. The same words must therefore mean the same thing in the letter of August 17, 1891.

Although the final decree was for probate of the will and although this was a result which the agreement of April 28, 1893, put in antithesis to defeat of the will, yet

the appellant declares that there was a defeat, because there was no compromise and a more favorable result was obtained. The reasons thus urged cannot be maintained.

It is no criticism on Colonel Ingersoll's loyalty or on his ability to declare emphatically that there was a compromise and that he intended to effect a compromise. The agreement of April 28, 1893, which terminated all controversy between the proponent of the will and Colonel Ingersoll's clients was in its every provision a compromise and was expressly declared to be such.

The situation of the parties was this: if the will was allowed the representatives of John A. Davis became entitled to the whole estate; if the will was disallowed they became entitled to one-eleventh, the contestants to three and a half elevenths, and other next of kin to six and a half elevenths. The agreement made ensured the representatives of John A. Davis two-elevenths in any event, reduced the share of the contestants to two and a half elevenths if the will was disallowed, and provided that if the will was allowed the two parties to the agreement should share equally in all above five and one-half elevenths (made up of two-elevenths to the proponents and three and a half elevenths to the contestants). All negotiations with the other next of kin were to be for joint benefit. (Rec. pp. 598 *et seq.*)

Whether the agreement is considered with reference to its effect on the interest of the proponents or of the contestants it is clear that it was a compromise. The proponents gave up a little more than half of what they would be entitled to if ultimately successful in the litigation. The contestants acquired a chance of gaining more than they could get by a successful contest, but took the risk of losing something in the event of a successful contest by others. The essence of the whole arrangement was that the contestants joined hands with the proponents of the will and made common cause against all the other next of kin.

Not only was the agreement by its purpose and effect

a compromise, but the parties expressly declared that in making the agreement it was their intention to effect a compromise.

The agreement in its last recital (Rec. p. 601) declared that

"All of the parties hereto are desirous of settling and compromising the said action, proceedings and contests, and desire to act conjointly in said compromise and in the distribution of said estate."

Section XIV of the Agreement (Rec. p. 606) provided:

"It is mutually agreed that these presents are made, in, with, and for the purpose of settlement and compromise of said action, proceedings and contest," . . .

The argument that there was not a compromise and that the will was defeated, because the contestants achieved a result more beneficial than a defeat of the will, is equally fallacious. Not only was the effect of the agreement different from a defeat of the will, but legally speaking the two things were not commensurable. Had the contest been carried to a conclusion and the will been disallowed, the contestants would have become entitled to their fixed shares as next of kin. By making the agreement of April 28, 1893, the contestants gave up the right to reach this result and gave up the right to receive their full shares in intestacy if the will was disallowed in consequence of some other contest. They acquired a chance to make a greater gain at the expense of a risk of loss. Under the agreement of April 28, 1893, the only way in which the contestants could gain as compared with the result of a disallowance of the will was by having the will enforced as valid against all the other next of kin. Unless by successfully meeting other contests or by buying up the interests of other contestants the will could be made operative these defendants must lose. The agreement did indeed give them the chance to make this gain, but to get it they had to take a corresponding risk and the

ultimate result depended on what could be done w
the other next of kin. The fact that the dealings w
the other next of kin turned out favorably shows nothi
as to whether the risk was a fair one to take. Certai
it does not make it possible to say that in making t
agreement the contestants achieved a result more ben
ficial than a disallowance of the will.

The result reached in making the agreement of Ap
28, 1893, is the only result that can be considered in weig
ing the appellant's argument that there has been a su
stantial performance of the condition. When that agre
ment was executed the contests of Maria Cummings a
Henry A. Root were at an end. Those contestants
longer had a right to dispute the validity of the will. N
further services could be rendered in carrying on tho
contests. The work for which the special fee was agre
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But the result then reached clearly was not a substanti
equivalent of a defeat of the will. It still remained unce
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the representatives of John A. Davis later profited at th
expense of the other next of kin by preventing the wi
from being disallowed, but such negotiations were n
part of their contest over the will. If the outcome of th
final negotiations is to be considered the anomalous con
clusion follows that had one of the other next of kin suc
cessfully contested the will and obtained its disallowanc
the will would not have been "defeated" so far as con
cerned Colonel Ingersoll's right to his fee since the resul
to these defendants would have been more unfavorabl
than in case of its allowance.

Using either the actual results reached or the nature of the services rendered by Colonel Ingersoll as a test, the conclusion must alike be that there was not a defeat of the will as stipulated. The results and the services are too dissimilar from those contracted for.

Had the will been defeated by a judgment of disallowance the property would have been distributed as intestate property, and the contestants would have become indisputably entitled to 350/1100. Instead, by the compromise agreement the property was to be distributed under the will, and the contestants were to get only 250/1100 and as much more, if any, as they might be able to secure by bargaining with the other next of kin.

Had a judgment disallowing the will been obtained John A. Davis or those claiming under him would have been entitled to one-eleventh only of the estate. Instead, those claiming under John A. Davis became entitled to a minimum of two-elevenths, in any event, and to as much more as they might secure by bargaining with the other next of kin; in the final event they received 365 1/2 1100.

Had the will been disallowed there would have been no ancillary probate in Massachusetts. The property then would have been disposed of as intestate property, and these contestants would have had a direct claim to share in it, if the Massachusetts Court elected to make a distribution. Instead, the will was allowed in Massachusetts and these contestants can share in the property there only by enforcing their contract rights under the compromise agreement.

The service for which Colonel Ingersoll was retained was to contest the will. The condition on which his stipulated fee depended was a defeat of the will. After the first trial the only way in which the will could legally be defeated was by a second trial and a verdict favorable to the contestant or by the proponent withdrawing the will. What actually followed was that the contestants were bought off by the proponent of the will, and then in con-

junction with him bought off or otherwise defeated the remaining possible contestants.

This result may have been more or less desirable than an actual defeat. In point of fact it turned out more desirable, but at the expense of an initial risk of loss. Whatever the result it was not finally brought about by a contest ending in a defeat of the will in form or in substance.

The nature of Colonel Ingersoll's reputation, the reasons that would induce the defendants to agree upon a fee of exceptional amount, are matters of judicial knowledge. Whether his supremacy as an advocate extended also to the field of negotiation in which the favorable result was finally reached, is wholly conjectural. Whether he in fact conducted the negotiations does not appear. The correspondence between him and Root while the negotiations were pending indicates that he did not conduct, but merely approved those negotiations. In the absence of allegations and proof it is fair to assume that the part he played was not that of leader, as it had been in the actual litigation.

The fundamental difficulty in the appellant's position and in the view taken by the Circuit Court is the attempt to convert the facts into a performance of a special contract, and the satisfaction of an express condition, when in reality the facts show a situation wholly different from that to which the special contract was made applicable. It is perfectly apparent that the parties to the letter of August 17, 1891, had not in contemplation any such event as took place. They dealt with two alternatives, — defeat of the will, by which they obviously meant a decree of disallowance, and allowance of the will. In the former event Colonel Ingersoll was to receive the stipulated fee; in the latter event he was to receive only his disbursements. The contingency of a settlement beneficial to the contestants was not dealt with.

The Judge of the Circuit Court recognized that in making their contract the parties did not anticipate "the

particular form of result by which the will in this case was defeated." (Rec. p. 89.) But apparently he deemed it possible to supply a contract which should cover this contingency. He declared that in substance the will was defeated because the settlement was advantageous. The settlement might, of course, have taken the form of the payment of a lump sum. To undertake to say at what point a settlement was sufficiently advantageous to constitute for the purposes of the contract a substantial defeat of the will, especially when the proponent by the settlement obtained got a very great advantage over an actual defeat, is not to interpret the existing contract, but to formulate a new contract. It is possible that the parties might have agreed on the payment of the same fee in the event that such a settlement were made. It is equally possible that there might have been cogent reasons for not doing so. The Circuit Court had no means of determining, and this Court has no means of determining, the question. Nor does any requirement of abstract justice make such a determination necessary, for the plaintiff had the option of seeking the recovery of a fair compensation if the special contract was inapplicable.

There is no principle of law that authorizes a Court to reconstruct a contract and insert terms to meet contingencies which the parties have omitted to consider. The law may well imply a promise to pay for services rendered their reasonable worth, although the services were performed under a special contract which has not been fully performed: such a course is indeed of every-day occurrence. The law cannot imply a promise to pay for services performed a compensation expressly agreed upon only for services that have not been performed.

The appellant in substance asks the Court to say that because Colonel Ingersoll rendered beneficial services he shall receive the fee agreed upon for the performance of different services leading to a different result. To adopt the appellant's argument the Court must say that an agreement avowedly made as a compromise, and in sub-

stance and effect undeniably a compromise, is a defeat of the will, because by negotiations conducted after the contestants had abandoned their right further to contest, they succeeded at the expense of other next of kin in securing a share of the estate greater than they would have received in case of intestacy, instead of a less share as might well have resulted from the agreement. No principle and no authority can be adduced justifying such an interference with the rights of the contracting parties.

III

THE DEFENDANTS DID NOT "GET THEIR SHARES" WITHIN THE MEANING OF THE CONTRACT BEFORE THE SUIT WAS BROUGHT.

Obviously, "their shares" meant the shares to which they would be entitled in case of intestacy. The defendants never became entitled to shares as distributees of an intestate estate. They acquired by their compromise agreement a right to a certain part of a testate estate. The result is the same as if the compromise agreement had given them the right to a fixed sum of money. They were bought off for a specified consideration. The consideration happened to be the transfer to them of specific undivided interests in what would be received by the residuary legatee under the will. But, in determining the application of the contract to the facts, the situation is the same as if any other consideration, equal in value to what the contestants would have received in case of intestacy, had been paid.

But, even if the property to be received by the defendants from the result of the compromise can be deemed to satisfy the description of "their shares," still the condition has not been performed, because the defendants did not "get" their shares and have not yet got their shares.

Three possible interpretations of the words "get their shares," used in the agreement with Colonel Ingersoll, may be suggested: (1) that the defendants "get their

shares" when by final adjudication they become entitled to their shares; (2) that they "get their shares" when they actually come into possession of property, part of their shares, sufficient to pay Colonel Ingersoll's fee; (3) that they "get their shares" upon a final settlement and distribution of the estate of Andrew J. Davis.

The first interpretation suggested gives no effect to the words "get their shares." If the will was defeated, the defendants would necessarily get their shares in the sense of having a final adjudication establishing their rights to their shares, unless another will was propounded. It is not conceivable that, if in making the agreement there had been in mind the contingency of a second will being propounded which the defendants must contest, it would have been dealt with in such a casual fashion.

The second interpretation of the words is that on which the appellant relies. It does violence to the language used. If in the phrase "get their shares" the word "get" means coming into actual possession, there is no justification for saying that coming into actual possession of a part of their shares is sufficient. There is no ground for cutting down the word "shares" so as to mean fractions of shares.

The third interpretation is the only one which gives effect to the language used, and does no violence to the natural meaning of the words. "Get their shares" naturally means to come into actual possession of their entire shares. The only objection to this interpretation arises from reading the agreement in the light of subsequent events. It is objected that the interpretation is unreasonable because it imposed on Colonel Ingersoll the necessity of awaiting a final distribution, and such distribution has not even yet been made. But the parties to the agreement, when it was made, had no reason to anticipate any such excessive delay in a final settlement of the estate, if the will was defeated. It was perfectly reasonable for them at that time to contemplate an early distribution, and for Colonel Ingersoll to agree that his fee should be payable when the distribution was made.

Even if the second suggested interpretation is adopted it must at least be shown that the defendants have, by final decree, become definitely entitled to the full shares that they would take upon a distribution of the estate as intestate property, as well as that they have actually received an amount sufficient to pay this claim. But in point of fact it is not shown that the defendants have become so entitled, for as to the property in Massachusetts, which is now in question, there has been no decree of any court establishing the rights of the parties or directing how the property shall be distributed.

IV

THE CONDITIONS NOT HAVING BEEN FULFILLED, THE APPELLANT CANNOT RECOVER.

The payment of a fee of one hundred thousand dollars was contingent upon defeat of the will and the contestants receiving their shares. Neither condition has been performed. Showing neither satisfaction nor a waiver of these conditions, the plaintiff cannot recover. The law is clearly settled that, to recover upon the express contract, performance of the conditions must be shown. It is not enough to show that the defendants have benefited, even to the full extent that the contract anticipated, if in fact the contract has not been performed.

The Supreme Court of Montana reached a conclusion adverse to the appellant on substantially the same ground above set forth. The opinion of that court was criticised by the judge of the Circuit Court in this case as "travelling in a circle." That criticism is wholly unfounded. The Supreme Court of Montana held that the allegations of the complainant before it, substantially the same as the bill of complaint here, failed to show performance of the special contract because the services performed were not the services contracted for, and the result reached was not the result contemplated by the contract. It was not neces-

sary for the court to consider whether the departure from the original contract for Colonel Ingersoll's services was by mutual agreement or not, because whatever the cause, such departure prevented performance of that contract. It was not alleged in the bill and was not shown in evidence that any new contract was made by which the hundred thousand dollar fee became payable for services other than those rendered in a successful contest of the will.

The judge of the Circuit Court was apparently of opinion that the services contemplated by the special contract were any services as a result of which these defendants should receive a part of the estate of Andrew J. Davis; he repudiated the suggestion that to determine what constituted a defeat of the will the contract was to be read in the light of the probate practice in Montana governing the contests over wills, and charged the Supreme Court of Montana with injecting into the contract a meaning not warranted by the language used. (Rec. pp. 85, 88.) It is difficult to follow this criticism. The special contract was expressly "for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will." The agreement was that the fee for such services rendered and to be rendered "in case the will is defeated," shall be one hundred thousand dollars. The learned judge of the Circuit Court interpreted this language as if it provided merely that in case the will was defeated, a sum of money should be paid to Colonel Ingersoll, making no mention of the services for which it was to be paid. The plain reading of the contract is that the fee is to be paid for services in a successful contest of the will; it is the reward for services in contesting the allowance of the will, payable in case the contest is successful. The proviso that the fee shall be payable only "in case the will is defeated" seems clearly in its natural meaning to signify that the defeat of the will is used as marking the successful termination of the contest, and that it is a defeat of the will as a termination of the contest that determined the right to the fee. The contest of a

will, at least in Montana, where there are express provisions of statute governing the procedure in will contests (Montana Code of Civ. Proc. §§ 2340–2346), does not mean the settlement generally of the estate. Services in a particular "contest" do not mean services generally in reaching a settlement and making a distribution. The service contracted for was a contest of the will. The service performed by which these defendants benefited was a skilful succession of bargains by which the contestants withdrew their opposition and received in return a share of the estate. Had Colonel Ingersoll become convinced that further opposition to the probate of the will was hopeless and agreed that it should be allowed and his clients receive from the estate an eleventh or any other share, every argument adduced by the appellant and by the judge of the Circuit Court would logically apply to show that the will had been defeated, the shares received, and the fee earned.

The distinctions insisted on are not mere matters of form. The contract provided a liberal fee for particular services if successfully rendered. In view of Colonel Ingersoll's great reputation for certain special gifts, the reason for the contestants' willingness to pay the fee is sufficiently apparent. There is no reason for supposing that they were prepared to pay Colonel Ingersoll the same amount for other services which did not call for the exercise of his peculiar powers. The fact that by a different course in which Colonel Ingersoll played some part, but so far as appears by no means the sole part, a result was eventually reached as favorable as a defeat of the will, or even more favorable, is no basis for implying an agreement to pay the amount for the services performed. The situation is the common one of a man who, originally acting under a special contract, has performed valuable services, but not the same services contracted for; the legal conclusion should be that he is entitled to compensation for his services according to their value, but not according to the special agreement.

PART FIFTH

The Bill should be dismissed for Want of Necessary Parties.

SYNOPSIS OF ARGUMENT

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I. If the bill can be maintained to reach the property in Massachusetts, the widow and children of John A. Davis and an ancillary administrator of his estate are necessary parties 151

II. Ellen S. Cornue and the executor of the will of Sarah Maria Cummings are necessary parties 154

I

IF THE BILL CAN BE MAINTAINED TO REACH THE PROPERTY IN MASSACHUSETTS, THE WIDOW AND CHILDREN OF JOHN A. DAVIS AND AN ANCILLARY ADMINISTRATOR OF HIS ESTATE ARE NECESSARY PARTIES.

The bill is founded on the assertion that there is property of the defendants in Massachusetts on which the appellant has a lien. In support of this assertion it is shown that a will of Andrew J. Davis has been admitted to Probate in Massachusetts, leaving all the property to John A. Davis; that John A. Davis died intestate after Andrew J. Davis, and that after John A. Davis's death his widow, children, and administrator appointed in Montana made the compromise agreements by which they undertook to assign a portion of the estate of Andrew J. Davis to these defendants.

There has been no decree in the Massachusetts Probate Court for the distribution of any part of the estate. The decree made in Montana in pursuance of the compromise agreement is of no effect in Massachusetts. The fund now in the control of the Massachusetts Probate Court must

be distributed by that Court in accordance with the will or else be transmitted to Montana for distribution. If it is transmitted to Montana for distribution there, the only relation of these defendants to the property is the contractual rights acquired by them under the compromise agreement. The only possible basis for asking relief in this suit is on the ground that this contractual right can be enforced by this Court for the benefit of the appellant who claims a lien on such interest as the defendants have thereunder in the property.

In seeking relief in the present suit, the appellant in fact asked the Court to determine that under the compromise agreement the defendants were entitled to receive a certain share of property which by the will belonged to John A. Davis. The appellant must rely wholly on the compromise agreement, because the decree of the Montana Court for distribution pursuant to the agreement is of no effect as to the property in Massachusetts. The appellant's claim, therefore, is that because the widow and children of John A. Davis, who in the administration of the estate in Montana were the persons beneficially interested, had assigned to the defendants a part of what they would receive, the appellant can have the assignment executed by the Court as to property that may come to the estate of John A. Davis in Massachusetts.

The interest of the widow and children of John A. Davis, both in law and in fact, is derivative only. By inheritance they had no title to the share of their intestate John A. Davis when it was distributed. The final decree entered on August 24, 1897, for the settlement of the Andrew J. Davis estate fully recognized this position, for by this decree the interest of John A. Davis's estate was expressly vested, as of right it should be, in the administrator of his estate. (Rec. p. 580.) The compromise agreement, therefore, so far as the widow and children were concerned, was not and could not be an assignment of property to which they had a direct right.

It was an assignment of what they might become entitled to receive in the distribution of the estate of John A. Davis, out of what the administrator of the estate might receive from the estate of Andrew J. Davis pursuant to the will.

So far as the compromise agreement was the contract of the next of kin, it cannot be enforced in this suit without joining them as parties. The right of the widow and next of kin was only a chose in action.

Hayward v. *Hayward*, 20 Pick. 517.
Wheeler v. *Bowen*, 20 Pick. 563.
Strong v. *Smith*, 1 Met. 476.
Mechanics Sav. Bk. v. *Waite*, 150 Mass. 234.

The right assigned could be enforced only through the assignors. The assignment did not undertake to transfer the whole interest of the widow and next of kin. The assignee could not, therefore, require a separate payment, but must take satisfaction through the assignors.

Mandeville v. *Welch*, 5 Wheat. 277, 288, 289.

The assignment being only of a part of the chose in action, the only rights acquired were dependent on the contract. There was no completed transfer.

In Re Earl of Lucan, L. R. 45 Ch. D. 470.

The determination of the rights under the contract, and the agreement of payment in favor of the assignees of part of the amount, requires, on the most liberal views of equity pleading, the presence of the assignors.

Hovey v. *Elliott*, 118 N. Y. 124.

If, therefore, the appellant relies on the compromise agreement as a contract and assignment by the widow and next of kin, assuming that they could make any assignment that would be of effect for the purposes of this suit, they were necessary parties.

In point of law an assignment could be effective only if made by the administrator of the estate of John A. Davis

with the defendants. The concurrence of all persons beneficially interested was sufficient to warrant the execution of the agreement by the administrator of the estate of John A. Davis; but the act of the administrator, though fully authorized, was inoperative as far as the property in Massachusetts was concerned. No act done by the administrator of the estate appointed in Montana could have extra-territorial effect. As to the disposition of estate in Massachusetts, authority could be derived only from an administrator in Massachusetts. The appellant cannot, therefore, derive title from the compromise agreement, or treat it as a contract and assignment by the administrator of the estate of John A. Davis.

If the decree of the Circuit Court should go into effect, it would require the administrator with the will annexed of the estate of Andrew J. Davis in Massachusetts to make a payment to the persons claiming title only as widow and next of kin of John A. Davis, without any settlement in Massachusetts of the estate of John A. Davis. The decree would be no protection against a claim by a creditor in Massachusetts of John A. Davis. If the estate of Andrew J. Davis in Massachusetts is to be distributed in Massachusetts, then only by the appointment in Massachusetts of an ancillary administrator of the estate of John A. Davis can a sufficient discharge be given, and consequently to the maintenance of a suit seeking to establish a right to a part of the property, such an administrator is a necessary party.

II

ELLEN S. CORNUE AND THE EXECUTOR OF THE WILL OF SARAH MARIA CUMMINGS ARE NECESSARY PARTIES.

Ellen S. Cornue is one of the persons who, in case of intestacy, was entitled to a share of Andrew J. Davis's estate, and one of the persons who by the compromise

agreement became entitled to a share of the five hundred and fifteen and a half eleven-hundredths of the estate payable to Root and his associates.

The only ground on which any lien can be charged upon her interest in the estate is that by an instrument dated September 25, 1890, she purported to assign to Root one-third of her interest to indemnify him for the expenses he might incur in contesting the will, and that Root created a lien on this one-third in favor of the plaintiff.

The instrument of September 25, 1890, purported to transfer to Root only an undivided share in the rights of Ellen S. Cornue. It was, therefore, only an attempted assignment of a part of a chose in action, and the right assigned, as already shown, could not be enforced without the presence as a party of the assignor. In a suit by the plaintiff seeking to enforce a claim upon the right so assigned, clearly Ellen S. Cornue is an equally necessary party.

By the settlement actually made Ellen S. Cornue did not become entitled to a defined part of the five hundred and fifteen and a half eleven-hundredths of the estate allotted to Root and his associates. The compromise agreement provided in Article II (Rec. p. 601) for distribution to Root and his associates in such shares as they should direct. The decree (Rec. p. 46) provided for a distribution to Root and his associates jointly. There is nothing in the record to show in what proportions Root and his associates are to share as between themselves, and nothing, therefore, to show what fractional interest of the estate is to go to Ellen S. Cornue. In any attempt to control the distribution of the property she is a necessary party in order to establish what part she is entitled to, and what part can be subjected to a lien created by Root or by Coram, or by both.

Ellen S. Cornue assigned to Root, and, therefore, authorized him to receive, only one-third of her total interest in the Davis estate. A large part of the estate has already been distributed. There is nothing in the record to show

whether she has received two-thirds of her share, whatever that share may be, of five hundred and fifteen and one-half eleven-hundredths of the part of the estate already distributed. If she has received less than two-thirds, and Root more than one-third, of her share in the part distributed, she is clearly entitled to receive as against Root and persons claiming under him from the fund in Massachusetts, if that fund is to be distributed according to the compromise agreement, enough to make up past overpayments to him. The Court cannot, therefore, in her absence decree that Root or the plaintiff claiming under him shall receive one-third or any other part of her share.

For each of these reasons Ellen S. Cornue is a necessary party, and the suit cannot be maintained in her absence, and for the same reasons the executor of the will of Sarah Maria Cummings was a necessary party, and the suit cannot be maintained, since the Court has dismissed him from the case.

PART SIXTH

The Circuit Court of Appeals rightly ordered the Bill to be dismissed.

SYNOPSIS OF ARGUMENT

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I. Unless there was property within this jurisdiction subject to the lien claimed, the suit must necessarily be dismissed 157

II. There is no ground for retaining the suit if the appellant cannot recover on the special contract 159

I

UNLESS THERE WAS PROPERTY WITHIN THE JURISDICTION SUBJECT TO THE LIEN CLAIMED, THE SUIT MUST NECESSARILY BE DISMISSED.

The only ground for jurisdiction in equity was the alleged lien upon property within the jurisdiction of the Court. The claim upon which the appellant sought to recover was a simple contract debt. A proceeding to obtain payment of such a claim was cognizable by the Circuit Court in equity only by reason of the alleged lien and the prayer for relief by way of foreclosing the lien.

In *Wright* v. *Ellison*, 1 Wall. 16, the plaintiff brought an action for a similar purpose. The Court held he was not entitled to a lien, and on that ground dismissed the bill as not one of equity jurisdiction. The Court said:

"We regard the case as a proper one for compensation, and in an action at law the complainant could hardly fail to recover.

"But this is a suit in equity. The rules of equity are as fixed as those of law, and this Court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases, the adverse party has a constitutional right to a trial by jury. The objection is one, which though not raised by

the pleadings nor suggested by counsel, this Court is bound to recognize and enforce." (Page 22.)

In *Trist* v. *Child*, 21 Wall. 441, the same result was reached. The Court there said:

"Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. (*Wright* v. *Ellison*, 1 Wall. 16.) If there was no lien, there was no jurisdiction in equity." (P. 447.)

Unless, therefore, the appellant succeeds in establishing the existence of a lien the suit must be dismissed even if the Court shall be of opinion that on all other points the respondents are in error. The jurisdiction in equity of the Circuit Court is strictly limited and does not permit the Court to give any relief unless the right on which the plaintiff relied as justifying a resort to equity is sustained.

It is necessary, moreover, for the Court to find not only that a lien was created, but that there was property in Massachusetts to which the lien attached. If the Court should be of opinion that a lien was created, or existed by Montana Statute, and that such lien attached to the shares which by the final decree in Montana were directed to be paid to these defendants, it would still be necessary to find in Massachusetts property so situated that the lien attached there also.

It has been shown that there is no property of the defendants in Massachusetts to which a lien can attach, because their only claim is under a contract not yet executed. The appellant is really seeking to enforce specifically the compromise agreement as to the property in Massachusetts, and to attach a lien to what the defendants upon the enforcement of that contract might get. Such a suit would not be sustainable unless by statutory pro-

vision, even if brought directly against the contracting parties.

Hart v. *Sansom*, 110 U. S. 51.

Still less can a suit be maintained by a creditor of one party to the contract to enforce it specifically against the other.

Even if the present defendants were directly entitled, as in case the estate was being distributed as intestate property, there would be no property on which the Circuit Court could act, because, as has been shown, the Probate Court in Massachusetts has full jurisdiction to direct all the property to be transmitted to Montana, and if it did so there would then be nothing left in Massachusetts to sustain the jurisdiction of the Circuit Court. Certainly, the provision of the Revised Statutes, sec. 738, was not intended to confer upon the Circuit Court jurisdiction to entertain cases for the recovery of mere money demands on the ground of a lien, when there was no property which the Circuit Court could lay hold of free from the liability of the property being lawfully removed from its jurisdiction during the pendency of the suit.

II

THERE IS NO GROUND FOR RETAINING THE SUIT IF THE APPELLANT CANNOT RECOVER ON THE SPECIAL CONTRACT.

If the Court should be of opinion that the appellant is not entitled to recover on the special contract then the bill should be dismissed, whatever opinion the Court may hold as to other questions involved. The case cannot properly be retained for other relief.

The dissenting Judge in the Circuit Court of Appeals appears to have thought that even if that Court were right in holding the Montana judgment a bar to any further claim on the special contract, yet the suit should

be retained, and relief granted as on a *quantum meruit*. Such a course is not in fact required by any considerations of justice and cannot be justified in point of law.

In dismissing the bill the Court is not treating the appellant with any undue severity. The only ground suggested for following a different course is that there were meritorious services performed by Colonel Ingersoll for which compensation should be recovered, and that the appellant should not be deprived of this opportunity to recover such compensation. If the appellant loses anything by not being permitted to recast this suit in an attempt to enforce payment on a *quantum meruit* the fault is hers.

The original action on the present claim was brought in Montana in 1901. The objection to the right to recover on the special contract was taken at the trial, and was sustained on appeal by the Supreme Court of Montana. This appellant by whom the Montana suit had originally been brought had notice, therefore, from the first that the defendants denied her right to recover on the special contract. Nevertheless, instead of pursuing further the remedy open to her in Montana by renewing the suit of the ancillary administrator there, and seeking reasonable compensation, she elected to try her fortune in a different jurisdiction before another tribunal. When the present suit was brought in Massachusetts the appellant was fully advised of the proceedings in Montana, and recited them in her bill. She deliberately renewed the litigation on the very point that the Supreme Court of Montana had decided. If in doing so she was ill-advised it was not a case of mistake or surprise, but a deliberate choice between submitting to the decision of the Montana Court, or seeking to get another Court to take a different view. The appellant has no right now to complain that if the suit is dismissed she may lose all remedy. She has had her opportunity to correct the mistake made in Montana in seeking to enforce the special contract, and has refused to accept the opportunity. To permit her now after a second defeat to protract this suit in order that she

may retrace her steps, instead of leaving her to such remedy as may exist in an independent proceeding for recovery on a *quantum meruit*, is an unjustifiable hardship on the defendants.

Even if the Court should desire to extend to the appellant a further opportunity to recover in this suit by allowing the bill to be retained and amended so as to ask for a recovery on a *quantum meruit*, such a course cannot be followed.

The bill is purely for recovery on a legal cause of action. If converted into a proceeding to recover reasonable compensation instead of the stipulated amount the cause of action would remain a strictly legal demand. There is no ground for jurisdiction in equity except the enforcement of the alleged lien.

The Circuit Court sustained the bill on the ground that the letter of August 17, 1891, created an equitable lien. Assuming that the letter could have that effect, the lien so created was to secure the special compensation provided for in the letter. The letter was a special contract by which the writers agreed upon the conditions specified to pay a certain sum, and on the theory adopted by the Circuit Court gave security for the payment. If the special contract fails it fails wholly. There was not an agreement for a contingent fee and an agreement giving a lien for whatever compensation Colonel Ingersoll became entitled to. If there was a lien it was to secure the contingent fee and that only; indeed, the fact that the fee was contingent is one of the arguments used to show that a lien was intended. Unless, therefore, the appellant is entitled to recover the contingent fee there can be no question of enforcing any lien.

If the only amendment that could be made would cut off the only ground for jurisdiction in equity then the bill would have to be dismissed as soon as the amendment was made. A plaintiff seeking to enforce a strictly legal claim and showing no ground for coming into equity except to enforce an equitable remedy cannot, at any rate

in the Circuit Court of the United States, if he fails to establish his right to the equitable remedy, have the bill retained for decision on the legal claim and for relief at law.

In *Hollins* v. *Brierfield C. & I. Co.*, 150 U. S. 371, the plaintiff, a simple contract creditor, brought his suit in equity alleging a lien on the property of the defendant corporation. This Court held that there was no lien and therefore no jurisdiction in equity, and ordered the bill to be dismissed on this ground.

In *Lewis* v. *Cocks*, 23 Wall. 466, the bill, as here, contained allegations which if supported would give grounds for jurisdiction in equity. The plaintiff failing to prove the facts alleged, this Court said the bill ought to be dismissed.

In *Buzard* v. *Houston*, 119 U. S. 347, the plaintiff sought to maintain jurisdiction in equity by asking for discovery to support his case. The answer disclosed nothing in support of the plaintiff's claim. This Court held that the bill should be dismissed.

Wright v. *Ellison*, 1 Wall. 16, and *Trist* v. *Child*, 21 Wall. 441, were both cases in which suit was brought to enforce recovery by foreclosure of an alleged lien. In both the Court decided that there was no lien and declared that on that account the will must be dismissed.

In *Dakin* v. *Union Pacific Railway Co.*, 5 Fed. R. 665, 666, Mr. Justice Blatchford, afterwards a member of this Court, stated the rule to be that:

> "As the entire ground for equitable relief fails, the bill cannot be retained to recover damages."

In the present case no ground for equitable relief or for jurisdiction in equity can be suggested except the existence of a lien and its foreclosure. When, therefore, it appears that no lien exists the bill must necessarily be dismissed, even if legal relief could be granted without amendment; *a fortiori*, it cannot be retained to permit an amendment having no object except to introduce allegations of fact intended to establish a right to purely legal relief.

PART SEVENTH

If the Plaintiff was entitled to maintain the Suit the Decree of the Circuit Court was Erroneous.

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   1. Root and Coram are not shown to be entitled to as much as four hundred and fifteen and one-half eleven-hundredths of the estate 163
   2. It does not appear that Root had authority to create a lien on the interests assigned to him and Wells jointly 169
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   1. The Circuit Court had no authority to interfere with the administration of the estate by the Probate Court for Suffolk County 170
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I

THE LIEN, IF ANY EXISTED, DID NOT EXTEND TO FOUR HUNDRED AND FIFTEEN AND ONE-HALF ELEVEN-HUNDREDTHS OF THE ESTATE.

1. *Root and Coram are not shown to be entitled to as much as four hundred and fifteen and one-half eleven-hundredths of the estate.*

The Circuit Court by its decree declared Root and Coram entitled to four hundred and fifteen and one half eleven-hundredths of the property in Massachusetts, and

adjudged that this proportion of the estate was subject to a lien in the plaintiff's favor, and should be applied to the satisfaction of her claim. This finding and the adjudication dependent on it are not supported by any proof.

The bill alleged (Par. 23, Rec. p. 29) that Root and the four heirs associated with him and Coram were entitled "by virtue of" the decree confirming the compromise to receive directly and indirectly five hundred and fifteen and one-half eleven-hundredths, and that all of this except one hundred eleven-hundredths, made up of thirty-three and one-third eleven-hundredths, (alleged to be two-thirds of the interest of Ellen S. Cornue,) and sixty-six and two-thirds eleven-hundredths, (alleged to be two-thirds of the interest of Sarah Maria Cummings,) was subject to the lien. The answer (Rec. p. 112) did not admit that the shares of Mrs. Cornue and Mrs. Cummings were respectively fifty eleven-hundredths and one hundred eleven-hundredths, or that Root and Coram were entitled to four hundred and fifteen and one-half eleven-hundredths, and denied all the allegations of the twenty-third paragraph of the bill not expressly admitted. The answer thus directly put in issue the proportion of the estate to which Root and Coram were entitled.

The Court itself recognized that the lien decreed to exist in favor of the plaintiff could apply only to the shares of the estate to which Root and Coram were entitled, and on this ground dismissed from the suit the executor of the will of Mrs. Cummings, and declared Mrs. Cornue and her husband unnecessary parties. It is essential, therefore, to the validity of the decree that it should appear to cover only so much of the property as Root and Coram are directly and indirectly entitled to, and, therefore, that they should be shown to be entitled to four hundred and fifteen and one-half eleven-hundredths of the whole estate.

The only proof contained in the record as to the shares of the estate to which Root and Coram are entitled consists of the compromise agreements and the assignment

from Elizabeth S. Ladd and her husband, and Mary Louise Dunbar, to Coram. The assignment vested in Coram all the interest of his assignors in the estate except what two of them had already assigned to Root, so that they may be disregarded. (Rec. p. 659.)

Sarah Maria Cummings, as one of the next of kin of Andrew J. Davis, would have been entitled to one hundred eleven-hundredths of his estate, and Ellen S. Cornue, as one of the next of kin, to fifty eleven hundredths. The estate was not distributed as an intestate estate, however, so that these proportions were never effective. The interests of Mrs. Cummings and Mrs. Cornue were not their interests as next of kin in an intestate estate, but the interests acquired by them under the compromise agreement of April 28, 1893, and the final decree of August 24, 1897, giving effect to the completed settlement.

The compromise agreement provided for the immediate distribution of two and one-half elevenths of the estate to the parties of the second part "in such interests to each of said second parties as said second parties may at that time direct," for a distribution through trustees of one-eleventh, and of half of five and one-half elevenths to the second parties "in such interests to each as said second parties at that time direct." (Rec. pp. 601, 602.) The parties of the second part in this agreement were Root, Maria Cummings, Mary Louise Dunbar, Ellen S. Cornue, Joshua G. Cornue, her husband, Elizabeth S. Ladd, and Charles H. Ladd, her husband. There is nothing in this agreement or in any of the subsequent agreements or in any proof submitted to show what the respective shares of any of these parties of the second part were. The subsequent compromise agreements, by which portions of the interest secured by the agreement of April 28, 1893, to the parties of the second part therein were relinquished to others of the next of kin of Andrew J. Davis, assigned such portions equally from the interest of the parties of the first part and from the interest of the

parties of the second part collectively in the original agreement. The final decree giving effect to all of these agreements directed distribution of two hundred and fifty eleven-hundredths to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue, and four hundred and thirty-one eleven-hundredths to Andrew J. Davis and Charles H. Palmer as trustees for the purposes of the trust created by the agreement of April 28, 1893. According to that trust one hundred eleven-hundredths were to be paid by the trustees to Root and his associates, and half of the remaining three hundred and thirty-one eleven-hundredths was also so to be paid over, making an aggregate of two hundred and sixty-five and a half eleven-hundredths. The decree provided nothing, and the agreement creating the trust provided nothing, as to the shares which Root and his associates should take as between themselves.

Obviously, if the defendants have any interest in the property in Massachusetts capable of being reached by this bill, it is an interest of the amount and in the shares provided by the compromise agreement and the final decree in Montana. But it has not been shown what the interest of either Mrs. Cornue or Mr. Cornue or Mrs. Cummings under the agreement and the decree is, and without such showing the decree of the Circuit Court cannot be sustained.

If this defect of proof is to be made good by conjecture, then one or two theories must be adopted, either that the persons named as parties of the second part in the agreement took in equal shares among themselves or that they took in proportion to the shares that they would have taken in case of intestacy.

If the former theory is followed, then Root is entitled to one-seventh in his own right and to one-third of four-sevenths or four twenty-firsts as assignee, from Sarah Maria Cummings, Ellen S. Cornue, Elizabeth S. Ladd,

	Share in Intestacy	Share under the decree upon a division proportionate to share in intestate		
		From direct distribution of two hundred and fifty eleven-hundredths	To be received from the trustees from two hundred and sixty-five and a half eleven-hundredths	Total
Henry A. Root in his own right	1/7 of 350/1100 or 50/1100	1/7 of 250/1100 or 35 5/7/1100	1/7 of 365 1/2/1100 or 37 13/14/1100	73 9/14/1100
Henry A. Root as assignee jointly with Gideon Wells of 1/3 of 300/1100	1/3 of 6/7 of 350/1100 or 100/1100	1/3 of 6/7 of 250/1100 or 71 3/7/1100	1/3 of 6/7 of 265 1/2/1100 or 75 12/14/1100	147 4/14/1100
Sarah Maria Cummings 2/7 less 1/3 assigned	2/7 less 1/3 assigned or 4/21 of 350/1100 or 66 2/3/1100	4/21 of 250/1100 or 47 13/21/1100	4/21 of 265 1/2/1100 or 50 12/21/1100	98 4/21/1100
Ellen S. Cornue 1/7 less 1/3 assigned	1/7 less 1/3 assigned or 2/21 of 350/1100 or 33 1/3/1100	2/21 of 250/1100 or 23 17/21/1100	2/21 of 2651/2/1100 or 25 6/21/1100	49 2/21/1100
Joseph A. Coram as assignee of Elizabeth S. Ladd 2/7 less 1/3 assigned	2/7 less 1/3 assigned or 4/21 of 350/1100 or 66 2/3/1100	4/21 of 250/1100 or 47 13/21/1100	4/21 of 265 1/2/1100 or 50 12/21/1100	98 4/21/1100
Joseph A. Coram as assignee of Mary Louise Dunbar 1/7 less 1/3 assigned	1/7 less 1/3 assigned or 2/21 of 350/1100 or 33 1/3/1100	2/21 of 250/1100 or 23 17/21/1100	2/21 of 265 1/2/1100 or 25 6/21/1100	49 2/21/1100
	350/1100	250/1100	265 1/2/1100	515 1/2/1100

and Mary Louise Dunbar, under the agreement of September 25, 1890 (Rec. p. 43); and Coram is entitled to one-seventh as assignee of Charles H. Ladd and four twenty-firsts as assignee of Elizabeth S. Ladd and Mary Louise Dunbar, making an aggregate to Root and Coram of fourteen twenty-firsts of the five hundred and fifteen and one-half eleven-hundredths, or three hundred and forty-three and two-thirds eleven-hundredths of the estate, instead of four hundred and fifteen and one-half eleven-hundredths as decreed by the Circuit Court.

If the shares are taken to be proportionate to the shares of the same persons in intestacy, then, as the amount to be received was to take the place of three and one-half shares in intestacy,[1] Root in his own right was entitled to one-seventh, and as assignee to one-third of the remaining six-sevenths, or two-sevenths; Coram was entitled as assignee to two-thirds of three-sevenths, or two-sevenths; Root and Coram together were entitled to an aggregate of five-sevenths of the five hundred and fifteen and one-half eleven-hundredths, or three hundred and sixty-eight and three-fourteenths eleven-hundredths instead of four hundred and fifteen and one-half eleven-hundredths as decreed by the Court. The above table shows the method of division upon this theory.

The theory on which the Circuit Court appears to have proceeded is: first, that Joshua G. Cornue and Charles H. Ladd, although parties to the compromise agreement and named as co-distributees in the decree of the Montana Court, were, in fact, entitled to nothing; and, second, that for some reason only Root and Coram benefited by the excess decreed to Root and his associates above the shares they would have received in a distribution of the estate as intestate property. There is nothing in the record to warrant either assumption.

The decree sets forth that by the assignment dated September 25, 1890, a copy of which is annexed to the

[1] The table on p. 167 shows the division on this plan.

bill of complaint (Rec. p. 43), the four heirs associated with Root "assigned, transferred, and set over one-third of each of their interests in the estate of said decedent to said Henry A. Root." (Rec. p. 947.) Mrs. Cummings and Mrs. Cornue confessedly retained all of their shares that they did not thus set over. These two were entitled in intestacy to one hundred eleven-hundredths and fifty eleven-hundredths, respectively, of the estate. The assignments and this finding of the Court must mean either that each set over one-third of the interest to which she might become entitled when the estate was settled or a share of the estate, whatever she personally might receive, equal to one-third of her share in intestacy. The further finding of the Court that Mrs. Cummings at the final settlement became entitled personally to receive only sixty-six and two-thirds eleven-hundredths and Mrs. Cornue only thirty-three and one-third eleven-hundredths, is not consistent with either construction. No justification for this finding has been suggested. It would be conceivable that the assignment transferred to Root one-third of the combined shares in intestacy of Mrs. Cummings and Mrs. Cornue, irrespective of what they received, but the language is not susceptible of the construction that the assignors retained two-thirds of their shares irrespective of what they might receive, and assigned all else.

2. *It does not appear that Root had authority to create a lien on the interests assigned to him and Wells jointly.*

The Circuit Court assumed that whatever lien held upon Root's personal interest in the estate extended equally to the shares assigned to him and Wells by the agreement dated September 25, 1890. (Rec. p. 43.) That agreement professed to assign to Root and Wells one-third of the share in the estate of each of the assignees, amounting in the aggregate to three hundred eleven-hundredths, in trust to reimburse Root for money expended or to be expended and liabilities assumed or to be assumed in the

contest over the will. The agreement further constituted Root and Wells attorneys to prosecute the claims of the assignors and receive their shares. The agreement conferred no power upon Root to make any disposition of the property assigned except in conjunction with his co-trustee.

Wells continued to act as trustee under this agreement, at least so far as appears, until his death in March, 1898. (Rec. pp. 766, 771.) He was not a party to the agreement of August 17, 1891, with Colonel Ingersoll, which the Circuit Court held created an equitable lien. He never, so far as appears, joined in any act which could create a lien on the property held in trust. No basis, therefore, appears for charging this property with a lien, and the lien, if one exists, can extend only to the individual interest of Root and to such interests as were vested in Coram.

II

THE DECREE OF THE CIRCUIT COURT EXCEEDED ITS JURISDICTION.

The decree entered by the Circuit Court undertook to establish *in rem* the shares to which Root and his associates were entitled, and to make certain orders for the appropriation of these shares to the satisfaction of the plaintiff's claim.

In both particulars the decree was an interference with the jurisdiction of the Probate Court.

1. *The Circuit Court had no authority to interfere with the administration of the estate by the Probate Court for Suffolk County.*

A Court of the United States has jurisdiction to determine controversies between citizens of different States. Even though a State confer exclusive jurisdiction upon a particular State tribunal over a particular class of con-

troversies, the Courts of the United States may exercise this jurisdiction.

A Court of the United States cannot by virtue of its jurisdiction over controversies between citizens of different States interfere with the exercise of its functions by a State Court which has already properly assumed jurisdiction of the same subject matter, except of course so far as the law provides for a removal from the State Court. The powers of a Federal Court are co-ordinate with and not superior to those of a State Court. Under no circumstances can a Federal Court, except by removal, interfere with the custody and administration by a State Court of property over which the State Court has first taken jurisdiction.

The decisions of this Court give full effect to these principles. The right of the Federal Courts to adjudicate controversies of whatever character between citizens of different States has been uniformly upheld.

In *Yonley* v. *Lavender*, 21 Wall. 276, it was held that a non-resident might sue in the Circuit Court of the United States to establish his debt against a decedent, although by State practice the claim should be proved before commissioners.

In *Payne* v. *Hook*, 7 Wall. 425, it was held that a suit might be brought in the Circuit Court to charge an administrator with a fraudulent disposition of the estate, set aside the fraud and recover the plaintiff's distributive share.

This Court has, however, with equal uniformity affirmed the inviolability of the right of a State Court to retain the custody and administration of property over which its jurisdiction has once attached.

In *Yonley* v. *Lavender*, 21 Wall. 276, it was held that while a non-resident could establish his debt by judgment of a Federal Court, he could not, to satisfy the judgment, levy on property which by the law of the State was in the hands of the administrator, and for this reason not subject to levy.

In *Borer* v. *Chapman*, 119 U. S. 587, 600, this Court, after reaffirming the doctrine of *Payne* v. *Hook*, that a non-resident can establish his rights in a Federal Court, said:

"The only qualification in the application of this principle is, that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of the court of a state."

In *Byers* v. *McAuley*, 149 U. S. 608, a suit was brought by a non-resident to establish rights as next of kin. The Circuit Court entered a decree in this suit practically directing the full administration of the property. This Court held that the Circuit Court had erred. Discussing the relative rights of the Federal and State Courts as to the property estate of a deceased person in course of administration this Court said:

"It was not a judgment against the estate, but a decree, binding personally the administrator, and compelling him, subject to the penalties of disobedience of a decree of a court of chancery, to administer the estate according to the orders of the Federal rather than those of the state court which had appointed him." (P. 612.)

Again the Court said as to interference with the administration by the State Court:

"So both by the terms of the final decree, and by the proceedings in the Circuit Court preliminary thereto, it is clear that the question is fairly presented to us as to the power of the Circuit Court of the United States to interfere with the administration of an estate in a state court. Such a question is of importance. No officer appointed by any court should be placed under the stress which rested upon this administrator, and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate." (P. 613.)

The right of the Circuit Court to interfere in any way with the administration by the State Court was denied.

The Court declared that possession of an administrator is possession of the Court by which he is appointed and not to be disturbed; and that the power of the Circuit Court is limited to establishing rights, with power of enforcing them only so far as it can be done without in any way interfering with the administration of the property by the State Court.

2. *The Circuit Court in adjudicating Root's interest in the property exceeded its jurisdiction.*

Assuming that the Circuit Court might have jurisdiction at the instance of one claiming a share in the estate, between whom and the administrator the requisite diversity of citizenship existed, to determine whether such person was entitled to any share, and if so, to what share, its jurisdiction could extend no further. It could not assume charge of the administration of the estate, and it could not determine the rights in the estate of other persons.

In *Byers* v. *McAuley*, 149 U. S. 608, this Court defined the extent of the jurisdiction of the Circuit Court in such cases, as follows:

"Thirdly. The jurisdiction of the Federal Courts is a limited one, depending upon either the existence of a Federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties. There is in the controversies growing out of the settlement of this estate no Federal question; the jurisdiction, therefore, must depend upon diverse citizenship, and can go no further than that diverse citizenship extends. The fact that other parties may be interested in the question involved is no reason for the Federal Courts taking jurisdiction of the controversy between such parties." (P. 618.)

"Our conclusion, therefore, is, that the Federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the State, as between themselves. The state court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In

other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the Circuit Court might entertain jurisdiction in favor of all citizens of other States, to determine and award their shares in the estate. Further than that, it was not at liberty to go." (P. 620.)

No person could bring a suit in the Circuit Court to establish his right to a share of the fund in the hands of the administrator unless between him and the administrator there was diversity of citizenship. The administrator was a citizen of Montana, and could not be sued in a Circuit Court of the United States except by a resident of some other State.

Coal Co. v. *Blatchford*, 11 Wall. 172.

Root was a citizen of Montana (Bill, Rec. p. 1). He could not, therefore, have sued in the Circuit Court to establish his right to a share in the fund in the hands of the administrator. The appellant was equally disqualified from suing in the Circuit Court to establish and recover Root's share in the property. The appellant's only interest in the estate is one derived by assignment from Root and his associates. Her only title, the only basis upon which the Circuit Court awarded relief, is under the alleged equitable assignment by Root and his associates of their rights. In seeking to establish the amount of Root's interest in the property and to secure payment of that amount to herself, she is seeking to enforce a right of Root against the administrator; no title to enforce such right is shown except the alleged lien resting on the equitable assignment.

The statutes of the United States provide that the assignee of a chose in action, subject to exceptions not now important, cannot proceed in the Circuit Court of the United States, if jurisdiction is founded on diversity of citizenship, unless his assignor could have done so. St. 1887, c. 373, sec. 1, 24 Stat. 352, corrected by St. 1888, c. 866, sec. 1, 25 Stat. 433. This limitation, which is the same in

substance as that in the judiciary act of 1789, applies as well to persons claiming under an equitable assignment as to persons claiming under a legal assignment. Chief Justice Marshall in *Sere* v. *Pitot*, 6 Cranch, 333, 335, said:

"But there is no reason to believe that the legislature was not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments."

The appellant proceeded in asking a determination of Root's share in the estate as an assignee of Root's interest. The right which she sought by virtue of the alleged equitable assignment to Colonel Ingersoll to enforce was a chose in action within the meaning of the statutory limitation.

It is not necessary to consider whether the right of one of the next of kin to a distributive share is such a chose in action or not. Root could not assert, the plaintiff did not seek to assert, and the decree of the Circuit Court did not profess to enforce, any rights of next of kin. The plaintiff's bill asserted ownership on the part of Root by virtue of the compromise agreement made in Montana. The decree of the Circuit Court gave full effect to such claim. On no theory could Root be entitled to more than fifty eleven-hundredths of the estate except by contract. In seeking to establish a right on his part to more than his share in intestacy the plaintiff in fact sought specifically to enforce the contract made by him and his associates with the persons representing John A. Davis, the proponent of the will.

No other construction can be put upon the undisputed facts. The will of Andrew J. Davis was allowed by the Probate Court in Massachusetts on December 9, 1897; an appeal from the allowance of the will was dismissed on March 9, 1898.

No other appeal from the allowance of the will has been taken. The Circuit Court could not entertain a suit to set aside the probate of the will and distribute the estate or any part of it as intestate property.

Broderick's Will, 21 Wall. 503.
Ellis v. Davis, 109 U. S. 485.
Farrell v. O'Brien, 199 U. S. 89.

The only right that the plaintiff could seek to enforce, therefore, was the right which she did seek to enforce, a right in Root and his associates pursuant to the compromise agreement to receive a part of the estate all of which by the will, already allowed, would otherwise go to the estate of John A. Davis. This right was purely a contractual right. The suit had for its object the enforcement of the agreement of April 28, 1893, and the application of what Root and his associates might be entitled to under that agreement to the satisfaction of the plaintiff's claim.

A suit to obtain specific performance of a contract is a suit to enforce a chose in action and cannot be maintained in the Circuit Court by an assignee unless the assignor could have sued in that Court.

Corbin v. County of Black Hawk, 105 U. S. 659.

The Circuit Court, therefore, had no jurisdiction to adjudicate the amount to which Root was entitled.

The judge of the Circuit Court waived aside all consideration of the nature of the rights of Root and his associates as matters with which a Court of equity should not seriously trouble itself. (Rec. p. 960.) Such a course is not permissible where a question of jurisdiction is concerned. Even if the great difficulties of enforcing such a claim in a proceeding like the present can be overcome, the real nature of the proceeding by which it is sought to accomplish the desired result must determine the jurisdiction of the Circuit Court.

Assuming that the plaintiff's suit is well founded in all respects, the decree of the Circuit Court is nevertheless beyond its jurisdiction. Having authority to determine the shares of the estate that might be payable by contract or otherwise to persons entitled by diversity of citizenship

to enforce their claims in the Circuit Court, that Court entered a decree determining the share to which Root, who as well as the administrator Leyson is a citizen of Montana, was entitled. Even if the decree is maintainable so far as it adjudicates the rights of Coram and the heirs associated with Root it is not maintainable and is beyond the jurisdiction of the Circuit Court so far as it deals with the rights of Root.

3. The orders of the Circuit Court as to the distribution of the property were an interference with the jurisdiction of the Probate Court.

At the time the bill was filed the estate of Andrew J. Davis in Massachusetts was already in course of administration. The jurisdiction of the Probate Court had attached. The property was in effect in the possession of that Court, and no other Court could interfere with such possession or with the full administration of the estate.

The decree of the Circuit Court required the administrator whenever "the probate administration" of the property in Massachusetts "is finished and distribution thereof is ordered," to bring into the Circuit Court "and deliver to the clerk thereof four hundred and fifteen and one-half eleven-hundredths parts and parcels of such portion of said money and bonds as may be ordered distributed to said Henry A. Root" and his associates. (Rec. p. 953.) The decree further enjoined the administrator from distributing any part of the four hundred and fifteen and one-half eleven-hundredths of the estate to Root or any of his associates, enumerating them, "or to any other person whomsoever without the order of this Court, — or pursuant to the order, judgment, or decree of the Probate Court" in Massachusetts, or of any other Court, and, upon any such order for distribution, directs him to bring the four hundred and fifteen and one-half eleven-hundredths into the Circuit Court, and deliver the property to the clerk. (Rec. pp. 955–6.) The decree further en-

joined Root, Coram, and Palmer and Davis, as trustees, from demanding or receiving from Leyson as administrator, either in Massachusetts or elsewhere, any part of the four hundred and fifteen and one-half eleven-hundredths of the estate. (Rec. pp. 956–7.)

The probate administration in Massachusetts can be finished only by a decree of the Probate Court, either directing transmission of the property to Montana or its distribution in Massachusetts pursuant to such decree as the Court may make. If the Probate Court orders distribution in Massachusetts, the decree enjoins the administrator from making payments which the Probate Court may direct, and requires him to bring into the Circuit Court a specified portion of the property to be distributed, and enjoins possible distributees from receiving the property that may be ordered to be paid them.

The injunction granted, restraining the administrator from paying, and Root and the others from receiving property that the Probate Court may order to be paid to them, is in effect an injunction upon the proceedings of that Court, and prohibited by section 720 of the Revised Statutes of the United States.

In *Whitney* v. *Wilder*, 54 F. R. 554, the will of Myra Clark Gaines was proved in New York, and the plaintiff appointed executor. He brought this suit to restrain an administrator appointed in Louisiana from distributing to heirs at law the estate in Louisiana. The Circuit Court of Appeals held that the Court below had no jurisdiction to grant the injunction.

"While the injunction is directed to the administrator of the succession and estate of Myra Clark Gaines, deceased, restraining him from paying out to the heirs at law of said estate any moneys belonging to it, its purpose and effect are to interfere with the pending administration of the estate in the Probate Court of the state of Louisiana, which is vested with exclusive jurisdiction of the same, and by whose order alone the administrator would be duly authorized to distribute and pay over any money belonging to it. The heirs at law of the deceased petition the probate court

that, after the payment of all debts, the property of the estate be turned over to them. The practical effect of the injunction is to stay proceedings under this petition. Should a decree be granted on the petition by the probate court, and the administrator be ordered to comply with the same, he would be subject to diverse and conflicting decrees,—that of the state court, directing him to distribute the funds of the estate in its custody and under its control according to its decree, and that of the federal court, directing him to refrain and desist from distributing such funds. It was said by this Court in the case of *Railway Co.* v. *Kuteman*, 54 Fed. Rep. 547 (decided at this term), that 'there is not in our system anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States.' The framers of our statute laws, foreseeing the evils of such conflicting jurisdiction, have wisely prohibited, in express terms, the granting of injunctions to stay proceedings in any court of a state. Rev. St. § 720; *Railway Co.* v. *Kuteman*, *supra*. This prohibition of the statute extends to all cases over which the state court first obtains jurisdiction, and applies not only to injunctions aimed at the State Court itself, but also to injunctions issued to parties before the court, its officers or litigants therein." 54 F. R. 555.

In *Evans* v. *Gorman*, 115 F. R. 399, it was upon the same ground held that an injunction should not issue to restrain an administrator from selling real estate under a license from the Probate Court.

See also

Chicago T. & S. B. v. *Bentz*, 59 F. R. 645.
Foster v. *Bank of Abingdon*, 68 F. R. 723.

The injunction restraining the defendants in this suit from receiving the sums that may be ordered distributed to them is equally in violation of the statute. The jurisdiction of the Probate Court had attached long before the present suit was brought. The Circuit Court could not, therefore, enjoin further proceedings in the Probate Court. For the same reasons it cannot enjoin persons who may become entitled under such proceedings from receiving what by the orders of the Probate Court may become payable to them.

In *Watson* v. *Jones*, 13 Wall. 679, a State Court of Chancery having ordered its marshal who had custody of certain property to deliver it to some of the parties, the Supreme Court held that an injunction against such parties' receiving possession under the order was in effect an injunction against the proceeding in the State Court, and unlawful. (P. 719.)

The learned judge of the Circuit Court referred to two cases as establishing the jurisdiction of that Court to make such a decree. Neither of these cases, it is submitted, supports any such position.

In *Hale* v. *Coffin*, 120 F. R. 470, a bill in equity was brought to enforce against an heir at law a stockholder's liability on the part of the deceased. This Court held, affirming the Circuit Court for the District of Maine, that a Maine statute limiting a proceeding against an heir to one year after the final settlement of the estate was a bar.

Sherman v. *American Congregational Ass'n*, 113 F. R. 609, appears to have been a bill brought against one to whom a legacy had been paid, claiming that it should, on the proper construction of the will, have been paid to the plaintiff. No question was involved of interference with the jurisdiction of the Probate Court, and no question of jurisdiction was discussed, except the right of any Court of Chancery or common law to construe a will to determine a controversy between parties before the Court, and the decision that there did not appear from the bill to have been any proceeding in the Probate Court adjudicating the construction of the will.

Neither case appears in any way to justify or support the decree entered by the Circuit Court in the present suit.

4. *The decree seeks to give the order of the Court extra-territorial effect.*

In case the Probate Court in Massachusetts sees fit, it may transmit the property in its custody to Montana for distribution. The decree of the Circuit Court seeks in that

event also to control the disposition of the fund by enjoining Leyson from making a payment to Root and his associates " pursuant to the order of any Court, whether within or without the State of Massachusetts," by enjoining Root and his associates from receiving any such payment, and by providing that, if Leyson resigns or is removed or dies, he or his legal representatives shall, before turning over the property to a successor, report the proposed action to the Circuit Court, and make the transfer in its presence.

It is clear that the Circuit Court has no jurisdiction over Leyson as administrator appointed in Montana. It is only an accident that the same individual is administrator both in Massachusetts and Montana, and that accident gives no jurisdiction in Massachusetts over the foreign administrator.

Emery v. *Batchelder*, 132 Mass. 452.

If the injunction against Leyson is intended to restrain his actions in his representative capacity in Montana, it is not only open to the objection already urged of interfering with administration by a State Court, but is also an unwarranted attempt to assume jurisdiction over the Montana administrator by reason of his being the Massachusetts administrator.

The character of the decree, as seeking to secure extraterritorial effect, is shown in the provision as to delivering the property to a successor. If the property is ordered to be transmitted to Montana, it will come into possession of an officer appointed by the Montana Court. That Court has full right to remove the administrator, and upon doing so may clearly require him to turn over the property to his successor appointed by the Court in Montana. Yet the decree of the Circuit Court enjoins any such transfer except upon notice to it and in its presence.

After the property is transmitted to Montana, it is to be administered there as if it had always been in Montana. The statutes of Massachusetts give no authority to an an-

cillary administrator to represent the assets for the purpose of liens being established against portions which may ultimately be ordered paid to individuals; and the Court in Montana is under no obligation to recognize any decree purporting to establish rights against property which comes into its hands for the very purpose of its determining the rights in the property. The presence personally of Leyson within the jurisdiction of the Circuit Court and the service of process on him do not render the decree in any way binding in the administration of the estate in Montana.

Vaughan v. *Northup*, 15 Pet. 1, 5.

The Montana Court, therefore, could and should make orders for the distribution of the estate, regardless of the decree of the Circuit Court, and the injunction restraining the administrator from following and the defendants from taking advantage of such orders is an unwarrantable attempt to exercise an extra-territorial jurisdiction.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
of Counsel.

FEBRUARY, 1908.

Office Supreme Court, U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1908

No. [redacted]8

EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,
Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,
Respondents.

Supplemental Brief for Petitioner on Questions Propounded by the Court.

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Counsel for Petitioner.

Supreme Court of the United States.

No. 169, October Term, 1907.

EVA A. INGERSOLL, as Administratrix of the Estate of Robert G. Ingersoll, Deceased,

Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, and CHARLES H. PALMER, Trustee.

SUPPLEMENTAL BRIEF FOR PETITIONER ON QUESTIONS PROPOUNDED BY THE COURT.

"The Court requests counsel for the respective parties to file, on or before July 1, next, briefs on the following questions of law:

1. Has the Circuit Court jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts?

2. Has the Circuit Court jurisdiction to enforce by foreclosure a lien upon property so situated?

3. Has the Circuit Court jurisdiction to determine the shares of Root and Coram in the property so situated?

4. Has the Circuit Court jurisdiction, upon the pending bill either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them, should hold any property, coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant?

5. To what extent, if any, is the jurisdiction of the Circuit Court limited or affected by the fact that the property from which payment is sought is in the hands of an administrator appointed by the Probate Court of Suffolk County?

6. Has the Probate Court of Suffolk County as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, enforce, and foreclose a lien upon it?

June 1, 1908."

THREE BASIC PRINCIPLES INVOLVED.

I.

1. The Federal Courts have no original probate jurisdiction for the conclusive reason that such jurisdiction, as vested in the English ecclesiastical courts, passed to the Probate Courts of the several States. This court therefore held in Byers *v.* McAuley, 149 U. S. 608, that the Federal Courts will not, "by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate or the power of determining all claims against or to it." And so in the very recent case of Garzot *v.* Rios de Rubio, not yet reported, this court dismissed the bill because "it is patent on the face of the bill that it but invokes the authority of the court to exercise *purely probate jurisdiction by administering and settling the estate of Rios*, the estate of his son, and that of the mother, and, as an incident thereof, to liquidate the community which had existed between Rios and his wife. Indeed, such was exactly the substantive relief which the bill as finally amended prayed." The crucial test of jurisdiction in such cases is therefore to be sought primarily in the substantive relief which the bill prays. When such a bill invokes "the authority of the court to exercise purely probate jurisdiction by administering and settling the estate," it should be dismissed.

2. In establishing the foregoing proposition this court has been careful to preserve a large section of federal juris-

diction from annihilation by recognizing the principle that a Federal Court, exercising its equity jurisdiction in a proper case, may adjudicate, establish, protect and enforce any equitable right in property in the hands of an administrator, where it may be done without taking possession of the estate, or interfering with the ordinary probate administration thereof. To that end this court was careful to say in Byers v. McAuley: "The State Court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the Circuit Court might entertain the jurisdiction in favor of all citizens of other states, *to determine and award their shares in the estate.*" With still greater emphasis this court has recognized the right of a person holding an equitable lien to have it enforced, in a Federal Court against property in the custody of an administrator, appointed by the State Court. Such has been the settled law since the case of Wylie v. Coxe, 15 How. 415, a suit brought by bill "in equity" in the United States Circuit Court against an administrator for the sole purpose of foreclosing an attorney's equitable lien on a "fund so in the hands of said defendant as administrator." It was "ordered, adjudged and decreed that said defendant as administrator as aforesaid pay over to said complainant," the amount of the debt secured by the attorney's equitable lien, with interest thereon from the time the fund became available. When the court applies the crucial test to the bill before it, it will see at once that the substantive relief which it seeks is not the exercise of "purely probate jurisdiction by administering and settling the estate," but the enforcement of a purely equitable lien which, by no possibility, can be enforced through probate jurisdiction as such. This bill was filed to establish a lien on certain shares of the property now in the custody of the administrator, and its prayer is that those shares on which the lien rests be subjected to the satisfaction thereof "*after such funds and effects*

subject to said lien are released from administration by said Probate Court."

3. The sixth question—"Has the Probate Court of Suffolk County as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, and foreclose a lien upon it"—must be answered in the light of the fact that whatever *equity* jurisdiction has lately been vested by statute in the Probate Courts of Mass., must be exercised independently of their ordinary probate jurisdiction. Sherman *v.* American Cong. Ass'n, 51 C. C. A. 339, 113 Fed. R. 609. "The jurisdiction in equity given to the probate courts (of Massachusetts) by St. 1891, c. 415, sec. 1, is a jurisdiction concurrent with that of other equity courts." (Mr. Justice Holmes in Bennett *v.* Kimball, 175 Mass. 199.) In Green *v.* Gaskill, 175 Mass. 265, the court said: "Conferring this concurrent jurisdiction in equity upon the probate courts does not enlarge that jurisdiction, or enable them to entertain any bill which could not also be entertained by the Superior Court or by this Court." The Suffolk County Probate Court could not possibly, in the exercise of its *probate jurisdiction*, adjudicate and determine the equities of complainant. The *equity side* of the Probate Court has no more possession than any other court vested with the same concurrent equity jurisdiction. The *equity side* of the Probate Court cannot do, as ancillary to the possession of the property on the probate side, any more than any other court of concurrent *equity* jurisdiction could do. If the admission should ever be made that because a probate court of a state is vested with *equity* jurisdiction, then no other court of equity could exercise the jurisdiction over equitable rights touching property in probate administration, *the federal jurisdiction to do what was done, and approved by this Court, in Byers* v. *McAuley, would be annihilated.* Certainly it is not within the sovereign power of Massachusetts to restrict or impair the exercise of the equity jurisdiction belonging to the *Federal* Courts, by vesting such jurisdiction, in an unusual form, in one of her own courts. When this question of jurisdiction was presented in the

Circuit Court, Judge Putnam said: "Notwithstanding the proceedings in the Probate Court, this court has the same jurisdiction which any court of superior jurisdiction of the State of Massachusetts would have. The courts of general jurisdiction constantly and properly exercise certain limited powers with reference to interests in estates in the courts of probate, and this to the extent which the present suit in equity requires."

If the three basic principles, as thus stated, are sound, and applicable to this case, there can not be the slightest difficulty as to jurisdiction. In what follows an effort will be made to support these principles by more specific statements and by more extended citations.

II.

More Specific Answers and Authorities.

"1. Has the Circuit Court jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts?"

Without making particular reference to the familiar provisions of the constitution, statutes and decisions defining the equity jurisdiction vested in the Federal Circuit Courts (all of which is clearly expounded, with reference to the authorities from an early to a very recent date, in 1 *Pomeroy's Equity Juris., 3d ed., secs. 292, 293, 294*), we pass directly to consideration of the particular point indicated in the above question. And we proceed with the inquiry bearing in mind the ruling of the court in *Byers* v. *McAuley*, 149 *U. S. 608, 37 L. ed.* 867, and cases there cited, to the effect that the national court will not, "by entertaining a suit against the administrator draw to itself the full possession of the estate or the power of determining all claims against or to it" (149 U. S. 619); or interfere with the regular probate administration of the property under the direction of the Probate Court pursuant to the state laws. So it is pertinent

first to inquire whether there is, in the case at bar, any such interference.

This action is brought to establish a lien on certain shares of the property now in the custody of the administrator, and complainant prays in her bill that those shares on which the lien rests, be subjected to the satisfaction thereof, "*after such funds and effects subject to said lien are released from administration by said Probate Court*" (*see bill, R. 41, top of page*); and prays that: "said Joseph A. Coram, Henry A. Root and Charles H. Palmer and Andrew J. Davis, trustees as aforesaid," their attorneys, agents, etc., be enjoined and restrained from "taking or carrying away or disposing of said shares, parts and parcels of said funds and effects hereinabove mentioned and described, as subject to said lien existing in favor of the estate and legal representative of Robert G. Ingersoll, deceased" (*see bill, R. 39, top of page*). She prays also generally for all such relief as the court may properly grant (R. 41).

The administrator could not lawfully deliver said funds and effects which are claimed to be subject to the lien, to defendants, until the administration of the estate is finished; nor could Coram, Root or other distributees lawfully demand from the administrator, or take or carry away the funds on which the lien is claimed, until the Probate Court's administration thereof is finished, and distribution ordered. When the case at bar was commenced, in view of the fact that Messrs. Coram, Root and their associates in interest were seeking to obtain "an immediate distribution and delivery to them of all said funds and effects of the estate," as shown in the bill (R. 32); and inasmuch as such order of distribution might be procured before the rights of complainant were determined in the case at bar, she prayed in her bill that said Leyson be enjoined and restrained "from distributing or delivering to said Henry A. Root, Joseph A. Coram or Charles H. Palmer and Andrew J. Davis, trustees, or either of them, or either of their agents, attorneys," etc., "the shares, parts or parcels of said funds and effects, or any part thereof" which is subject to complainant's lien

(R. 38); and that said Leyson or some other suitable person be appointed receiver of said funds and effects which are subject to said lien, "*to take and hold custody thereof whenever the same is released from administration by said Probate Court of Suffolk County, Massachusetts*, and hold custody thereof until the rights of your orator in the premises be determined" (R. 38, bottom of page).

The observations of Mr. Justice Brewer in delivering the opinion of this court in *Byers* v. *McAuley, supra*, may be applied with perfect truth to the case at bar. In that opinion, referring to the case of *Payne v. Hook*, 7 *Wall.* 425, it is said: "There was no suggestion in the bill that the Federal Court take possession of the estate and remove it from the custody of the administrator appointed by the State Court; no attempt to settle the claims of citizens of the state as between themselves; no attempt to take the administration of the estate, but simply to establish and enforce in behalf of a citizen of another state her claim to a share of the estate" (149 U. S. 617). Nor does the case at bar take a course in any of its proceedings contrary to the ruling in the McAuley case. The case at bar has in view the establishment of a lien on certain shares of funds and effects, which, although now in the hands of an administrator of an estate already settled, with the exception of possibly a few minor details, as shown without dispute, will be distributed to the parties holden for the debt secured by that lien. The administrator is a necessary party for the purpose of the suit and to protect the lien on the shares in his hands subject thereto, which he will have for distribution to the parties holden for the debt secured by the lien. The lien can only be established and protected by a court of equity jurisdiction. *Hauselt* v. *Harrison*, 105 *U. S.* 401, 26 *L. ed.* 1075; *Fletcher* v. *Morey*, 2 *Story* 555, *Fed. Case No.* 4864, *per Story J.*; *Pinch* v. *Anthony*, 8 *Allen* 336, *per Bigelow, C. J.*; *Hovey* v. *Elliot*, 118 *N. Y.* 124, 23 *N. E. Rep.* 475. No probate court, as such, could adjudicate the question of debt and the existence of the lien involved in the case at bar. *Perris* v. *Higley*, 20 *Wall.* 375.

If the Probate Court of Suffolk County, Mass., is invested with any equity jurisdiction, it must be exercised separately from its probate jurisdiction, and is *concurrent* with that of other equity courts of Massachusetts, State and Federal. *Bennett* v. *Kimball*, 175 *Mass.* 199, *Green* v. *Gaskill*, 175 *Mass.* 265, *Sherman* v. *Am. Cong. Ass'n* 51, *C. C. A.* 329, 332, 333, s. c. 113 Fed. R. 612. Moreover, all equitable remedies provided by state laws to be administered by State Courts possessing equity jurisdiction, for the protection and enforcement of an equitable right, interest, or lien in or upon property in the hands of an administrator, will be likewise administered by the Federal Circuit Court in that state, in a proper case belonging to the chancery jurisdiction. But no abridgement of the equity jurisdiction of state courts by state law would restrict or impair the chancery jurisdiction of the Federal Court sitting in that state. *Payne* v. *Hook*, 7 *Wall.* 425; *Kendall adm'r* v. *Creighton*, 23 *How.* 90; *Holland* v. *Challen*, 110 *U. S.* 15; *Gormley* v. *Clark*, 134 *U. S.* 338; *Bardon* v. *Land & R. Imp. Co.*, 157 *U. S.* 327; *Rich* v. *Braxton*, 158 *U. S.* 405; *Smith* v. *Ames*, 169 *U. S.* 466, 516.

In the case of *Byers* v. *McAuley*, *supra*, it is said: "A citizen of another state may establish a debt against the estate. *Yonley* v. *Lavender*, 88 *U. S.* 21 *Wall.* 276; *Hess* v. *Reynolds*, 113 *U. S.* 73. But the debt thus established must take its place and share of the estate as administered by the Probate Court; and it cannot be enforced by process directly against the property of the decedent. *Yonley* v. *Lavender*, *supra*. In like manner, a distributee, citizen of another state, may establish his right to a share in the estate and enforce such adjudication against the administrator personally, or his sureties (*Payne* v. *Hook*, 74 *U. S.* 7 *Wall.* 425), or against any other parties subject to liability (*Borer* v. *Chapman*, 119 *U. S.* 587), or in any other way which does not disturb the possession of the property by the State Court. (See the many cases heretofore cited.)" (149 *U. S.* 620.) The same opinion also quotes with approval the rule laid down in *Ellis* v. *Davis*, 109 *U. S.*

485, 498, that: "The only qualification in the application of this principal is, that the courts of the United States in the exercise of their jurisdiction, over the parties, cannot seize or control property while in the custody of a court of the state." (149 U. S. 617, 618.)

When the funds and effects subject to complainant's lien are to be paid over to distributees pursuant to order of the Probate Court, then that court will be entirely through with administration thereof. And in the meantime there has been no interference with the custody or administration thereof, by the proceedings in the case at bar.

A controversy as to the existence of a debt and lien on property to secure it, or other equitable right in property in the hands of an administrator or executor, may be adjudicated and determined by a court of equity without seizing or taking actual possession of the property on which the lien rests. *Wylie* v. *Coxe*, 15 *How.* 415; *McComb* v. *Frink*, 149 *U. S.* 629, 37 *L.ed.* 876; *Canfield* v. *Canfield*, 55 *C. C. A.* 169, 118 *Fed. R.* 1, *per Mr. Justice Day as Circuit Judge*; *Richardson* v. *Green*, 9 *C. C. A.* 565, 61 *Fed. R.* 423, *in which Mr. Justice McKenna concurred on circuit*; *Van Bokelen* v. *Cook*, 5 *Saw.* 587, *Fed. case No.* 16831, *per Mr. Justice Field sitting with Circuit Judge Sawyer and Hilliard District Judge*; *Snyder's adm'r* v. *McComb's Ex'r.* 39 *Fed.* 292, *per Mr. Justice Bradley on circuit, sitting with Judge Wales.* After affirmance of the decree in the last-mentioned case (149 U. S. 629), an equitable lien in favor of the attorneys for Snyder's heirs was established and foreclosed on the fund produced by their labors in that litigation. See also *Semmes* v. *Whitney*, 50 *Fed. R.* 666. We shall cite below other cases, English and American, wherein equitable liens, and other equitable rights and interests in funds in the hands of an administrator for probate administration, were established and enforced; but we add here to those just cited, three leading state cases: *Davis* v. *Newton*, 6 *Met.* 537, *opinion by Shaw, C. J.*; *Moses* v. *Murgatroyed*, 1 *Johns. Ch.* 119, 7 *Am. Dec.* 478, *per Chancellor Kent*; *and Pierce* v. *Robinson, adm'r*, 13 *Cal.* 116, *by Mr. Justice Field.*

The courts are constantly adjudicating and establishing such rights without taking actual custody of funds or other personal property which is subject to the lien or other equitable right. The case of *Hovey* v. *Elliot*, 118 *N. Y.* 124, 23 *N. E. Rep.* 475, decided in 1890 by the New York Court of Appeals, strikingly illustrates the necessity for the proceedings taken in the case at bar. In that case, the court, in speaking of the former suit in the court of the District of Columbia, to *foreclose the attorney's lien* on bonds of which the courts did not have possession, it is said: "McDonald" (the debtor for the amount secured by the equitable lien) "had a right to contest the plaintiff's alleged claim of lien, and it was not in the power of the defendants" (who held possession of the bonds) "to deny to him that right, or to render his successful denial of it ineffectual. This was the situation of the defendants in their relation to the other parties interested, until the final decree was obtained against McDonald and White, and until then the defendants could not assume that they were at liberty to pay anything to plaintiffs from the proceeds of the sale of the bonds. . . . As before suggested, the lien upon which the plaintiffs relied, existed in executory contract and was cognizable in equity only, until it was perfected either by recognition or contract of McDonald in terms making it so *in presenti* after performance by plaintiffs, or by decree to that effect." (23 N. E. Rep. 479.)

In the case of *Watson* v. *Jones*, 13 *Wall.* 679, 20 *L. ed.* 666, this court in opinion by Mr. Justice Miller, speaking directly upon the question of the jurisdiction of the United States Circuit Court to adjudicate equitable rights touching property in the possession of the Chancery Court of Kentucky, and quoting from a prior opinion of this court, said: "'In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits.' And it might have been added—to the facts on which the claim for relief is founded.'" And after illustrating the point by reference

to an example, it is said: "But, as the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the other." (13 Wall. 716.) And further along in the same opinion, after referring to the prayer for relief, it is said: "Undoubtedly if the order of the Chancery Court had been executed, and the marshal had delivered the key of the church to the defendants, and placed them in the same position they were in before the suit was commenced, they could in any court having jurisdiction and in a case properly made out, be compelled to respect the rights we have stated, and be controlled in their use of the possession by the court, so far as to secure those rights. All we have said in regard to the possession which the marshal is directed to deliver to the defendants, is equally applicable to the possession held by him pending the execution of that order. His possession is a substitute for theirs, and the order under which he received that possession, which we have recited, shows this very clearly. The decree which we are now reviewing seems to us to be carefully framed on this view of the matter." (13 Wall. 721.)

Pertinent observations on the jurisdiction of the United States Circuit Court, by Severns J., in *Ball* v. *Tompkins*, 41 *Fed.* 490, are quoted in *Pomeroy's Eq. Juris.*, *page* 511, note to sec. 294, as follows: "The possession contemplated as sufficient to make it exclusive is that which the court by its process, or some similar mode, has, either for the direct purpose of the proceedings, or for some other purpose ancillary to the main object, drawn into its dominions and custody some thing. That thing may be corporeal or incorporeal—a substance or a mere right. But a controversy, a question, an inquiry, is not such a thing. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds from the beginning to the judgment without the courts having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession." So a suit may be pending in

different courts at the same time to establish one and the same right. *Stanton* v. *Embry, adm'r*, 93 *U. S.* 593.

The cases we cite below, wherein courts exercising chancery jurisdiction have adjudicated and established a *debt and lien upon property in the hands of administrators*, show that such claims may be adjudicated and established without taking actual possession of the *res;* and that the possession thereof by the Probate Court for the purposes of administration, does not exclude the Chancery Court from exercising its jurisdiction to foreclose such lien—a jurisdiction which the Probate Court, as such, does not possess.

The English Chancery exercised it. In the case of *Turwin* v. *Gibson*, 3 *Atk.* 719, decided by Lord Ch. Hardwicke, it is said that: "It was insisted by the petitioner, Margaret Turwin, as she is the representative of Arthur Harding, her first husband, and he has left bond debts, that Wade, the solicitor for Harding, who was the plaintiff in the original cause, has no right to be paid out of the sum decreed for the plaintiff in preference to Harding's bond creditors.

"Lord Chancellor: I am of the opinion that a solicitor in consideration of his trouble and the money he disburses for his client has a right to be paid out of the duty decreed for the plaintiff and has a lien upon it, before the bond creditors of the deceased plaintiff, and it is constantly the rule in this court; neither can the administratrix controvert this rule, by insisting upon applying the effects in course of administration."

Again in the case of *Barnesley* v. *Powell*, 1 *Amb.* 102, which, as the report records, was presented to Lord Hardwicke upon, "Petition by the solicitor for Barnesley (who was a lunatic) setting forth that he had expended great sums of money in prosecuting suits in this court, and at law, against the defendant Powell, on behalf of the lunatic, and praying that he may be at liberty to enter up a judgment with stay of execution against the lunatic, for such moneys, that thereby he may have a lien on his real estate.

"The Lord Chancellor said: If a solicitor prosecutes to a decree he has a lien on the estate recovered in the hands of

the person recovering for his bills. . . . I will assist the solicitor as much as I can, therefore declare he stands in the place of the committee, and has a lien on the lunatic's estate."

"It was referred," says the report, "to the Master to tax the petitioner his costs of suing out and prosecuting two commissions of lunacy against the plaintiff and also his fees and disbursements in this and the cross cause, both at law and in this court, and to enquire what other suits and business had been solicited or performed by the petitioner or for or on behalf of plaintiff or his wife, and whether the same were for the benefit or advantage of the lunatic or his estate; and if so then to tax the petitioner's bill of fees and disbursements in respect thereof, and to take an account of what sums of money the petitioner had advanced and paid for the lunatic, and for his use, and upon his account, and for what causes and purposes the same were so advanced and paid. The Master by his report certified £8316 1s. 11d. due to the petitioner and his Lordship declared 'that *Eliza*, the wife of the lunatic, and Mr. B. the committee of his estate, have a lien upon it and are entitled to have satisfaction out of the personal and real estate of said lunatic for what they have or shall pay, or are liable to pay on account of the £8316 1s. 11d., and *that the petitioner* as standing in the place of the said Eliza, the wife, and said Mr. B., *has also a lien* upon, and is entitled to be paid out of said lunatic's personal and real estate what is due to him; and the said Eliza and Mr. B., *and the said petitioner*, are to be at liberty to apply from time to time for payment of said £8316 1s. 11d. or part thereof.'"

In *Dennick, adm'r, etc.* v. *Cent. R. Co.*, 103 U. S. 11, Mr. Justice Miller, in delivering the opinion of this court, said: "There can be no doubt that an administrator invested with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay over to some one who establishes a better right, or that what was so recovered was held in trust for some one not claiming under the will or under the administrator."

In that affirmation this court condensed the effect of what was adjudged by Chancellor Kent in *Moses* v. *Murgatroyd*, 1 *Johns. Ch.* 119, 7 *Am. Dec.* 478, by California Supreme Court in *Pierce* v. *Robinson adm'r*, 13 Cal. 116, in opinion by *Mr. Justice Field*, by Massachusetts Supreme Court in *Davis* v. *Newton*, 6 Met. 537, opinion by *Shaw C. J.*, by the English Chancery in *Marriot* v. *Marriot*, 1 Strange 166, *Gilb. R.* 203, and in many other cases which we cite.

In the case of *Semmes* v. *Whitney*, 50 Fed. 666, which was a *suit in equity* brought in the United States Circuit Court, "against W. W. Whitney, administrator of the succession of Myra Clark Gaines *to enforce an attorney's lien*" on funds in the administrator's hands, it was held, that: "This court has jurisdiction, and can render a decree, which would, as to the amount of the debt and the existence of the lien, conclude the administrator and the succession. The lien, being that of a solicitor who has recovered a judgment, upon that judgment, springs both from the doctrine of the equity courts and from a statute of the State of Louisiana. The lien gives almost a proprietary interest in the judgment. It would be only the residue of the judgment, after deducting the amount of the solicitor's fee, which would, in the ordinary course of things, be paid over by the plaintiff to the succession. In case of the insolvency of the succession, even if the Probate Court might have to determine the rank or priority of the lien as between the complainant and the holders of other privileges, the effect of the judgment would still be, beyond all controversy, to fix, as between the plaintiff and the succession, the amount due and the lien upon the specific thing."

The case of *Wylie* v. *Coxe*, 15 *How.* 415, 14 *L. ed.* 753, was brought by bill "in equity" in the United States Circuit Court against an administrator for the sole purpose *of foreclosing* an *attorney's equitable lien* on a "fund so in the hands of said defendant as administrator;" and it was "ordered adjudged and decreed that said defendant as administrator as aforesaid, pay over to said complainant," the amount of the debt secured by the attorney's equitable lien, with

interest thereon from the time the fund became available. (15 How. 416.) That decree was affirmed by this court. In the opinion, speaking of the court's jurisdiction, it is said "There may be a legal remedy, and yet if a more complete remedy can be had in chancery it is sufficient ground for jurisdiction. . . . A bill filed under the Act" (referring to the Act providing for adjudication of the claim prosecuted by the attorney) "would have authorized an injunction for the amount claimed by the complainant. Such a procedure would be within the Act. But under the contract the lien on the fund in the hands of the administrator is sufficient ground for an equity jurisdiction. The payment of the fund to the executrix in Mexico would place it, probably, beyond the reach of complainant." (15 How. 420.)

In the case at bar it is shown in the bill: "That if said funds and effects are distributed and delivered by said Leyson as such administrator and custodian thereof to said Henry A. Root, Joseph A. Coram, and Charles H. Palmer and Andrew J. Davis, trustees, the same will be widely scattered and dissipated, and would necessitate a multiplicity of actions in an effort to reach or recover the same in satisfaction of said claim and lien existing in favor of the estate and legal representative of Robert G. Ingersoll, deceased, and as your orator verily believes the same would be lost, and your orator and the heirs of Robert G. Ingersoll, deceased, would be thereby wholly deprived of remedy to enforce said claim and lien and defeated of their rights in the premises; that there is no plain, speedy or adequate remedy at law in the premises." (See bill, record 37, bottom of page.) *Hovey* v. *Elliott*, 118 N. Y. 124, 23 N. E. 475.

The case of *Walker* v. *Brown, adm'x*, 165 U. S. 654, 41 L. ed. 865, was, as the report shows, "a suit in equity brought by James H. Walker *et al.*, against Anna L. Brown, administratrix *et al.*, to establish an equitable lien on certain bonds and for the sale of the same and application of the proceeds to the payment of a debt due to the complainants." In the opinion of this court delivered by Mr. Justice White, speaking of the averments of the bill, he said: "It was

alleged that complainants did not know the true condition of the estate of Brown, or whether the Memphis bonds were yet among its assets, and that a discovery and accounting were necessary in order to enable them to reach the property upon which the lien was asserted to exist, or the proceeds thereof in the hands of the administrators. The relief prayed was that if on discovery it be found that the Memphis bonds or any portion thereof were part of the assets of the estate of Brown, an equitable lien be recognized thereon and the bonds be ordered to be sold and the proceeds applied as far as necessary, to the payment of the debt due by Lloyd & Company to complainants. That if the Memphis bonds had been sold or exchanged by Brown for other properties which could be traced to the hands of the administrators, that a like lien might be adjudged thereon." And prayed for injunction to protect such lien. (165 U. S. 656, 657.) It is further stated in the opinion that, the answer "admitted that at the time of Brown's death 'there were fifteen $1,000 bonds of the city of Memphis in his possession as his property, and that the same passed with his other estate into the hands of his administrators as part of his said estate. But this respondent avers that the bonds were, prior to the death of Brown, given by him as a gift to his wife, Anna L. Brown, who now holds and owns the same' "—she was one of the administrators. (165 U. S. 659.)

The equitable lien claimed in that case was found to exist by reason of the transaction disclosed. And there is no suggestion or intimation in that opinion that the Federal Court would not have jurisdiction to foreclose such equitable lien on said bonds in the hands of an administrator. In the course of the opinion it is said: "Pomeroy in his work on Equity Jurisprudence (vol. 3, sec. 1235) condenses and states the general result of the authorities on the subject as follows: 'The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described, or identified, a security for a debt

or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. . . . The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, *equity regards as done that which ought to be done.*'" (165 U. S. 664, 665.)

Complainant in the case at bar was obliged to apply to a court of equity for relief when she brought this action, or her rights would have been irretrievably lost. Defendants were seeking to circumvent and defeat her rights by obtaining possession of all the funds on which the lien rests and "run away with the fruits" of the labors of Col. Ingersoll "without satisfying the demands of the attorney by whose industry and expense those fruits were obtained." *Read v. Dupper*, 6 *T. R.* 361. Had complainant delayed action until probate administration of the estate were finished, and the funds distributed, the result would have been, not only to afford defendants opportunity to run away with the fruits, but her claim would have been barred by the statute of limitations before the present time. The Probate Court in the exercise of its probate jurisdiction could not adjudicate the question of debt and existence of the lien, or issue injunction to protect and enforce it. But a court of equity is competent to do all those things, and without any interference with the probate administration of the estate. The lien and all measures for its protection and enforcement is a matter for a court of equity alone to deal with.

The Federal Court, exercising its equity jurisdiction in a proper case which falls within the chancery jurisdiction, may adjudicate, establish, protect, and enforce any equitable right in property in the hands of an administrator, where it may be done without taking possession of the estate, or interfering with the ordinary probate administration thereof

under the direction of the Probate Court. No authority contradicts that proposition. The *equity* jurisdiction of the Federal Circuit Court sitting in any state, is as extensive speaking generally, as that of any court of such state. For besides the general chancery jurisdiction of the Federal Court – co-extensive with that of the English Chancery – if there be state law giving to its equity courts additional equitable remedies, the Federal Court will also administer them in a proper case, lying within chancery cognizance. *Bardon* v. *Land & R. Imp. Co.*, 157 *U. S.* 327; *Gormley* v. *Clark*, 134 *U. S.* 338; *Holland* v. *Challen*, 110 *U. S.* 15; *Rich* v. *Braxton*, 158 *U. S.* 405; *Smith* v. *Ames*, 169 *U. S.* 466, 516; *Cates* v. *Allen*, 149 *U. S.* 451. The foreclosure, protection and enforcement of a lien is unquestionably a case within the chancery jurisdiction.

The equity jurisdiction of the Supreme Judicial Court of Massachusetts is entirely sufficient for the purposes of the relief sought by complainant and granted in the decree in the case at bar.

The question of the court's jurisdiction in this case was raised before the Circuit Court, and after argument and consideration Judge Putnam said in his opinion: "Notwithstanding the proceedings in the Probate Court, this court has the same jurisdiction which any court of superior jurisdiction of the State of Massachusetts would have. The courts of general jurisdiction constantly and properly exercise certain limited powers with reference to interests in estates in the courts of probate and this to the extent which the present suit in equity requires." (*R.* 70, *Ingersoll* v. *Coram*, 127 *Fed.* 421, 422.) And his view is cited in support of the text of Pomeroy's Equity Juris., 3d ed., vol. 1, sec. 294, page 511.

In the case of *Davis* v. *Newton*, 6 *Met.* 537, bill in equity was brought on behalf of creditors to reach assets of an insolvent debtor, part of which was a sum of money the insolvent was entitled to receive "as his distributive share as heir-at-law of the estate of his deceased brother." But such share was still in the hands of the administrator. It was

held in the opinion by *Shaw C. J.*, that "the right to the distributive share is a vested interest and although the settlement of the estate be delayed, and a decree of distribution postponed, yet the decree of distribution when made, relates back to the time of the decease of the intestate . . . This distributive share, therefore, though its amount was uncertain, and the time of payment contingent, was a vested property of the insolvent at the time of the decease of his brother Henry." (6 Met. 541.) And speaking of alleged reasons set up by the assignee for not proceeding to assert and establish his right to receive said distributive share from the administrator when distribution were made, it is said in the opinion: "This certainly is no reason why the claim should not be asserted and established—the amount to be received when by law it shall become payable." (6 Met. 542.)

In the case of *Palmer* v. *Whitney*, 166 *Mass.* 306, 44 *N. E.* 229, the court said: "It cannot be true that an administrator is necessarily compelled to pay, actually and literally, into the hands of the creditors of the estate, and of the distributees, the amounts due them, and cannot pay the amounts to their order. . . . In a hearing on the allowance of an account, it must be determined by the court passing upon the account whether payments made on orders are to be allowed or not."

A creditor by bill in equity, may reach and subject to payment of a distributee's debts, his or her share of an estate held in trust, there being no condition to prevent alienation thereof by the distributee. *Maynard* v. *Cleaves*, 149 Mass. 307, 21 N. E. Rep. 376; *Forbes* v. *Lothrop*, 137 *Mass.* 523.

In a recent case, *Snyder* v. *Smith*, 185 *Mass.* 58; 69 *N. E. Rep.* 1089, decided in 1904, Knowlton, C. J., delivering the opinion of the court, explains the equity jurisdiction of the Supreme Judicial Court, in protecting and enforcing an *equitable lien*. In that opinion it is said: "The suit was brought under Pub. St. 1892, c. 151, sec. 2, cl. 11 (Rev. laws, c. 159, sec. 3, cl. 7), to reach and apply certain equitable assets of the defendant Smith in the possession of

defendants Batt and Dickinson, trustees. A temporary injunction was issued on May 15, 1901, soon after the commencement of the suit, restraining the defendant Smith and the defendants who held the property from disposing of it." Further along in the opinion, in discussing *equitable liens*, and the means by which a court exercising its equity jurisdiction protects and enforces such liens, it is said: "This lien does not depend upon possession, it is created by operation of law. . . . That equitable liens upon property can be enforced where there is no other control of the property than by the process of a court of equity, has been decided repeatedly in this Commonwealth. *Wiggin* v. *Heywood*, 118 *Mass.* 514; *Western Un. Tel. Co.* v. *Caldwell*, 141 *Mass.* 489, 6 *N. E.* 737; *Desmond* v. *Fisher*, 152 *Mass.* 521, 25 *N. E.* 968."

An assignment may be made by a distributee or legatee of his interest, *or part of his interest*, in funds or other personal assets of an unsettled estate; and such assigned interest will be protected and enforced by a Massachusetts court of equity, by injunction upon the executor or administrator. *Lenz* v. *Prescott*, 114 *Mass.* 505, 515; 11 *N. E. Rep.* 923, 928. In that case it was decided that such relief will be given notwithstanding "the accounts of the representatives of the three estates involved" have yet to be "settled finally in the Probate Court"; that: "While until this is done, it may not be possible to determine all that is due to plaintiff under her assignment, from either, if anything, or what sums shall be finally paid by them, she is still entitled to maintain the bill to restrain them from paying over to Welcome any moneys now in their hands, or which may hereafter come into them, to which she is equitably entitled by her assignment. . . . The bill should also be retained in order that when it is ascertained by proper decrees of the Probate Court, and an accounting there, what is due to Welcome from the estate of his uncle Thomas A. Greene, and the estate of his brothers, Roscoe and Alfred, the representatives of those estates shall be ordered to pay to plaintiff enough to satisfy her claim, without regard to the division

and distribution they have made of the assets of the estates respectively represented by them, by agreement among themselves, and without order of court." (11 N. E. Rep. 929.)

In the case of *Ricketson* v. *Merrill*, 148 *Mass.* 76, 19 *N. E. Rep.* 11, the plaintiff had prosecuted her claim to judgment in the court of another state, and *by bill in equity*, in the Supreme Judicial Court of Massachusetts, she sought, as said in the opinion: "To have applied so far as may be necessary for the payment of her debt, the right, title or interest which George B. may have in the estate of his late father Edward Merrill, by a decree that shall direct the other defendants, as executors or trustees under the will of Edward Merrill, to account to her for such sums of money *as they may have received*, or *may hereafter receive*, in either capacity, for the benefit of George B. Merrill, until the debt due her shall be paid, and to this extent substituting her claim, for that of George B. Merrill under the will." The court then considered his right under the will, and said: "After the property had been turned into money, and after others had received enough to make the amounts they had received equal to what had been advanced to him, he was entitled to a dividend on the remainder, first, to make his share equal to that of the son John, who had received the largest amount, and, when advances were thus equalized, then to his share of the equal division thereafter to be made among all the children. Valuable as this right is found to be, it is not a right in the property of the testator as such, but is a right to a dividend when the property of the testator shall have been sold and the account of the executors settled.

"Since this suit was brought, the executors have made a distribution to the other children, and hold now, for George B. Merrill's interest, the sum of $401.78, to await the determination of this suit. According to the facts as found, a considerable sum awaits distribution, and no sale has yet been made of those portions of the estate which the testator had directed should be kept, unless specified prices could be obtained. The next inquiry is therefore, whether and to what extent the creditor Mrs. Ricketson can be substituted

as a beneficiary for George B. Merrill, by a decree *binding the executors* to account to her, until her debt shall be paid. The scope of the Pub. St., c. 151, sec. 2, cl. 11, has been much enlarged by St. 1884, c. 285, and many difficulties which have been found in the execution of the original section do not now exist. The interest of George B. is a vested interest, the value of which could be ascertained by a sale, an appraisal thereof, or other means within the usual procedure of courts; nor is it an objection, so far as it is affected by sales to be hereafter made, it cannot be reached and applied until a future time. The principal reason suggested against a decree which shall compel the executors to pay over the share of George B. Merrill, so far as it may be necessary, now or hereafter, as it may be realized, to the plaintiff, is that the gift or devise is outside of the duties of the executorship, and may compel them to hold the estate in a prolonged trust for many years; that properly qualified trustees are necessary for this; and that they have neither accepted such trust duties, nor qualified. The facts show that they have been performing trust duties by selling portions of the estate, and by partial distributions of the estate in conformity with the will. No other trustees than the executors are contemplated by the will, and their bond, as such, would cover the performance of these trust duties. . . . The creditor is put in George B. Merrill's place simply until his debt is paid. But no more and no less is paid for that reason on his share. As he could assign this share or transfer it by will, there is no reason why a creditor ought not, after proper proofs and proceedings, to be allowed to stand in his place and receive thus the amount of his debt.

"The first paragraph of the decree is that alone on which the plaintiff insists. It provides that the defendants, as executors or trustees under the will of Edward Merrill, shall account with the complainant for such sums of money as, under the *administration* of Edward Merrill's will, may *now or hereafter* be held by them for George B. Merrill, and for which they would be liable to account to him, whether received by them in either capacity, and whether derived

from rent, sales of real estate, or otherwise, until the plaintiff's debt is fully paid. It would seem from the report of the case that there are now funds in the hands of the executors, to the distribution of his portion of which George B. Merrill would be entitled. So far as the decree relates to sums yet to be collected, it follows, in substance, the form heretofore used where there were funds yet to be collected or acquired. *Barry* v. *Abbott*, 100 *Mass.* 396; *Lord* v. *Harte*, 118 *Mass.* 271. We see no objection to this paragraph of the decree nor do we see any serious objection to that which follows, which would appear to have been inserted at the request of the executors, and which provides that the payment shall be made as the future administration of the estate whether as executors or trustees, shall enable the executors named, reasonably to make the distributions, substituting, to the extent of her debt, the plaintiff for George B. Merrill, although this paragraph appears to be superfluous." (148 Mass. 76, 81; 19 N. E. Rep. 11, 12, 13.)

It will be observed that in the last-mentioned case the Massachusetts court administered the same character of relief in equity as Lord Chancellor Hardwicke granted in protecting and enforcing the *attorney's equitable lien* in the case of *Turwin* v. *Gibson*, and in *Barnesley* v. *Powell*, *supra*.

In re Estate of Angle, 148 Cal. 102, it appears that the widow, being entitled to half the estate, executed a first and second mortgage of her share, and they were foreclosed thereon by action in the Superior Court of Mendocino County (see *Ambrose* v. *Drew*, *et al.*, 139 *Cal.* 665). When those proceedings were had the estate was still in course of probate administration, *as appears in* 148 *Cal.* 102 *et seq.* Afterward the realty—of which her share had been mortgaged—was sold by order of the Probate Court. Then final distribution was ordered. And the widow's share of the funds derived from the sale, was withheld from her and applied toward the satisfaction of her first mortgage.

So in the case of *Sanders* v. *Strobel*, 42 *S. E. Rep.* (*South Car.*) 429, it appears that the widow had mortgaged her interest in real estate to which she was entitled as an heir, to

secure payment for attorney's services in litigation concerning her interests. It was held, as stated in the head note, that: "Where a widow executes a mortgage to secure attorney's fees for defending suit for possession of her husband's land, it may properly be paid out of the widow's distributive share."

The Chancery Court will, in the exercise of its inherent jurisdiction, without aid of special statute, and where there is no lien or mortgage, intercept, by injunction, and subject the share of an heir in undistributed funds of an estate in the hands of an administrator to the payment of the heir's debt, because there is no remedy at law, the legal remedy having been exhausted.

In the case of *Earl* v. *Circuit Judge*, 92 *Mich.* 285, it appears that the plaintiff in the court below had obtained judgment in New York against defendant on personal service, and execution on that judgment had been returned *nulla bona;* thereupon plaintiff brought his bill "in the Kent Circuit Court in Chancery" of Michigan, to subject to the satisfaction of the judgment, defendant's share of his father's estate in the hands of an administrator. The estate was in course of probate administration and no order of distribution had been made. The administrator was made party and enjoined "from transferring or paying over to Lyman (the heir) any portion or interest he might have in his father's estate until complainant's debt should be first satisfied." There was no statute which aided the court in granting the relief. The court said: "It is true that the complainant based its claim for relief upon the general equity jurisdiction of the court, and upon the idea that, having no legal remedy, it was entitled to proceed against the interest of Lyman H. Kendall, in his father's estate in equity. Complainant's bill was not planted on the statute, nor is relief sought by virtue of it, in the amended bill." The statute referred to did not apply to such case.

In the case of *Lawson* v. *Virgin*, 21 *Ga.* 356, bill in equity was brought by a creditor against an administrator and an heir, to subject the heir's share of an intestate's estate to

payment of the heir's debt; and prayed that the "administrator . . . be enjoined and restrained from paying said distributive share to said Robert and that he be decreed by the court to pay the same, or so much thereof as is necessary to discharge complainant's demand." The relief was granted, insolvency of the debtor heir having been shown, although the creditor had not yet obtained judgment on the demand. No reference is made to statute authorizing the relief.

So in the case of *Sayre* v. *Flournoy, adm'r*, 3 Kelley's Ga. Rep. 541, it was held that a creditor of an heir or distributee, having exhausted his legal remedy, may by bill in equity reach and have applied in satisfaction of the debt, the heir's distributive share of an estate, in the hands of an administrator."

In *Selman* v. *Milliken*, 28 Ga. 366, it was held that garnishment of an administrator was not the proper remedy to reach the heir's distributive share of an estate: but, says the court: "An injunction could require him (the administrator) to pause and answer when the proper time comes."

The case of *Bennick* v. *Bennick and Slamey adm'r*, 61 N. C. (*Phil. Eq.*) 45, was an "original bill to subject an interest in the hands of an administrator to the satisfaction of a claim of a creditor of one of the next of kin." The bill was sustained by the court, the creditor having obtained judgment at law, and execution having been returned showing a barren result.

In the case of *Napier* v. *Howard*, 3 Kelley's Ga. Rep. 193, it was held that where several heirs are entitled to undivided portions of a bequest, the Court of Chancery will, in order to enforce a creditor's right to payment out of the share of one of them, determine the share to which each is entitled and charge the debt upon the share of the debtor.

In the case of *Greer* v. *Simrall* (Ky., 1900), 59 S. W. Rep. 759, a judgment creditor of an heir, for alimony, acquired a lien by levy on his undivided interest in certain real estate coming to him as one of the heirs of his father's estate. The same real estate was sold to satisfy a mortgage

made by the heirs, while, as it appears, the probate administration was in progress. The share of the judgment debtor heir was subjected to satisfaction of the judgment for alimony; and to do that the court had to determine the share to which the debtor heir was entitled, of the funds in question, and found that the judgment creditor was entitled "to the extent of the undivided one-fifth interest belonging to John W. Greer."

In the case of *Cassady* v. *Gummelman* (Ia. 1899), 77 N. W. Rep. 1067, the court in an action, in equity, against an heir and administrator, by a judgment creditor of the heir, determined the share of certain funds in the hands of the administrator, to which the heir was entitled and subjected his share to the payment of the judgment. There had been no previous levy on that fund, nor on any thing from which it was derived.

In the case of *Oppenheimer* v. *Collins*, 115 Wis. 283, 60 L. R. A. 406, the court in the exercise of its equity jurisdiction, in a suit against an intestate's administrator and an heir and his alleged assignee, subjected the undivided share of the heir in the personal and real estate of his father's estate, to the payment of his judgment creditor. To do this, the court declared void, as to the judgment creditor, an assignment of the heir's interest in the estate. The estate was in course of probate administration. The exact amount or value of the interest sought to be reached could not at the time be ascertained. But the court determined the share of the estate property to which the heir was entitled, and required the "administrator to pay to plaintiff's attorney all sums thereafter payable to John Collins, Jr.," the judgment debtor heir, until the judgment be satisfied.

A Massachusetts court of equity would, as we have shown, apply the remedies which have been applied in the case at bar, to protect and enforce complainant's equitable right in the funds in the hands of the administrator, although they be in probate administration. So may the Federal Circuit Court, sitting in Massachusetts, apply the same equitable remedies to a case cognizable in chancery, even

though it be an enlarged remedy given by statute. *Clark* v. *Smith*, 13 *Pet.* 194, 203, 204; *Gaines* v. *Fuentes*, 92 *U. S.* 10; *Gormley* v. *Clark*, 134 *U. S.* 338; *Holland* v. *Challen*, 110 *U. S.* 15; *Bardon* v. *Land & R. Imp. Co.*, 157 *U. S.* 327; *Rich* v. *Braxton*, 158 *U. S.* 405; *Smith* v. *Ames*, 169 *U. S.* 466, 516; *Richardson* v. *Green*, 9 *C. C. A.* 565, 61 *Fed. R.* 423. This rule was recently applied in the case last cited, brought in the Circuit Court for Oregon, to annul a will admitted to probate by a County Court of that state. The complainants alleged that the will was forged. Mr. *Justice McKenna*, presiding in the Circuit Court of Appeals, concurred in the last mentioned decision. And that decision was approved by the United States Supreme Court, to the extent implied by refusing to grant a writ of certiorari to review it. *Richardson* v. *Green*, 159 U. S. 264, 40 L. ed. 142. The property involved in that case must have been in probate administration, for the will was admitted to probate contemporaneously with the adjudication in the Federal Court.

There is, moreover, direct statutory authority given to the United States Circuit Court "to enforce any legal or equitable lien upon . . . real or personal property within the district." *McDaniel* v. *Traylor*, 196 U. S. 415, where the statute is quoted and applied touching property in probate administration.

It cannot be maintained on principle, or authority, that the fact that the property, on which complainant's lien rests, is temporarily in the possession of an administrator, precludes a court of equity from adjudicating, protecting, and enforcing her equitable right therein. To deny that a court of equity has such jurisdiction is to contradict all the weighty authorities from the McAuley case first cited above, where trust interests were established by the Circuit Court in property in probate administration, to the last case cited above; and more to the same effect might be added.

The equity jurisdiction of the United States Circuit Court, for cases cognizable therein, is as complete and effective as that of any equity court in the land. As said by Mr. *Justice Story*, in *Harvey* v. *Richards*, 1 *Mason*, 381, *Fed.*

Case No. 6184: "The equity powers and authorities of the courts of the United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the Court of Chancery. The present is a suit between citizens of different states, over whom this court has an unquestionable right to entertain jurisdiction; and it will follow, of course, that plaintiff is entitled to the relief she prays for, if it be competent and proper for any court of equity to grant it." He was considering the question whether the Circuit Court ought to require an administrator to distribute to an heir her share of an estate then in the administrator's hands, in Massachusetts, which others opposing, sought to have sent out of the jurisdiction before the rights of the complainant heir were determined and protected. The opposition was based largely upon the claim that the Massachusetts administraton was *ancillary*. But the learned Justice utterly repudiated the pretension that an equitable right in property, or the chancery jurisdiction to protect and enforce such right, was affected by the circumstance that one administration was claimed to be principal and the other auxiliary or ancillary. He said: "But I am yet to learn, what possible difference it can make in the rights of parties before the court, whether the administration be a principal or an auxiliary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin." He declared that the protection and enforcement of the right in question belonged to the Court of Chancery as a branch of its "ancient and settled jurisdiction," and should be exercised in behalf of the complainant before him. All those observations apply with equal force to the case at bar. The right of lien and its protection is within the ancient and settled cognizance of equity courts, and their jurisdiction is constantly invoked and exercised for the protection of such rights in property in the possession of administrators. Nor does the application of the equitable remedies, necessary and

sufficient to adjudicate, establish, protect and enforce complainant's lien, in any way interfere with, or disturb, the proper administration of the estate under the direction of the Probate Court.

"2. Has the Circuit Court jurisdiction to enforce by foreclosure a lien upon property so situated?"

This question, as we understand, raises the inquiry whether the Circuit Court has power to enforce the lien asserted in the case at bar, if judicially found to exist, and is by decree foreclosed on the funds and effects in question. What we have already said and the authorities cited, apply very forcibly to that question; but more authority may be referred to, bearing directly upon it.

It is established law that a court of equity will use the writ of injunction, and decree injunction provisions, to protect and enforce a lien on funds or other property which might be put beyond the reach of the lien holder. Mr. Pomeroy states the law upon this subject in his work on Equity Jurisprudence (sec. 1339), as follows:

"The *jurisdiction to grant injunctions* restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests, or claims, with respect to specific things, whether lands, chattels, securities, or funds of money, or to relieve against mistakes, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate, cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the estates, interests, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature. Many

breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake, or fraud, with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties, concerning specific property, and to enforce any other equitable estate, interest, *lien*, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of his final relief. It may, therefore, be stated as a general proposition, that whenever the equitable relief against mistake, or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties, concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property, *requires the aid of an injunction*, a court of equity has jurisdiction, and will exercise that jurisdiction to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would, therefore, interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property. The particular instances to which this doctrine is applied are almost numberless, and extend through the entire range of equitable remedies against mistake and fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, *liens*, and primary rights in and to specific property of any kind or form." (*III Pomeroy's Eq. juris.*, *sec.* 1339.)

Among the "particular instances" which he mentions in the next section (1340) is "to enforce a trust, *or an equitable lien*," citing cases in the note thereunder.

Speaking of an equitable lien in *Hauselt* v. *Harrison*, 105 *U. S.* 401, this court said: "Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Boyer had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt, and a court of equity would not have hesitated, by an injunction, to prevent the commission or continuation of the wrong. Boyer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement. 'Indeed' says Story, Eq. Jur., sec 1231, 'there is generally no difficulty in equity in establishing a lien not only on real estate, but on personal property or on money in the hands of a third person, whenever that is a matter of agreement, at least against the party himself and third persons who are volunteers or have notice. For it is a general principle in equity that, as against the party himself, and any claiming under him voluntarily, or with notice, such an agreement raises a trust.'"

In the case of *Milner* v. *Metz*, 16 *Pet.* 221, the assignor in bankruptcy under Pennsylvania law was, after his discharge, awarded by Act of Congress a sum of money for services performed for the Government before he assigned in bankruptcy. Both the assignor and assignee applied to the Treasury for the money. "The Department," says the court, "refused to examine the equities of the parties or look beyond the Act of Congress. Metz (the assignee) filed his bill enjoining Milner from receiving the money and had a decree for *perpetual injunction*." The decree was affirmed by this court (16 Pet. 225).

In the case of *Dulaney* v. *Scudder*, 36 C. C. A. 52, 94

Fed. R. 6, there was a dispute as to which party was entitled to a sum of money to be paid by the Government for construction work done on a levee. The Government was not made party to the suit brought by Scudder *et al*, by their bill in chancery praying "that Dulaney be *perpetually enjoined* from collecting or receiving the money due for the work. The Circuit Court overruled a demurrer to the bill, and on final hearing enjoined Dulaney as prayed." The Circuit Court of Appeals (fifth circuit), affirmed the decree. The main contention before the court seems to have been that because the court could not lay hold of the fund or even had the Government before it as a party, the controversy between the real parties in interest in the fund could not be adjudicated, determined and enforced by the court administering equity. But the court in overruling that contention, referred among others, to the case of *Phelps* v. *McDonald*, 99 *U. S.* 298, and said it "was a contest in equity as to the ownership of money which was not within the jurisdiction of the court." The court said: "Whether the money be here or abroad, the assignee (in bankruptcy) is entitled to have the question finally settled whether he or McDonald has the better right." (36 C. C. A. 54.)

There can be no doubt of the jurisdiction of an equity court by injunction, to protect a lien or other equitable rights in a fund or other personal effects and to control the conduct of parties in custody of or claiming the same, so as to enforce such lien or equitable right.

111 *Pomeroy's Ed. Juris., secs.* 1339, 1340.
Hauselt v. *Harrison*, 105 *U. S.* 401.
Phelps v. *McDonald*, 99 *U. S.* 298, 308.
Milner v. *Metz*, 16 *Pet.* 221.
Dulancy v. *Scudder*, 36 *C. C. A.* 52, 94 *Fed. R.* 6.
McKinney v. *Curtiss*, 60 *Mich.* 611.
Sherman v. *Am. Stove Co.*, 85 *Mich.* 169, 48 *N. W. R.* 537.
Smith, etc., Co. v. *Skinner*, 91 *Hunn.* 641.
Lewis v. *Doge*, 17 *How. Pr.* 229, 36 *N. Y. Supp.* 1000.
Keller v. *Payne*, 1 *N. Y. Supp.* 148.
Hendrix v. *Morrill*, 6 *N. Y. Supp.* 254.

An administrator may be enjoined by a court of equity from delivering or paying funds in his hands to a person not in equity entitled thereto, although the Probate Court has ordered such delivery or payment. *McKinney v. Curtiss*, 60 *Mich.* 611. See also the Massachusetts cases cited above.

But, it is contended, that inasmuch as the Probate Court of Suffolk County, under the law of Massachusetts (Rev. L., c. 143, secs. 1 and 2) may order the money and bonds in question to "be distributed" in Massachusetts, "or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the State or country where the deceased had his domicile"; and the Probate Court therefore, may not order distribution in Massachusetts to the distributees of said funds and bonds, as provided by the decree of the Montana Court determining the will contests prosecuted by Colonel Ingersoll, but may order defendant Leyson as administrator in custody of said funds and bonds subject to complainant's lien to transmit the same to himself as administrator of the same estate in Montana; that in such event they might pass out of the territorial jurisdiction of the Circuit Court; and it is contended that in that event the decree and injunction of the Circuit Court would not be binding upon defendant Leyson as administrator, or the other defendants, who are before the Circuit Court *in person*, as parties to the case at bar.

It is shown in the case at bar that in respect to the administration of the Davis estate in Montana, "each and all liens claimed asserted . . . upon the shares thereof acquired for said five heirs and Coram" except the lien existing in favor of complainant "have been acknowledged and confessed by said Henry A. Root and Joseph A. Coram"; and "paid and discharged out of funds of said estate" heretofore ordered to "be distributed to said five heirs and Joseph A. Coram"; "that each and all claims allowed or asserted against the estate of Andrew J. Davis, deceased, in the State of Montana, have been fully paid and discharged except certain costs and expenses of administration of small amount, to pay which

there are funds of said estate reserved in the custody of the administrator thereof in the State of Montana; that the administration and distribution of said estate in the State of Montana, is practically finished, except to close up a few matters of little consequence, and there are no unsettled debts of said estate of Andrew J. Davis, deceased, or other matters pertaining to said estate in Montana, which, for any reason, occasion or require the transfer of said funds and effects thereof situate in Massachusetts, to the State of Montana," (see bill, R. pages 33, 34). Defendants admit that all liens claimed in Montana, "have been paid and discharged" (R. 113, 114), and the proof shows that all debts and claims against the estate in Montana have been paid—that in fact there were none of any consequence (R. 410). It is also shown and admitted that all the real estate, money and other personal property of the estate which was in Montana has been heretofore distributed, and that Col. Ingersoll's clients have had and received already, over $374,900 in money besides their share of the real estate, the value of which is measured in millions (*see complainants' principal brief, page 13, where the record is cited*).

All those facts may be shown to the Probate Court of Suffolk County, Mass., when it comes to make disposition of the funds and effects situate there.

But suppose the lien claimed by complainant be established and foreclosed on the shares of said funds and effects to which Coram and Root are entitled, by decree of the United States Circuit Court containing proper *injunction* provisions; and with the lien thus established and foreclosed on said money and bonds and with those injunction provisions resting upon the parties to the case at bar—all of whom were served with process, have appeared and are *present in person* before the United States Circuit Court—said funds and bonds should be transmitted to Montana, *would that decree and its injunction be binding and effective* upon the parties to this action? That question is answered affirmatively in the authorities.

The United States Circuit Court, by statute, has jurisdic-

tion to foreclose the lien, even if it had not personal jurisdiction over the defendants. *McDaniel* v. *Traylor*, 196 *U. S.* 407. The statute is cited and set forth at page 419 of the opinion in that case. With how much more force has it jurisdiction to adjudicate and decide the rights of the parties in and to the funds and bonds in question with all the parties in interest before the court *in person?* We have explained in *our principal brief*, under the *head of "Property in Massachusetts,"* etc., page 153, and in our supplemental *brief*, pages 17 *et seq.*, filed within five days after the submission of the case, the attitude and interest of all parties to this action.

With the parties before the court *in person*, having appeared, answered and submitted their claims to the court for adjudication without objection as to the district in which the suit was brought (*in re Moore decided at this term on April 20, L. ed. Advance sheet of May 15, 1908*), the court had jurisdiction *in personam* for all purposes, and for all relief which the cause and facts warrant.

In *French* v. *Hay*, 22 *Wall.* 250, this court said: "The court having jurisdiction *in personam*, had power to require the defendant to do, or refrain from doing, anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. *Watts* v. *Waddle*, 6 *Pet.* 391; *Lewis* v. *Darling*, 16 *How.* 1."

The same rule of law is affirmed in *Phelps* v. *McDonald*, 99 U. S. 308. It is there said by the court:

"In this case whether the money be here or abroad, the assignee is entitled to have the question finally settled whether he or McDonald has the better right . . . conceding the fund to be there, why should not this question of paramount right be settled in this case, rather than that the American claimant should be subjected to the delay, expense, and other inconveniences of a suit before a foreign tribunal. The adjudication would be as binding in one case as in the other.

"Where the necessary parties are before a court of equity

it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary according to the *lex loci rei citae*, which he could do voluntarily to give full effect to the decree against him.

"Without regard to the situation of the subject matter such courts consider the equities between the parties and decree *in personam* according to the equities and enforce obedience to their decrees by process *in personam*. 2 *Story eq., sec.* 899; *Miller* v. *Sherry*, 2 *Wall.* 249; *Penn.* v. *Lord Baltimore*, 1 *Ves.* 444; *Mitchell* v. *Bunch*, 2 *Paige*, 606."

In the case of *Cole* v. *Cunningham*, 133 *U. S.* 107, *Chief Justice* Fuller, in delivering the opinion of the court, said:

"The jurisdiction of the English Court of Chancery to restrain persons within its territorial limits and under its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act, *in pais*, or the institution or prosecution of an action in a foreign court, is well settled.

"*In Penn.* v. *Lord Baltimore*, 1 *Ves. sr.*, 444, Lord Hardwicke recognized the principle that equity, as it acts primarily *in personam*, and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract, or other equity subsisting between the parties, respecting property situated out of the jurisdiction. 2 *Lead. Cas. in Eq., 4th Am. ed.*, 1806, *and cases.*

"*In McIntosh* v. *Ogilvie*, 4 *Term Rep.* 193, *note*; *S. C.* 3 *Swanst.* 365, *note*, *Lord* Hardwicke lays down the same doctrine as to restraining prosecution of suit. This case bears so close an analogy to that at bar, that we give it in full as follows:

" 'The plaintiff was the assignee of a bankrupt, the defendant a creditor, who before the bankruptcy, went into Scotland and made arrestments, on debts due to the bankrupt from persons there. Upon an affidavit of the defendant's

having got this money into his hands, a *ne exeat* was granted; and a motion was now made on the behalf of the defendant to discharge it, upon a supposition that he had a right to the goods as creditor by his arrestments.

"'The Lord Chancellor asked whether he had sentence before the bankruptcy, and, being answered in the negative, he said, "Then it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy. I cannot grant a prohibition to the court of sessions; but I will certainly make an order on the party here to restrain him from getting a priority, and evading the laws of bankruptcy here. If the gentleman were not going abroad I would do nothing; but as he is, I will not discharge the writ without his giving security to abide the event of the cause."'

"*Penn* v. *Lord Baltimore* is cited with approval by *Chief Justice* Marshal, in *Massie* v. *Watts*, 10 *U. S. 6 Cranch* 148, where a suit was instituted in the Circuit Court of Kentucky to compel the conveyance, by the defendant, of the legal title of land in Ohio, on the ground that he had notice when it was purchased, of the prior equity of the complainant. The defense was that the land was beyond the jurisdiction of the court, and within the state of Ohio. This defense was overruled by the court below, and its decision affirmed by this court. 'This court is of opinion,' said the Chief Justice, 'that in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.'

"And in *Pennoyer* v. *Neff*, 95 U. S. 714, 723, it is said in the opinion of the court by *Mr. Justice* Field: 'The state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is

situated. *Penn* v. *Lord Baltimore*, 1 *Ves. Sr.* 444; *Massee* v. *Watts*, 10 *U. S.* 6 *Cranch*, 148; *Watkins* v. *Holman* 41 *U. S.* 16 *Pet.* 25; *Corbett* v. *Nutt*, 77 *U. S.* 10 *Wall.* 464.'

"In *Lord Portarlington* v. *Soulby*, 3 *Myl. & K.* 104, 10[illegible] *Lord Chancellor* Brougham reviews the history of the juris diction to restrain parties from commencing or prosecutin actions in foreign countries, and concludes: 'Nothing ca be more unfounded than the doubts of the jurisdiction That is grounded like all other jurisdiction of the court, no upon any pretension to the exercise of judicial and admin is trative rights abroad, but on the circumstance of the perso of the party, on whom this order is made, being within th power of the court.' *Earl of Oxford's case*, 2 *Lead. Cas. i Eq.*, 1316, 1 Ch. Rep. 1."

The learned *Chief Justice* in *Cole* v. *Cunningham supra* reviews a long line of cases on the subject, showing wit what harmony the English and American courts, both Stat and Federal, have affirmed the existence of the chancer jurisdiction in question and exercised it in administerin justice. And being presented with a New York opinion (49 Barb. 299) which seems to question the propriety of it exercise he said: "The reason urged against the exercise o the power . . . has not commended itself to the judicia mind, for the injunction is not directed to the courts of th other state, but simply to the parties litigant."

The New York courts, however, do not persist in the con trary view. In the case of *Williams* v. *Ingersoll*, 89 *N. Y.* 508, the New York Court of Appeals, in affirming a decre foreclosing an *attorney's equitable lien*, offered on its own motion to cause an injunction provision to be inserted i the decree, forbidding further prosecution, by the partie before the New York court, of garnishment proceedings previously commenced by some of them in Connecticut to the prejudice of the attorney's equitable lien.

The binding force of a decree in the case at bar determin ing the equitable rights of complainant by foreclosure o her lien upon the portions of said money and bonds owned by Messrs. Coram and Root, cannot be successfully con

troverted; nor can the parties to this suit before the court *in person*, escape the binding force of that decree or its injunction provisions, even though said money and bonds should be sent into another state. Anyone through whose hands they might pass with notice of the lien (and with more force where it had been foreclosed by decree) would be bound, and if he disposed of them to the prejudice of the lien, would be bound to answer for the wrong. But the lien must be kept alive; and the only way that can be done is by timely prosecution of a suit in a court of equity. *Hovey v. Elliott*, 118 *N. Y.* 124, 23 *N. E. Rep.* 475. It cannot be done by petitioning a probate court, as such, however willing that court might be to effectuate justice.

It is not a legitimate supposition that any probate court, or other court, will undertake so to shape its proceedings as to embarrass the pursuit of justice. They were instituted to effectuate justice so far as their jurisdiction reaches, and if it does not reach far enough, and that of some other court does, and for that reason two courts have different and distinct offices to perform touching some thing, it is reasonable to suppose, from every day experience, that they will both shape their proceedings to the ends of justice. The courts of common law and probate jurisdiction recognize the fact that there are many important rights and obligations of binding character in law, capable of judicial protection and enforcement, in a court of equity, with which the former courts cannot deal. Not only so, the chancery courts have constantly and actively used their power to assist the other courts in administering justice. The Probate Court, as such, being of limited jurisdiction, constantly depends upon the courts instituted for adjudication of controversies, touching property rights, to protect and enforce the rights of its administrators. There are two administrators, appointed by the Probate Court of Suffolk County, Mass., concerned in the litigation and in the property involved in the case at bar. That property is in the possession of one of them, in the course of administration, under the direction of said Probate Court.

But the inquiry now is whether the United States Circuit Court has jurisdiction to *enforce* by foreclosure a lien upon property so situated? We have shown by the authorities cited above, that in the foreclosure of this lien, and in the injunction of its decree to protect the rights of the lienor, the Circuit Court has simply exercised the equity jurisdiction that belonged to the English Chancery, to the Federal Courts, to the Supreme Judicial Court of Massachusetts, and to other state courts invested with general equity jurisdiction.

How would the decree of the Circuit Court establishing the rights of complainant and foreclosing her lien, be enforced?

In considering this question we have proceeded and shall proceed on the unreasonable and even violent assumption that the Probate Court of Suffolk County, Massachusetts, when the equitable rights of complainant established by decree of the Federal Court, as the result of adjudication of the case at bar, is shown by proper representation, *will refuse* to take any notice thereof; although that court on a former occasion denied a petition of defendant Henry A. Root, because it appeared to the court to have been prosecuted "for the purpose of evading liens," as shown by the record in the case at bar (R. 730); and we will further assume that now those liens, except that of complainant, having been paid and discharged, by order of the Montana Court exercising probate jurisdiction out of funds distributed from the estate distributed there, to Colonel Ingersoll's clients, as shown by the record in the case at bar (*see bill*, R. 33, 34, *also consent of lien claimants to order of distribution*, R. 591, *and decree ordering payment thereof*, R. 595), the defendants Coram and Root will, in order to embarrass if possible, the enforcement of complainant's lien, prosecute another petition to the Probate Court of Suffolk County, Mass., to order said money and bonds transmitted by defendant Leyson as administrator in Massachusetts, to himself as administrator thereof in Montana, and that it being, by the law of Massachusetts (Rev. L. c. 143, secs. 1 and 2) "in the

discretion of the court" to make such order for transmission, or distribute said personal property in Massachusetts, the Suffolk County Probate Court will grant such petition of Coram and Root for transmission, without reference to complainant's rights in said money and bonds established by decree of the Circuit Court, as the result of adjudication in the case at bar; and that in such event said money and bonds will be transferred by Leyson as administrator in Massachusetts, to himself as administrator in Montana. We assume such course of proceeding not because it may be reasonably expected, but simply to follow out that *possible* course with reference to the enforcement of the decree of the United States Circuit Court foreclosing complainant's lien.

The funds and effects in question would then become subject to the probate jurisdiction of the Montana Court, with complainant's lien established and foreclosed upon all the right, interest and share owned therein by Coram and Root; and with the Circuit Court's decree and its injunction provisions binding upon Leyson as administrator or trustee, in charge of those funds and effects, and binding upon all the defendants in this action. But if such transmission be made, the parties bound by the decree of the United States Circuit Court would not for that reason be beyond the reach of the law; nor would the party in charge of those funds and effects, nor the other defendants in this case, who are entitled to shares thereof, be beyond the binding force of the Circuit Court's decree, and its injunction provisions. There are many instances in which rights established in one court, must be asserted in some other, to realize the fruits of those established rights. It is so in all such cases as *Phelps* v. *McDonald supra*, in *Massie* v. *Watts*, and others cited in *Cole* v. *Cunningham supra*. All courts in the land dealing with said funds and effects would be bound to give full faith, credit, and effect to the decree in the case at bar when set up, and rights thereunder are asserted.

What could be done with said funds of about half a million dollars in money and the bonds described in the Circuit Court's decree, when it came under the probate jurisdiction

of the Montana Court? All distributive rights in that property have been settled beyond question by proper adjudications in competent courts, as shown in our principal brief. The administration of the estate is finished with the possible exception of a few unimportant matters, as shown without dispute in the case at bar.

In re Davis estate, 27 *Mont.* 494, it is said in the opinion of the Supreme Court of Montana: "All debts due from the estate have also been paid. A large amount of money and property has been distributed from time to time to the parties named in the order of August 24, 1897, or to their assignees. Among these assignees Coram has been recognized as entitled by assignment to the shares of Elizabeth Ladd and Marie Louise Dunbar, and has received a large amount of property and money by virtue of his substitution in their stead. . . . The assignment to Coram by Elizabeth Ladd and Marie Louise Dunbar was not disputed by either of them. It had theretofore been recognized by the Court. Distribution had been made to Coram. He had, therefore, been in effect substituted in the stead of his assignors, and had all the rights which such substitution implied." (27 Mont. 494, 497.)

Therefore the matter before the Montana Court exercising probate jurisdiction touching said funds, would be simply a proceeding for order of distribution, according to rights settled by prior decrees of courts of competent jurisdiction.

The complainant having obtained a *judgment* foreclosing her lien in the case at bar, would then have a right to appear in her *personal capacity*, in the courts of Montana, and set up that judgment and prosecute her rights under it, without appointment as administratrix in that state—the former claim having been merged by judgment in her personal and individual right. *Biddle adm'r* v. *Wilkins;* 1 *Pet.* 687, 7 *L. ed.* 315; *Moore* v. *Petty*, 135 *Fed. R.* 668; *Talmage* v. *Chappell*, 16 *Mass.* 71; *Sweet* v. *Brackley*, 53 *Me.* 346; *Weeks* v. *Hermon*, 65 *N. H.* 91.

It will also be the duty of Mr. Leyson as administrator, having in his hands said funds and effects, in the rela-

tion of trustee, and bound by decree of the Circuit Court foreclosing complainant's lien thereon, to make proper showing of said decree to the Montana Court having probate jurisdiction of said funds and effects, when distribution thereof is to be ordered, if any such showing be deemed necessary.

We will assume, however, for the purpose of the question before us, that the Montana Court would refuse to notice complainant's rights established in the case at bar by decree of the United States Circuit Court, if that decree were set up before it, in a proceeding for distribution of said funds and effects—although it seems to us a far stretch so to assume, for the same Montana Court provided in a former order of distribution of funds of the same estates, made pursuant to the decree determining the will contests prosecuted by Colonel Ingersoll on behalf of Messrs. Coram, Root and their associates, that certain liens claimed by attorneys residing in Montana, who assisted Colonel Ingersoll in that contest, should be paid out of the funds ordered distributed to Messrs. Coram, Root and associates, as shown in the case at bar; which lien claims so ordered paid, had not been established by judgment, but were asserted by mere notice to Mr. Leyson as administrator (*see bill* 33, 34, *also consent of lien claimants to order of distribution*, R. 591, *and court's order for payment of said lien claims*, R. 592, 595). And that order of distribution, making provision for those lien claimants, was *affirmed* by the Supreme Court of Montana in *re Davis estate*, 27 *Mont.* 225, *and same case*, 27 *Mont.* 490. We will assume, for the purposes of the question here under consideration, that the courts of Montana would not deal so favorably with *complainant's* lien, though foreclosed by decree of the United States Circuit Court in her suit to enforce payment for services of Colonel Ingersoll in the same will contest—a lien established in a case wherein Leyson as administrator and Coram, Root, and all their associates, except Ellen S. Cornue, were parties present before the United States Court *in person*, and are subject to the decree and injunction of that court, and Ellen

Cornue's interest in said money and bonds is represented in the case at bar by Leyson as administrator standing in the relation of her trustee. The order of distribution would, in that event, be made without any provision for application of the portion of said funds and effects owned by Messrs. Coram and Root, to the lien of complainant established and foreclosed by the Circuit Court's decree.

Then the court of Montana would be through with the probate administration of said funds and effects, and Mr. Leyson as administrator would be at liberty to distribute them. He would have in his hands 515½-1100 of said bonds, and about a half million dollars in money which had been ordered distributed to the *parties defendant in the case at bar*, except Ellen S. Cornue, who owns a small interest therein which would also be in Mr. Leyson's hands as administrator, in the same relation as trustee, for which he must account to her. But Mr. Leyson, being bound by the decree of the Circuit Court, in which he has *acquiesced*, refusing to appeal therefrom (*see additional brief for complainant filed just after the submission of this case, pages* 17 *et seq., and citations*), would not be at liberty to deliver to Coram and Root the portion of those funds and effects owned by them, as he has done with all former distributions of the property of said estate. Nor would Coram and Root be at liberty to demand or receive their portions, until complainant's lien were satisfied, because they, too, are under the decree and injunction of the Circuit Court.

The *obligation* and *protection* of defendant Leyson while acting under and in conformity with the decree of the United States Circuit Court, with regard to said funds and effects, when the same are ordered distributed, is perfectly clear. And his *liability* for disregarding that decree if he should wish to shoulder the responsibility, is also clear.

In *Welsh* v. *Hole*, 1 *Doug.* 238, *Lord Mansfield*, in speaking of the rights of an attorney under his equitable lien, upon the fruit of his labors, said: "He may stop it *in transitu*, . . . If he apply to the courts, they will prevent it being paid over till his demand is satisfied. I am inclined

to go still further, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which had been assigned, after notice."

Lord Kenyon ruled to the same effect in *Omerod* v. *Tate*, 1 *East* 464, where in speaking of the attempt of parties to defeat the attorney's equitable lien, he said: "This appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien"; and required the defendant to satisfy the attorney's lien, though he had "paid it over to the plaintiff himself and obtained from him a receipt in full of all demands."

The same liability is shown in the declaration of the same Chancellor, in *Read* v. *Dupper*, 6 *T. R.* 361, that: "The principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained."

In the case of *Cent. R. R. Co.* v. *Pettus*, 113 *U. S.* 116, the railroad company with knowledge of the attorney's rights, by private and secret arrangement, brought up the claims of creditors after their rights had been established by the labors in their behalf, by the attorneys in a suit in equity. That was like paying in their own wrong. They were held liable for the attorney's equitable lien.

If the administrator in the case of *Wylie* v. *Coxe*, 15 *How.* 415, had delivered to others the money in his hands subject to the attorney's lien, he would without any doubt have been liable to answer to the attorney for the wrong. The same liability is declared in *Hovey* v. *Elliott*, 118 *N. Y.* 124, and in a great number of cases relating to trust interests in the hands of a trustee. We think there is no need of stopping here to cite more authorities affirming that rule of law.

The simple fact would be that, with complainant's lien foreclosed on the portion of those funds in the hands of Mr. Leyson, owned by Coram and Root, in the hands of Mr.

Leyson, he would be the trustee of complainant to the extent of her equitable right established therein; and the law would require Leyson to account to complainant for such equitable interest.

On the other hand, Mr. Leyson would be entirely protected in obeying the decree and injunction of the United States Circuit Court in the case at bar, against all actions and proceedings where his acts under and in obedience to that decree were questioned. If sued in a civil action by Messrs. Coram and Root or either of them, or assigns or volunteers, to coerce payment of the portion of their shares of said fund delivered to complainant in satisfaction of her lien, whether that suit be in State or Federal Court, he could set up the decree of the Circuit Court under which he satisfied the lien, and thereby a federal question would be raised. If such suit be in a state court, that federal question would permit the case to be removed to the proper Federal Court for determination, or it could be reviewed by the United States Supreme Court on writ of error to such state court, if its decision were against the right of Leyson to act in obedience to the decree of the Federal Court.

Dupasseur v. *Rochereau*, 21 *Wall.* 130.
Clements v. *Berry*, 11 *How.* 398.
Embry v. *Palmer*, 107 *U. S.* 3.
Cen. Nat. Bk. v. *Stevens*, 169 *U. S.* 432.
Nat. F. & P. Works v. *Oconto, etc. Co.*, 183 *U. S.* 216.
Deposit Bk. v. *Board of, etc.*, 191 *U. S.* 499.

The statute of Montana (sec. 2844, Code Civ. Proc.), provides that when distribution of estate property be ordered by the court exercising probate jurisdiction, the persons to whom the distribution is ordered, "may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession." It is not understood that contempt proceedings or other proceedings of a criminal or *quasi* criminal nature could be invoked under the Montana law, to coerce an administrator to hand over to a distributee the share of money or other

personal property which had been ordered distributed from an estate. But suppose such proceedings were taken against Mr. Leyson for declining, in obedience to the decree in the case at bar, to deliver said funds to Coram and Root, or anyone else contrary to that decree? The Federal authority would instantly release him. *Cunningham* v. *Nagle*, 135 *U. S.* 1, *and cases cited.*

The Federal Court, moreover, may protect rights acquired under its decrees, by enjoining parties before it from prosecuting other actions in state courts which would tend to render such rights valueless. *Deitzsch* v. *Huidekoper*, 103 *U. S.* 494. *Julian* v. *Central Trust Co.*, 193 *U. S.* 83, and cases there cited. Defendants Coram and Root are already properly enjoined by the decree in the case at bar, from demanding of Leyson or taking or carrying away the portion of said funds and effects subject to complainant's lien.

Besides the formidable civil liability which Mr. Leyson would take upon himself by disobeying the decree of the Circuit Court, he and Coram and Root would, in that event, also be liable to appropriate punishment for violation of the injunction of the Circuit Court.

Under the authority given by the United States statute (set forth in *McDaniel* v. *Traylor*, 196 *U. S.* 419), the Circuit Court has power to foreclose complainant's lien on the funds in question, and bind the interests of Coram and Root therein, in the hands of Leyson, wherever he may take them, without having had Coram and Root personally before the court.

It is by such power and processes as mentioned, that a court of equity, acting *upon the person* of the parties before it, enforces its decrees. The equity jurisdiction of the national court is in this respect more effective than that of any state court. Its powers and processes are not confined by state lines, even though there be some provisions of law defining the district within which suits may be brought. The national courts also have constitutional authority to arrest an attempt, by a state, to deprive a person of property without due process of law. It was, moreover,

the proper court for complainant to resort to for protection of her rights, because it takes judicial notice of the laws of all the states of the Union and administers them in proper cases.

A court of equity uses such measures as it deems sufficient for the case in hand. The court's decree in the present case is sufficient according to every day's experience with regard to such civil controversies, touching property in the hands of an administrator or trustee. The equities being authoritatively determined by the decree in the case at bar and the injunction of the court being upon the parties with binding force wherever they go, they are allowed to go their way and execute the decree.

At the close of respondent's last brief (page 181), presented to this court when the case was argued at bar, it is said: "If the property is ordered to be transmitted to Montana, it will come into possession of an officer appointed by the Montana Court. That court has full right to remove the administrator, and upon doing so may clearly require him to turn over the property to his successor appointed by the court in Montana, yet the decree of the Circuit Court enjoins any such transfer except upon notice to it and in its presence . . . the court in Montana is under no obligation to recognize any decree purporting to establish rights against property which comes into its hands for the very purpose of its determining the rights in the property."

That claim, if admitted, would deny the Federal Court's jurisdiction in all such cases as *Payne* v. *Hook*, 7 *Wall.* 425; *Arrowsmith* v. *Gleason*, 129 *U. S.* 86; *and McDaniel* v. *Traylor*, 196 *U. S.* 415, and in a great many others, wherein parties by reason of their citizenship have been allowed to come into the Federal Courts and have their rights in property in the hands of an administrator or which has gone through his hands and been wrongfully diverted, adjudicated and enforced, even though the wrong to be corrected had the sanction of an order of a state probate court.

Any pretense that the Montana Court would have any-

thing more to do with the funds and effects in question if transmitted there, than to order a distribution according to rights long since settled by decrees of competent courts, is refuted by the decision made *in re Davis estate*, 27 *Mont.* 235 *and* 490, where Messrs. Coram and Root were declared to have all the rights of distributees, under assignments from others.

Mr. Leyson was appointed to the responsible position of administrator and custodian of the property in question, a great portion of which was money or its equivalent, by agreement of Messrs. Coram and Root with other distributees, as the record in the case at bar shows (R. 603). It is true he might be removed by the Montana Court, or by the Massachusetts Probate Court. There is nothing in the decree in the case at bar which interferes in the least with such a determination. But if when Mr. Leyson, having been removed, invited his successor to come into the United States Circuit Court and receive the assets in question, so that he might be relieved of responsibility as a party to the case at bar, would Messrs. Coram and Root object? Would they have Mr. Leyson arrested in his attempt to hand over the property to a successor, upon his removal? If they did so because he attempted to obey Federal authority, that same authority would intervene and release him.

"3. Has the Circuit Court jurisdiction to determine the shares of Root and Coram in the property so situated?"

It has jurisdiction to foreclose a lien on personal property in the hands of a third person, and to protect the equitable rights of the lienor, "as owner of a beneficial interest in the property entitled to the enjoyment of the specific fruits," as held in *Hauselt* v. *Harrison*, 105 *U. S.* 40, *and in Phelps* v. *McDonald*, 99 *U. S.* 298, 308, and in many cases above cited. Such right is purely equitable, and the protection and enforcement thereof belongs exclusively to a court of equity. If the Circuit Court has equity jurisdiction to foreclose such lien, then in order to exercise that power it must determine the share of the fund to which the lien

attaches. In foreclosing the lien in the case at bar on the portion of the funds in question, owned by Coram and Root, the Circuit Court determines their interest, as between them and co-owners of interests in the same fund; but it does not in this case determine the interest of an heir or distributee in the estate from which those funds come to Coram and Root—although it has jurisdiction to do that. The Circuit Court, in a case where the citizenship of parties entitles the complainant to come into that court, has jurisdiction in equity to ascertain, determine and enforce the right of an heir, devisee, or legatee, in estate property, in the hands of an administrator (*Payne* v. *Hook*, 7 *Wall.* 425); and may construe a will, or declare a trust created by a writing which falls short of a will, and determine and enforce the rights of an heir, devisee, legatee, or *cestui que trustent*, in the estate property, in the hands of an administrator in the course of probate administration (*Byers* v. *McAuley*, 149 *U. S.* 608); or may enforce the right of an assignee of a distributive share or part thereof in the hands of an administrator or executor (*per Mr. Justice Washington*, in *Mayer* v. *Foulkrod*, *Fed. Case No.* 9,341); or declare a will admitted to probate by a state court, void and determine and enforce the rights of an heir, where, by the state law, its courts of equity have jurisdiction to determine the validity of the will (*Gaines* v. *Fuentes*, 92 *U. S.* 10; *Richardson* v. *Green*, 9 *C. C. A.* 565, 61 *Fed. R.* 423). The Circuit Court has jurisdiction to correct frauds or mistakes of an administrator with respect to disposition of estate property; though his acts have been sanctioned by order of the State Probate Court: and "has jurisdiction to compel executors and administrators to account and distribute the assets in their hands." *Payne* v. *Hook*, 7 *Wall.* 425; *Dodd* v. *Ghiselin*, 27 *Fed. R.* 405, *per Mr. Justice Brewer*; *Sullivan* v. *Andoe*, 6 *Fed. R.* 641. And "there can be no doubt that an administrator invested with the apparent right to receive or recover by suit, property or money, may be compelled to deliver or pay it over, to some one who establishes a better right, or that what was so recovered was held in trust

for some one not claiming under the will or under the administrator," as held by this court in *Dennick adm'r* v. *Cent R. Co.*, 103 *U. S.* 11. But such equitable right in funds in the hands of an administrator could not be enforced by the Probate Court, as such, because it moves only in the line prescribed by statute.

The United States Circuit Court has jurisdiction to foreclose an attorney's equitable lien on funds in the hands of an administration in the court of probate administration. *Wylie* v. *Coxe*, 15 *How.* 415, *Semmes* v. *Whitney*, 50 *Fed. R.* 666.

The Circuit Court, in a proper case, the citizenship of parties permitting, has jurisdiction to determine and enforce the equitable right or interest of either Root or Coram or any of their associates, in the 515½–1100 of said money and bonds to which they are entitled by the decree determining the will contests prosecuted on their behalf by Colonel Ingersoll. And if Leyson should refuse to recognize the rights of either in that trust fund, the one whose right was denied could sue Leyson in a court of equity to establish his right in the trust funds in Leyson's hands, and he would not have to wait until the estate was administered and distributed to others. So the executor or administrator of either person entitled to share in that trust fund could sue Leyson in the United States Circuit Court, and have his share determined, if his citizenship and that of Leyson's permitted. Mayer *v.* Foulkrod, vol. 16, Fed. Cases, No. 9341, *per Mr. Justice Washington*. There can be no doubt about that. It is an interest in trust funds in the hands of an administrator, standing in the same relation as trustee; and equitable rights and interests therein is a matter exclusively of equitable cognizance. A lien upon either of those shares is also a matter for protection and enforcement by a court of equity. If the Circuit Court has jurisdiction in a case between citizens of different states to enforce the equitable right of either associate in interest in that fund, why has it not jurisdiction to foreclose a lien on such interest, which exists both in equity and by statute law? How, or by what event, has

the Circuit Court lost or been deprived of jurisdiction to foreclose a lien on such interest?

The answer of those who dispute the jurisdiction of the Circuit Court is: "Because the property is in the hands of an administrator appointed by a state court." But all kinds of equitable rights claimed in property which comes into the hands of an administrator, if contested, must be determined by a court of equity. The Probate Court cannot, and does not, attempt to adjudicate or determine such equitable claims; nor does it even try or determine legal claims if controverted between the claimant and administrator. The denial that the Circuit Court has jurisdiction to enforce such an equitable lien as that involved in the case at bar, is rested on the qualification of its jurisdiction mentioned in *Byers* v. *McAuley*, *supra*, namely, that the Federal Court in determining rights of a citizen of another state, in property in the hands of an administrator, would not take over to itself the entire control of the administration or disturb its proper conduct under the direction of the Probate Court. No state court of equity does that in determining contested equitable rights touching property in the hands of an administrator. But the Chancery Court controls the conduct of the administrator with reference to the property subject to the equitable right, sufficiently to protect and enforce that right. The courts of Massachusetts in determining and enforcing equitable rights in property in the hands of an administrator do not assume control of the probate administration of the estate in which that equitable right exists. They adjudicate and establish the equitable right, and require the administrator to give effect to such right.

The Federal Court has jurisdiction to do the same, in a proper case between citizens of different states, as affirmed and clearly explained in *Byers* v. *McAuley*, *supra*, and in numerous other cases decided by the United States Supreme Court. In the case at bar the controversy being between citizens of different states, the Circuit Court has jurisdiction to foreclose the lien claimed by complainant, upon property within its

jurisdiction, and to exercise that jurisdiction it must ascertain the shares of Coram and Root on which that lien rests, and out of which it ought to be satisfied. The Circuit Court has jurisdiction of the administrator who represents, in the same relation as trustee, all beneficiaries interested with Coram and Root, and it has jurisdiction of Coram and Root, and all others having or claiming any interest in that portion of the estate decreed to Colonel Ingersoll's clients—all of whom are before the Circuit Court in the case at bar *in person* except Ellen S. Cornue, and she is represented by Leyson, who must account to her, in the relation of trustee, for her share. Under these circumstances the Circuit Court has jurisdiction to determine the shares of Coram and Root in the fund in question, in order to protect, foreclose, and enforce complainant's equitable lien thereon, just the same as it would have jurisdiction, their citizenship permitting, to determine, protect and enforce their equitable rights in the same funds in the hands of Leyson.

The Probate Court in ordering distribution of the estate property, in Leyson's hands as administrator, follows the decree of the Montana Court which determined the will contests and decreed that the estate should be divided and distributed to the persons named therein. The portion of the estate going to Colonel Ingersoll's clients, is awarded to them directly, and to trustees Palmer and Davis, Jr., for them as so many eleven-hundredths—amounting in all to 515½-1100—but that decree does not designate the share of each beneficiary interested in the portion decreed them. When distribution is ordered, there is, therefore, 515½-1100 of the funds and effects in Leyson's hands, which defendants all admit is to be passed over to Colonel Ingersoll's clients; and it is shown by abundance of undisputed evidence referred to in complainant's brief heretofore filed, that Coram and Root own 415½-1100 of that portion.

When a court of equity takes jurisdiction by reason of the equitable right or interest involved, it will adjudicate and determine all matters necessary to grant complete relief,

notwithstanding it relates to property in the hands of an administrator. *Payne* v. *Hook*, 7 *Wall*, 425.

"4. Has the Circuit Court jurisdiction, upon the pending bill either in its present form or as it might be amended, to direct that Leyson, Root, Coram or either of them should hold any property coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant?"

There is no doubt that within the Circuit Court's equity jurisdiction to protect liens, it has jurisdiction to do everything mentioned in the above question. Mr. Pomeroy shows it in his clear statement of the equity jurisdiction in that respect, quoted above. He says the instances to which that jurisdiction "is applied are almost numberless, and extend through the entire range of equitable remedies against mistake and fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, *liens*," etc. He is speaking of the use of injunction to that end (3 *Pomeroy's, eq. juris., sec.* 1339). The same is also affirmed by this court in *Hauselt* v. *Harrison*, 105 *U. S.* 401, and in the remarks of Mr. Story in his work on Eq. juris., quoted in the case last cited. It is also shown throughout all the cases we have cited above, and from which we have quoted the authoritative declarations of the courts directly upon this question of jurisdiction.

The Court of Equity will protect and enforce the lien and use its jurisdictional processes to that end. If not, the parties mentioned in the above question may, with impunity, run away with the fruits to which the lienor is entitled, and utterly defeat the equitable right. That the Circuit Court has as extensive jurisdiction in equity, to protect complainant's rights in the case at bar, as any court to which she could apply for relief, cannot be controverted. And in some respects, which we have mentioned above, its jurisdiction which complainant invokes, reaches further than that of any state court of equity.

The Circuit Court in the exercise of its equity jurisdiction

can require the defendants in the case at bar, all of whom are before it *in person*, to do, or refrain from doing, anything in Massachusetts or elsewhere, that may be necessary to protect and enforce complainant's equitable rights in the premises, as clearly shown by Mr. Chief Justice Fuller in *Cole* v. *Cunningham, supra.*

The bill we believe to be sufficient in showing and in prayer for relief, to warrant all the relief for which complainant asks, including such as indicated in the 4th question quoted above. But she would avail herself of the privilege to amend the bill in any particular which might be deemed necessary. In her prayer for relief she prays that: "John H. Leyson who has custody of said funds and effects situate within the jurisdiction of this court, and who is already under bond for the safe keeping thereof . . . be, by order of this court, appointed receiver of said funds and effects . . . *subject to said lien* . . . to take and hold custody thereof *whenever the same is released from administration by the Probate Court* . . . and hold custody thereof until the rights of your orator in the premises be determined." (R. 38.)

"5. To what extent, if any, is the jurisdiction of the Circuit Court limited or affected by the fact that the property from which payment is sought is in the hands of an administrator appointed by the Probate Court of Suffolk County?"

In any such case as that at bar, where the equitable right sought to be protected and enforced, is in property in the hands of an administrator, it may be said that the jurisdiction of the Circuit Court is limited to the determination, protection and enforcement of the equitable rights of the citizen of a different state than that of the administrator. It is because of such diversity of citizenship that the Federal Court has jurisdiction in such a case to adjudicate, determine and enforce the equitable right. Therefore, it will confine the scope of its action to that extent, and not take charge of the entire administration of the estate or interrupt the proper administration of it under the direction of the State Probate Court. To that extent, and to that only, is the

jurisdiction of the Circuit Court, in such cases, limited, as held by this court in *Byers* v. *McAuley*, 149 *U. S.* 608.

In the adjudication, protection and ultimate enforcement of complainant's rights in the case at bar, by the Circuit Court, there has not been, nor is it necessary that there should be, any interruption or interference with the administration of the property in question under the probate jurisdiction of the Suffolk County Probate Court. Complainant was obliged to seek relief in another court. For however willing that court might be to grant the relief necessary in complainant's case it has no jurisdiction, *as a Probate Court*, to grant it. *Sherman* v. *American Cong. Ass'n*, 51 *C. C. A.* 329, 113 *Fed. R.* 609. A Massachusetts court of equity jurisdiction could protect and enforce complainant's equitable rights in question, as we have shown above. The Federal Circuit Court there also has jurisdiction to grant the same relief.

6. Has the Probate Court of Suffolk County as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, enforce, and foreclose a lien upon it?

Whatever *equity* jurisdiction is vested in the probate courts of Massachusetts, must be exercised independently of their ordinary probate jurisdiction. In *Sherman* v. *American Cong. Ass'n*, 51 *C. C. A.* 329, 113 *Fed. R.* 609, a case brought in the United States Circuit Court for Massachusetts, to construe and ascertain rights under a will, the *Circuit Court of Appeals* said: "It is, however, true that questions of the construction and effect of the will, or of any particular clause therein, stand, so far as the probate courts of Massachusetts are concerned, on an entirely peculiar basis. Under late statutes, on a special proceeding, the Probate Court, *acting as an equity court*, has jurisdiction to determine them; but the distinction between probate courts proceeding as such, and the same courts when exercising the statutory jurisdiction in equity, is a broad one, and is carefully preserved. *Bennett* v. *Kimball*, 175 *Mass.* 199, 200, 55 *N. E.* 893; *Green* v. *Gaskill*, 175 *Mass.* 265, 56 *N. E.* 560. It is the understood law of Massachusetts that any action of a

probate court, in the exercise of its normal jurisdiction with reference to the construction of Mr. Langworthy's will, would have been void. *Cowdin* v. *Perry*, 11 *Pick.* 503; *Granger* v. *Bassett*, 98 *Mass.* 462. In this particular the normal jurisdiction of the probate courts of Massachusetts remains, as it does everywhere in the absence of special legislation, and it leaves to the courts of common law and the Chancellor all questions of the construction and effect of devises and legacies. Therefore, notwithstanding the statutes referred to in *Bennet* v. *Kimball* and *Green* v. *Gaskill*, in the absence of any showing that the Probate Court, on its equity side, passed on the question which, as we have said, is the only one necessary for us to consider, there is no doubt about our jurisdiction."

It is also made perfectly clear by the opinion of the court in *Bennett* v. *Kimball*, and in *Green* v. *Gaskill*, cited in the above excerpt, that: "The jurisdiction in equity given to the probate courts (of Massachusetts) by St. 1891, c. 415, sec. 1, is a jurisdiction concurrent with that of other equity courts." (*Per Mr. Justice Holmes*, 175 *Mass.* 109; 55 *N. E. Rep.* 893.)

In *Green* v. *Gaskill*, 175 *Mass.* 265, 56 *N. E. Rep.* 561, the court said: "conferring the concurrent jurisdiction in equity upon the probate courts, does not enlarge that jurisdiction, or enable them to entertain any bill which could not also be entertained by the Superior Court or by this court. Nor does it enable a probate court upon its equity side to do any of those things upon a bill in equity, with reference to such trust which can be done by a probate court under its probate jurisdiction only."

The Suffolk County Probate Court of course could not, in the exercise of its *probate jurisdiction*, adjudicate and determine the equities of complainant. It has a probate jurisdiction over the property in question, and in that sense and to that extent it has what is sometimes said to be possession of the property, but it is not, nor has it ever been considered in law, such possession as that taken by a court when it seizes property to adjudicate rights and transfer

title and possession of the thing, from one litigant to another, or sell it and deliver the proceeds. The law or the will devolves title to property in probate administration after payment to estate debts, but controversies as to succession, and the protection of rightful heirs against pretenders (*Sullivan* v. *Andoe*, 6 *Fed. R.* 641), or frauds of administrators, and the protection of all sorts of equitable rights in estate property lies with chancery. The Probate Court's possession is for certain prescribed administrative purposes. It has no possession that excludes established chancery jurisdiction over equitable rights touching the property. The chancery jurisdiction is not different in Massachusetts. And if it were different there, by virtue of state law, the equity jurisdiction of the Federal Court would not be thereby impaired.

Now "has the Probate Court of Suffolk County as ancillary to its possession of the property, jurisdiction in *equity*, to ascertain, declare, enforce, and foreclose a lien upon it."

The possession mentioned in the question is, of course, such possession as the Probate Court has under its probate jurisdiction. The equity side of the Probate Court clearly has no possession of or concern with the property subject to its probate jurisdiction, simply because it is vested with equity jurisdiction separate from its probate jurisdiction. The two jurisdictions are as distinct as they could be if set apart in two different tribunals. Then what can the *equity side* do with respect to adjudication of equitable rights as ancillary to, or because the probate side has possession for probate administration? Nothing. The *equity side* has no more possession than any other court vested with the same concurrent equity jurisdiction. The equity side of the Probate Court cannot do, as ancillary to the possession of the property on the probate side, any more than any other court of concurrent *equity* jurisdiction could do. The probate side could not bestow, or withhold, any more aid or power to its own *equity side* than it could to a separate tribunal of concurrent *equity* jurisdiction. No one would contend that the Probate Court of Suffolk County, *as ancillary* to its possession of property for probate

administration, could foreclose or enforce complainant's lien by proceedings on its *probate side*. Nor could it, on its equity side, foreclose the lien because it has probate jurisdiction over the property in question. If it could foreclose the lien, it could do so because it possesses *equity* jurisdiction. And that jurisdiction is concurrent with that of other equity courts of Massachusetts, and with that of the Federal Circuit Court. If by reason of the possession of property by the Probate Court for probate administration other equity courts could not exercise their chancery jurisdiction to determine equitable rights touching that property, as they always have done, then it follows that the other courts of Massachusetts are divested of equity jurisdiction, over such rights by reason of the fact that the property is in course of probate administration. And if it be claimed that only the Probate Court on its equity side may adjudicate, determine and enforce such equitable rights, touching property under its jurisdiction for probate and administration, then it follows that there is only one court in Massachusetts that can adjudicate and enforce such equitable rights in property in course of probate administration—but one court of equity jurisdiction that can do what formerly the other equity courts could do, and were constantly doing. No such condition, if it were established with respect to Massachusetts equity courts, could prevail to restrict or impair the exercise of equity jurisdiction belonging to the Federal Court.

The establishment of a rule that because a probate court of a state is vested with *equity* jurisdiction, then no other court of equity could exercise its jurisdiction over equitable rights touching property in probate administration, would take away the jurisdiction of the Federal Court to do what was done, and approved by the United States Supreme Court, in the case of *Byers* v. *McAuley*, 149 U. S. 608, and in all the other Federal cases cited above.

In the last passage quoted above from *Green* v. *Gaskill*, it is said: "Nor does it enable a probate court upon its equity side to do any of those things with reference to such trust, which can be done by a probate court under its pro-

bate jurisdiction only." If the law of Massachusetts should give to its probate courts, as such, exclusive jurisdiction to do things which belonged to a chancery court under its general equity jurisdiction with reference to a trust, that would not prevent the Federal Court in Massachusetts from doing the same thing with reference to such trust, in a case which could be brought before it.

II.

In respondent's brief presented at the argument of the case at bar (pages 173, 174), there was contention that Mr. Root, being a citizen of Montana, could not sue Leyson as administrator in the United States Circuit Court for his share of said funds and effects; and that complainant's claim of lien on Mr. Root's share, being in the nature of an equitable chose in action, she could not therefore maintain this action against Leyson an administrator to enforce her claim on Mr. Root's share.

That contention is based on the Act of Congress of March 3, 1875, as subsequently amended (U. S. Comp. st., 1901, vol. 1, page 508), which forbids a suit in the Circuit Court "to recover the contents of any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The case of *Sere* v. *Pitot*, 6 *Cranch*, 333, is cited in support of that contention. But in that case the court expressly held that the ruling there made does not apply to a chose in action held by an administrator.

The present suit is not to enforce the *contents of* a promissory note or other chose in action, against Leyson. It is to enforce a lien on funds in Leyson's hands. But if complainant were suing citizens of other states to enforce the contents of a chose in action, the title to which had devolved upon her by operation of law, as by appointment as administratrix, she could prosecute such suit in the Federal Court even if her intestate could not have prosecuted a suit "in such court to recover the said contents."

Respondent's contention on this point is entirely refuted by the decisions of the court from the time of Chief Justice Marshall to a very recent date.

Mr. Justice Washington, in ruling in the case of *Mayer* v. *Foulkrod*, *vol.* 16, *Fed. Cases No.* 9341, explains in a few words the rule of law on this point, as held by the Supreme Court. He said: "The objection to the general jurisdiction of the court was considered so clearly untenable by the Supreme Court in *Chappedelaine* v. *Dechenaux*, 4 *Cranch.* 306, that the counsel when proceeding to discuss it, were stopped by the court (Marshal C. J. presiding). This decision came afterward under the notice of the court in *Sere* v. *Pitot*, 6 *Cranch* 333, and was then more deliberately considered. The opinion there given was, that the eleventh section of the judiciary law, which was relied upon, does not apply to the case of an executor or administrator who is an alien, or citizen of another state than that in which the suit is brought, because 'they are not usually designated by the term assignees, and are therefore not within the words of the act.' These cases so entirely refute the objection under consideration, that a further examination of it is rendered altogether unnecessary." That was a case brought in the Circuit Court by bill in equity, by an *administrator* of an *assignee* of certain shares in an estate, to enforce the assignee's right against an executor.

The same rule of law has been affirmed in many other cases in this court, some of which we cite below.

Chappedelaine v. *Dechenaux*, 4 *Cranch.* 308.
Bushnell v. *Kennedy*, 9 *Wall.* 387.
Childres exec'r v. *McLure*, 8 *Wheat.* 643.
Rice v. *Huston*, 13 *Wall.* 66.
New Orleans v. *Whitney*, 138 *U. S.* 595.
Glass v. *Police Jury, etc.*, 176 *U. S.* 207.
Mayer v. *Foulkrod*, 4 *Wash.* 349, *Fed. cas. No.* 9341.

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Supreme Court of the United States,

OCTOBER TERM, 1908

No. [redacted].8

EVA A. INGERSOLL AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,

Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,

Respondents.

Addenda to Petitioner's Brief on Questions Propounded by the Court.

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Supreme Court of the United States.

No. 169, October Term, 1907.

EVA A. INGERSOLL, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT G. INGERSOLL, DECEASED,

Petitioner,

v.

JOSEPH A. CORAM, HENRY A. ROOT, AND CHARLES H. PALMER, TRUSTEE,

Respondents.

ADDITIONAL AUTHORITIES TOUCHING QUESTIONS PROPOUNDED BY THE COURT ON JUNE 1, 1908.

To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

Counsel for petitioner desire, and hereby ask leave, to refer the court to cases mentioned below, as addenda to their brief, recently filed upon the questions propounded by the court on June 1, 1908, such authorities being, as we believe, especially applicable to those questions.

The case of *Justice* v. *Justice*, 115 Ind. 201, 16 N. E. Rep. 615, was one wherein an *attorney's equitable lien* to secure his compensation *for contesting a will* on behalf of an heir, was foreclosed on the share of such heir in estate property which came to him by reason of defeating the will. The lien was sustained and enforced by the Indiana Court of Equity, on the authority of *Wylie* v. *Coxe*, 15 How. 415, and some other cases. In order to enforce the lien upon the interest

of said heir, it was necessary for the Equity Court to determine his share of the funds on which the lien rested, and the court found it to be "an undivided one twenty-eighth part of one-half" of said funds.

The case of *Shaw* v. *Shaw*, 4 Cranch C. C. 715, Fed. Case 12,724, opinion by *Chief Judge Cranch*, is pointedly applicable to many of the questions propounded in the case at bar, affirming at it does: (1) that a court of equity will determine the share of each heir in a fund arising from the sale of estate property made under order of the County Court, because the County Court has only "a summary jurisdiction given by the statute, and has no authority to grant relief as a court of equity" (quotation from head note); (2) that the Equity Court will not only determine the share of each heir in such fund, but will charge each share with its proper equitable burden which arose or accrued by act of the owner thereof in favor of other parties to the action entitled to such relief; (3) that the Court of Equity will adjudicate, adjust, and determine all rights and interests of the parties properly before it, in or to such estate property however complicated the same may be, and notwithstanding the fund or property is under the jurisdiction of the County Court for certain administrative purposes prescribed by statute; (4) that the Court of Equity will grant injunction against the custodians, "to stay the money and bonds in their hands until the further order of the court" (quotation from opinion of *Chief Judge Cranch*).

A court of equity has jurisdiction to, and will, determine, and cause to be distributed, the share of a single heir or distributee of estate property, in an administrator's hands. In order to do that the court may, and will when necessary, require accounting by the administrator; and will also ascertain and apply foreign law governing the succession, as ruled by *Mr. Justice Story*, in *Harvey* v. *Richards*, 1 Mason 381, Fed. Case 6184. And the court will determine the legitimacy of the claim of heirship, *Harvey* v. *Richards*, 2

Gall. 555, Fed. Case 6183, *Canfield* v. *Canfield*, 55 C. C. A. 169, opinion by *Mr. Justice Day*, and *Sullivan* v. *Andoe*, 6 Fed. R. 641. Those things will be done by a court of equity while the probate administration of the estate is in progress, and regardless of what may have been done or sanctioned by the Probate Court, as shown by the authorities cited above, and also in *Payne* v. *Hook*, 7 Wall. 425, and its counterpart in *Hook* v. *Payne*, 14 Wall. 252.

The equity court would determine, protect and enforce in an action against the administrator, Leyson, alone, the interest of Coram, Root, or either of their associates, in the funds and effects in question, in the case at bar. In *Alston* v. *Cohen*, 1 Wood 487, Fed. Case 265, it was held as stated in the head note: "An executor and administrator is the trustee and proper representative of all persons interested in the personal estate, . . . consequently, when he is made a party to the bill filed by a distributee to sell the personal property of an estate and divide its proceeds, the other distributees are not necessary parties." It was ruled to the same effect in *Kendall, adm'rx* v. *Creighton*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 425; and *Hook* v. *Payne*, 14 Wall. 252; *Wormley* v. *Wormley*, 8 Wheat. 422; *Harvey* v. *Richards*, *supra*; *West* v. *Randall*, 2 Mason 181, Fed. Case 17,424, *per Story J.*; *Van Bokelen* v. *Cook*, Fed. Case 16,831, 5 Sawy. 587.

Courts of equity have jurisdiction to search out from among the personal assets of an estate, in the hands of an administrator for probate administration, that which belongs to a trust, determine the amount of it, and take the trust property away from the administrator, creditors and succession, and deliver it to the *cestui que trustent*. *McComb* v. *Frink, adm'rs*, 149 U. S. 629; *Walker* v. *Beal, ex'r*, 76 U. S. 743; *Moses* v. *Murgatroyd, ex'r*, 1 Johns. Ch. 119, 7 Am. Dec. 478, *per Ch. Kent*; *Pierce* v. *Robinson, adm'r*, 13 Cal. 116, *per Mr. Justice Field*.

An equity court has jurisdiction to, and in a proper case

will determine what share of an unsettled and undistributed estate in the hands of an administrator an individual heir or distributee is entitled to, in order to subject that share to the debt of the heir or distributee; and to that end the Equity Court will restrain by injunction the administrator or executor from delivering such share to the heir or distributee. *Ricketson* v. *Merrill*, 148 Mass. 76; *Earl* v. *Circuit Judge*, 92 Mich. 285; *McKinney* v. *Curtis*, 60 Mich. 611; *Napier* v. *Howard*, 3 Kelley's Ga. Rep. 193; *Lawson* v. *Virgin*, 21 Ga. 356; *Selman* v. *Milliken*, 28 Ga. 366; *Bennick* v. *Bennick, and Stamey, adm'r*, 61 N. C. (Phil. eq.) 45; *Greer* v. *Simrall* (Ky. 1900), 59 S. W. Rep. 759; *Cassady* v. *Gummelman* (Ia.), 77 N. W. Rep. 1067; *Oppenheimer* v. *Collins*, 115 Wis. 283, 60 L. R. A. 406.

A court of equity will also determine the share of an heir or distributee in property of an unsettled estate in the hands of an administrator, in order to enforce the right of an assignee of the share, or part of the share, of such distributee, in the estate property. *Kendall adm'r* v. *Creighton*, 23 How. 90; *Mayer* v. *Foulkrod*, 4 Wash. 349, Fed. Case 9341, *per Mr. Justice Washington; Davis* v. *Newton*, 6 Met. 537, *per Shaw C. J.; Lenz* v. *Prescott*, 144 Mass. 505, 515; *Estate of Angle*, 148 Cal. 102; *Sanders* v. *Strobel*, 42 S. E. Rep. (South Car.) 429.

The court, exercising its equity jurisdiction to enforce an *attorney's equitable lien*, will not only determine the share of an heir in estate property, *acquired for him by contesting a will*, which stood in the way of his right to share in the estate (*Justice* v. *Justice*, 115 Ind. 201, 16 N. E. Rep. 615), but will *by injunction protect and enforce the attorney's equitable lien*. *Wylie* v. *Coxe*, 15 How. 415; *Key* v. *Bank of United States*, 1 Hay. & H. 74, Fed. Case 7746. And an administrator will be enjoined from delivering estate property to others where it is necessary to protect an *attorney's equitable lien*, or other equitable right or interest, in or upon funds or other property in his hands. *Wylie* v. *Coxe*, 15 How. 415; *Lenz*

v. *Prescott*, 144 Mass. 505, 515; *Ricketson* v. *Merrill*, 148 Mass. 76; *Earl* v. *Circuit Judge*, 92 Mich. 285; *McKinney* v. *Curtis*, 60 Mich. 611; *Lawson* v. *Virgin*, 21 Ga. 356; *Selman* v. *Milliken*, 28 Ga. 366.

In the case of *Key* v. *Bank of United States*, 1 Hay. & H. 74, Fed. Case 7746, it appears that complainant, Francis S. Key, by professional labor rendered in the prosecution of claims of Williamson Smith against the Government, procured allowance of upwards of $35,377 in his favor. Smith assigned the claims to defendant bank. The Circuit Court for the District of Columbia held as stated in the head note: "Where a claim for services rendered by an attorney may be defeated by an assignment of the fund on which said claim is an equitable lien, the court will enjoin the payment of the claim, without the consent of the complainant." And the court enjoined "defendants and their agents," etc., "from receiving the payment thereof, or an allowance of credit therefor, at the Treasury of the United States, without consent of complainant."

But the paramount efficacy of the decree in the case at bar—more important than any other part of the relief—is the establishment of the equitable right of complainant to have her lien satisfied out of the portion of said money and bonds owned by Coram and Root, in this case where they and the administrator and all parties interested in the portion of the estate decreed to Colonel Ingersoll's clients, are present before the Circuit Court *in person*, except Cornue, who is also represented by the administrator. Complainant's right is thereby established on as solid footing as the right of Coram and Root, in the money and bonds in question. Her right thus established will have the same protection as theirs, and must be given effect whenever and wherever the shares of Root and Coram are to be passed over to them or their legal representatives or assigns. That is sufficient with respect to such affairs. *Cole* v. *Cunningham*, 133 U. S. 107; *Phelps* v. *McDonald*, 99 U. S. 298, 308; *French* v. *Hay*,

22 *Wall.* 250; *Wylie* v. *Coxe*, 15 *How.* 415; *Meddaugh* v. *Wilson*, 151 *U. S.* 333; *Cent. R. R. Co.* v. *Pettus*, 113 *U. S.* 116; *Louisv. E. & St. L. R. Co.* v. *Wilson*, 138 *U. S.* 501; *Canfield* v. *Canfield*, 55 *C. C. A.* 169; *Dulaney* v. *Scudder*, 36 *C. C. A.* 52; *Mahoney* v. *South. Tel. Co.*, 33 *Fed.* 702, *approved in* 138 *U. S.* 507; *Frink* v. *McComb*, 60 *Fed. R.* 486; *Semmes* v. *Whitney*, 50 *Fed. R.* 666; *Davis* v. *Newton*, 6 *Met.* 537; *Ricketson* v. *Merrill*, 148 *Mass.* 76; *Hovey* v. *Elliott*, 118 *N. Y.* 124, 23 *N. E. Rep.* 475; *Rooney* v. *Second Ave. Ry. Co.*, 18 *N. Y.* 368; *Earl* v. *Circuit Judge*, 92 *Mich.* 285; *McKinney* v. *Curtis*, 60 *Mich.* 611; *Justice* v. *Justice*, 115 *Ind.* 201, 16 *N. E. Rep.* 615; *Stratton* v. *Hussey*, 62 *Me.* 286; *Rennick* v. *Luddington*, 16 *W. Va.* 378; *Pierce* v. *Robinson*, 13 *Cal.* 116; *Moses* v. *Murgatroyd*, 1 *Johns. Ch.* 119, 7 *Am. Dec.* 478; *Welsh* v. *Hole*, 1 *Doug.* 238, *per Lord Ch. Mansfield; Omerod* v. *Tait*, 1 *East.* 464, *and Read* v. *Dupper*, 6 *T. R.* 361, *per Lord Ch. Kenyon; Turwin* v. *Gibson*, 3 *Atk.* 719, *per Lord Ch. Hardwicke.*

The English Chancery jurisdiction, as exercised when our State and National Governments were formed, had a direct and controlling effect upon the administration and disposition of estate property. This is shown in the part it took in the construction of wills, enforcing payment of legacies, and distributive shares of estates, to heirs of an intestate, and in other ways protecting their interests as well as that of the creditors. As said in *Fonblanque's Equity:* "But it is without question that the suit for a personal legacy may be brought in Chancery; and if the matter has proceeded to a sentence in the ecclesiastical court, it is proper to come here for the executor's indemnity. And here legatees are to give security to refund, but not there; and this court will see the money put out for the children. And so a bill for distribution of an intestate's personal estate is very proper in this court, for the spiritual court in that case has but a lame jurisdiction." *Fonbl. Eq.* (Am. ed. 1835), pages 524, 525. So with respect to accounting in chancery by executors or

administrators for the benefit of creditors and distributees. 1 *Spence Eq. Juris.* 579, *et seq.*

The sphere of action of the ecclesiastical and chancery courts was, as to these matters, often upon the same plane, as clearly shown by the authorities. But in some particulars it was necessary to invoke the chancery jurisdiction to complete the administration, as "where there was a will and the *residue* was undisposed of, this was necessary as the spiritual court had, in that case, no jurisdiction. Independently of these considerations the superior power which this court had of compelling discovery, its exclusive power of effectually securing the effects pending the litigation, and of binding all parties interested by its decree, must have powerfully operated to establish the jurisdiction of this court in all these cases." 1 *Spence Eq. Juris.* 582.

The same jurisdiction is possessed by the Federal Courts, and also by any state court invested with plenary equity jurisdiction. The institution of probate courts in this country, to fill the place formerly occupied by ecclesiastical courts, does not abridge the equity jurisdiction of any court which is given complete chancery jurisdiction. Nor is it a conflicting jurisdiction. Even where they move on the same plane and deal with the same subject matter, there is, in this age and country, no ground for calling it a conflict of jurisdiction, because in contemplation of law they are acting together to accomplish the same end the administration of justice according to the law of the land. For instance, where chancery, through its superior means of discovery, calls a delinquent administrator to account, and requires him to deliver to creditors or heirs what he had fraudulently withheld, even though he had got his false accounts approved by the Probate Court, is that to be called a conflict of jurisdiction? It would seem to be no more so than where chancery, by its superior power, enforced ecclesiastical decrees for alimony, which ecclesiastical censure failed to enforce. The aid of chancery in such matters would seem to be more properly characterized as supplementary.

But in adjudicating, protecting and enforcing such equitable rights as that in the case at bar, upon property in the hands of an administrator, the Equity Court is administering justice with regard to rights and obligations outside of and beyond the province of the Probate Court, and it may be done without interfering in any way with probate administration.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted] 8

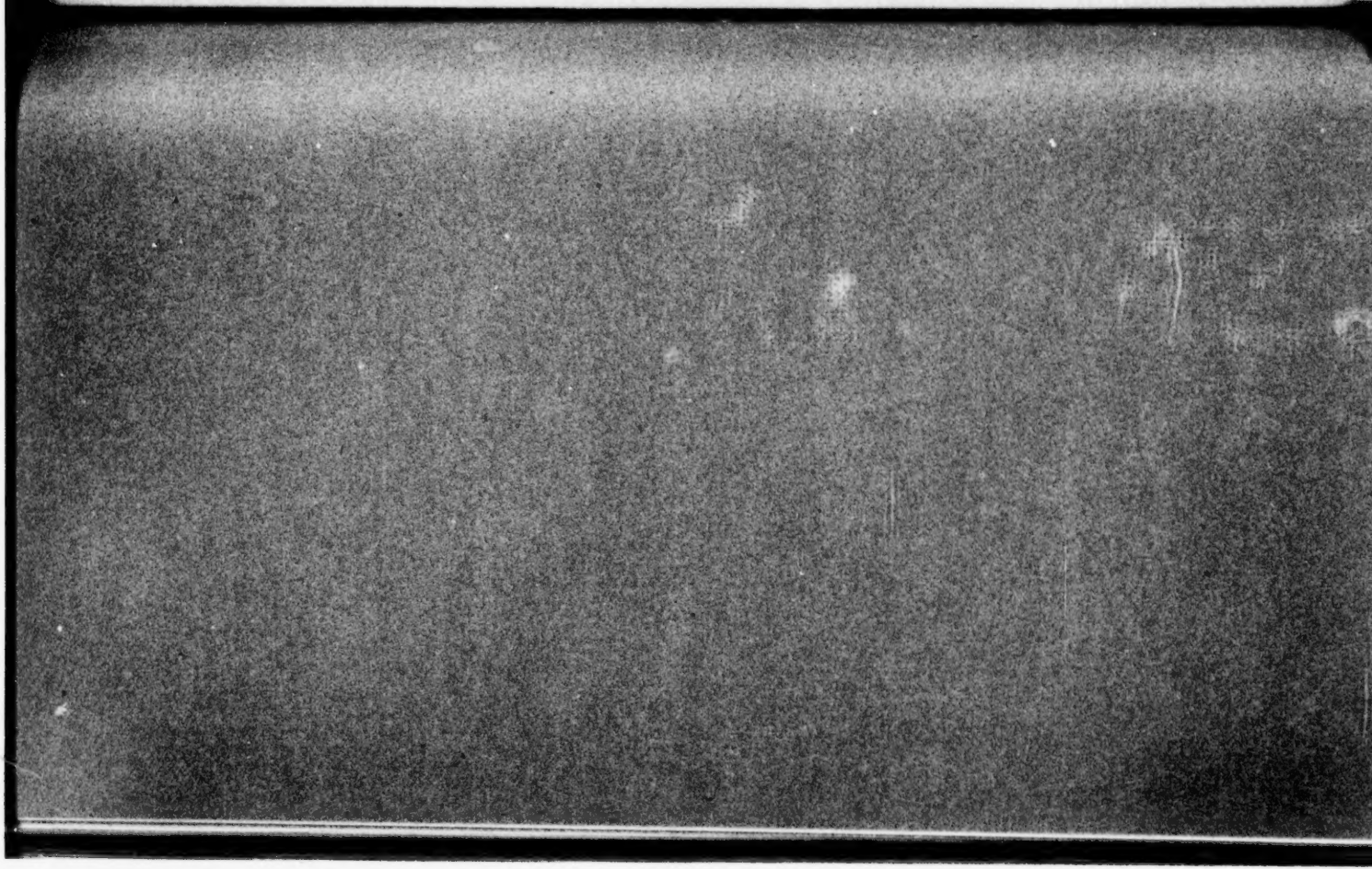
EVA A. INGERSOLL, AS ADMINISTRATRIX,
PETITIONER,

v.

JOSEPH A. CORAM, ET AL., RESPONDENTS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

LOUIS D. BRANDEIS,
WILLIAM E. DUNBAR,
of Counsel for Respondents.



Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 169.

EVA A. INGERSOLL, AS ADMINISTRATRIX, PETITIONER,

v.

JOSEPH A. CORAM ET AL., RESPONDENTS

SUPPLEMENTAL BRIEF FOR RESPONDENTS

The Court has requested that counsel file briefs considering the following questions propounded by the Court, viz.:

1. Has the Court jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts?

2. Has the Circuit Court jurisdiction to enforce by foreclosure a lien upon property so situated?

3. Has the Circuit Court jurisdiction to determine the shares of Root and Coram in the property so situated?

4. Has the Circuit Court jurisdiction, upon the pending bill either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them should hold any property, coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant?

5. To what extent, if any, is the jurisdiction of the Circuit Court limited or affected by the fact that the property from which payment is sought is in the hands

of an administrator appointed by the Probate Court of Suffolk County?

6. Has the Probate Court of Suffolk County, as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, enforce, and foreclose a lien upon it?

The respondents submit the following argument in answer to the questions propounded by the Court:

ARGUMENT

FIRST

THE COURT HAS NO JURISDICTION TO ASCERTAIN AND DECLARE A LIEN UPON PROPERTY IN THE POSSESSION OF THE ADMINISTRATOR APPOINTED BY THE PROBATE COURT FOR THE COUNTY OF SUFFOLK AND STATE OF MASSACHUSETTS.

I

The Court cannot entertain such a suit unless there is a res *of which it can take jurisdiction.*

This suit was brought as a proceeding under section 738 of the Revised Statutes as amended or superseded by section 8 of the Act of March 3, 1875 (18 St. 470, 472), and the learned judge of the Circuit Court rightly declared that it could "only be sustained in that aspect." (Rec. p. 959.)

Section 8 of the Act of March 3, 1875, provides for summoning in non-resident parties "in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought."

The whole purpose of this provision is to enable a Circuit Court to entertain suits disposing of property within the jurisdiction of the Court when the only obstacle is the non-residence of a necessary party. The foundation of

the jurisdiction is the ability of the Court to give effect to its decree, although it has not acquired jurisdiction over the person of a necessary party. The Act applies and can apply only when consistently with the general principles of equity procedure relief can be enforced directly against the property by a decree taking effect *in rem*.

This provision was first enacted in the Act of June 1, 1872, ch. 255, sect. 13 (17 St. 198), and was first considered by this Court in *Robertson* v. *Carson*, 19 Wall. 94, and in the same case under the name of *McBurney* v. *Carson*, 99 U. S. 567. The Court held that where an executor had taken satisfaction in Confederate currency of a debt secured by mortgage of real estate in South Carolina, the widow and orphans for whose benefit the mortgage was held might proceed against the land to re-establish the mortgage, bringing in by substituted service a necessary party. The relief prayed was to set aside the cancellation of the mortgage as fraudulent and void. The bill originally sought also to charge certain non-residents as principal and surety on bonds given for personal property sold to them, but the last amended bill related only to the real estate. (99 U. S. 570.)

In *Goodman* v. *Niblack*, 102 U. S. 556, one Sloo had made a general assignment for creditors, including his interest in a claim against the United States. The claim was paid to his administrator. A creditor, claiming under the general assignment, brought suit against the administrator, asserting by virtue of the assignment for creditors a claim upon the fund superior to the title of the administrator. The Court held that the assignees for creditors were necessary parties, but that they could be brought in by substituted service, as the suit was "a proceeding in equity to enforce a lien on the fund which is within reach of the court." (P. 563.)

In *Insurance Co.* v. *Bangs*, 103 U. S. 435, the question in issue was the validity of a decree of a Circuit Court for cancellation, after the death of the insured, of a life insurance policy. An infant child of the insured, not a resident

of the district, was made a party and a guardian *ad litem* appointed. The Court held that there was no authority to appoint a guardian *ad litem*, because the suit related only to a personal contract.

"In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants, or their voluntary appearance." (P. 439.)

In *Mellen* v. *Moline Iron Works*, 131 U. S. 352, the unsecured creditors of an insolvent corporation brought suit to set aside a mortgage of its property securing certain creditors, and to administer the property. One of the secured creditors was not within the jurisdiction of the Court. After a final decree granting the relief, persons claiming under the non-resident secured creditor brought this suit to foreclose the mortgage, alleging that the decree in the former suit was invalid as to him for want of jurisdiction. This Court held that the original suit was within the statute, as it sought to remove a lien or incumbrance on property within the jurisdiction of the Court.

Arndt v. *Griggs*, 134 U. S. 316, was a suit brought pursuant to a statute of Nebraska authorizing suits to quiet title against non-residents.

In *Greeley* v. *Lowe*, 155 U. S. 58, this Court held that a suit by one of a large number of tenants in common asking for a partition of real estate was "clearly a bill to enforce a claim and settle the title to real estate" (p. 74), and that it could, therefore, be brought in the district where the land lay, although neither the plaintiff nor all of the defendants were inhabitants of that district.

Dick v. *Foraker*, 155 U. S. 404, was a suit brought to remove a cloud on title. The plaintiff claimed under a tax sale, and the defendant, a non-resident, claimed under a deed given by the Commissioner of Lands of the State of Arkansas on the ground that the same lands were forfeited to the State for non-payment of taxes. The relief sought was the removal of the cloud created by this deed.

Neither party was in possession, but by statute of Arkansas a bill in equity could be filed to remove a cloud to title to land of which neither party was in possession, and such a bill could, therefore, be filed in the Circuit Court. (Pp. 415, 416.)

In *Compton* v. *Jesup*, 167 U. S. 1, an order for substituted service had been made in the course of the proceedings for foreclosure of a railroad mortgage; one of the questions certified to this Court but not passed on was whether the Circuit Court had power to make this order. (P. 4.)

Roller v. *Holly*, 176 U. S. 398, was a writ of error to a State Court involving the question whether the proceedings in a former suit in a State Court for foreclosing a vendor's lien were valid.

In *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1, the plaintiff sought to establish title to certain shares of stock in the defendant corporation on the ground that their sale for non-payment of an assessment was fraudulent and the alleged title thereby acquired by the non-resident defendants void. This Court held that the shares were personal property in the district where the corporation existed, and consequently that the case was there maintainable under the statute.

In *McDaniel* v. *Traylor*, 196 U. S. 415, a bill was brought by heirs at law to remove a lien on real estate created by the allowance of certain claims by a Probate Court as valid against the estate of the deceased ancestor. The Court held that the bill could be maintained, and said that under the Act of March 3, 1875,

"it was competent for the Circuit Court, by a final decree, to remove any encumbrance or lien or cloud upon the title to real or personal property within the district, as against persons not inhabitants thereof and not found therein, or who did not voluntarily appear in the suit." (P. 422.)

Citizens' Sav. & Tr. Co. v. *Illinois Cent. R. R. Co.*, 205 U. S. 46, was a suit brought to set aside a lease and deed

of a railroad. The defendants were not residents of the district. This Court held that the Circuit Court could exercise jurisdiction, because the railroad, the subject matter of the controversy, was wholly in the district, and the suit was therefore one to remove an encumbrance from property which was within the jurisdiction of the Court.

In all of the foregoing cases, which it is believed comprise all the cases in which this provision of the statutes has been considered in this Court, the relief sought was enforceable by the direct action of the Court upon a *res* within its jurisdiction, and the power to grant and enforce relief by such action was referred to and relied upon as the basis for taking jurisdiction.

The statute has not enlarged and does not purport to enlarge the power of a Circuit Court to grant relief. The limitations upon the powers of the Court in making a decree as to the title to property are the same as before; no property is brought within the jurisdiction of the Court by the statute. Unless, therefore, independently of the statute, the Circuit Court could in any particular case but for absence of parties afford the relief asked, by a decree operating directly on the property in question, it cannot do so since the passing of the statute. And unless there is a *res* within the jurisdiction of the Court upon which the decree can be made directly effective the statute has no application and the suit cannot be maintained by virtue of the statute. Jurisdiction is dependent upon the presence of property, the disposition of which the Court can by a decree enforced upon the property itself control.

II

There was no res *within the jurisdiction upon which the decree of the Court could be enforced.*

When the suit was brought there was within the district of Massachusetts certain personal property which had belonged to Andrew J. Davis in his lifetime. Long prior to

this suit the Probate Court for Suffolk County had granted ancillary administration upon this property. The property had passed into the custody of the administrator so appointed. The administrator was an officer of the Court and property in his custody was in legal effect in the custody of the Court.

Byers v. *McAuley*, 149 U. S. 608.

This Court has emphatically laid down the rule that when the jurisdiction of one Court has attached to certain property, and such property has passed into the custody or control of that Court, another Court cannot interfere with such possession or issue process to be enforced against the property. The rule is of universal application. It is entitled to peculiar regard when the question arises between the Courts of independent sovereignties.

In *Byers* v. *McAuley*, 149 U. S. 608, 615, this Court said:

"An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court."

A Federal Court may entertain a suit, when the requisite diversity of citizenship exists, to determine rights relating to such property. It may establish the existence of a debt due from the deceased,

Hess v. *Reynolds*, 113 U. S. 73;

and for its payment if the administrator has admitted assets so that there is no further question to be determined,

Kennedy v. *Creswell*, 101 U. S. 641;

or declare the liability of an administrator for malversation of the property,

Payne v. *Hook*, 7 Wall. 425.

But it cannot unless such a course is authorized by statute of the State satisfy the debt established by levy upon the property of the deceased in course of administration, because to do so would displace the possession of the Probate Court.

Yonley v. *Lavender*, 21 Wall. 276.

In *Borer* v. *Chapman*, 119 U. S. 587, 600, the limitation on the powers of the Federal Courts was explicitly stated. After referring to *Payne* v. *Hook*, and the power of the Circuit Court to determine controversies between citizens of different States, the Court said:

"The only qualification in the application of this principle is, that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state."

Conversely, if a Federal Court has acquired jurisdiction of property by levy of process, it need not relinquish possession to the Probate Court upon the subsequent death of the defendant and appointment of an administrator.

Rio Grande R. R. Co. v. *Gomila*, 132 U. S. 478.

The same principle is applied where property is in possession of a Court by virtue of a receivership or other process. In *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, a proceeding was brought in a State Court to enforce a mechanic's lien against property which had been seized for a forfeiture under the internal revenue laws. This Court held that the State Court might have decided the right to a lien, but should not have undertaken to enforce the lien by sale, because this disturbed the possession of the Federal Court.

For the same reason this Court held in *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, that a State Court could not enforce a lien against property in the possession, actually or constructively, of a federal receiver.

In *McDaniel* v. *Traylor*, 196 U. S. 415, certain claims had been allowed as an indebtedness of a decedent, and thereby became liens upon the real estate. The heirs at law sought to have the lien discharged on the ground that the allowance was obtained by fraud, and the relief sought was granted. There was no disturbance of any possession of the Probate Court. The property in question being real estate, was not in possession of the administrator. A Court of equity could therefore make a decree directly operative upon the real estate without any interference with the jurisdiction of the Probate Court over property in its custody.

These authorities establish conclusively that whatever jurisdiction a Federal Court may have to determine rights between parties in relation to property in course of administration, that jurisdiction cannot be founded on the presence of a *res*. The jurisdiction must be personal. The limitation on the exercise of jurisdiction by the Federal Court is that it shall not disturb the possession of the State Court; certainly then it cannot exercise a jurisdiction resting wholly on the power to enforce its decree *in rem* against the property in the possession of the Probate Court.

In *Brendel* v. *Church*, 82 F. R. 262, Judge Taft very clearly pointed out the distinction between entertaining a suit and allowing a personal recovery against the executor or administrator and proceeding against the property in the custody of the Probate Court. He held that a legatee might sue to recover his legacy and enforce his adjudication

> "against the administrator or executor personally, or against his sureties, or against other persons liable therefor, or proceed in any way which does not disturb the actual possession of the property of the estate by the state court."

Having parties before it and jurisdiction by reason of diversity of citizenship, a Federal Court can adjudicate; but the absence of personal jurisdiction clearly cannot be

made good by possession of the *res* and consequent power to carry out a decree, if the *res* is in fact in possession of another court. Under such circumstances the exercise of jurisdiction would be founded on doing the very thing which the court has not the right to do.

III

Even in a suit inter partes *founded on personal jurisdiction the Circuit Court would not have jurisdiction to ascertain and declare a lien on the property in possession of the ancillary administrator appointed in Massachusetts.*

This Court has declared that a State cannot by conferring upon any of its Courts exclusive jurisdiction of a particular class of actions deprive non-residents of their right to have such an action determined in a Court of the United States. This principle is not disputed and is not now drawn in question.

Every State has the right to prescribe how property found within its boundaries at the death of the owner shall be disposed of. Transmission of property after death is a privilege accorded by the law of the State where the property is. As such it may be taxed.

Blackstone v. *Miller*, 188 U. S. 189;

and for the same such transmission reason is wholly within the control of the Legislature.

Mager v. *Grima*, 8 How. 490, 493.

The right of an individual under the laws of the State governing the devolution of property is a right the enforcement of which cannot according to the decisions of this Court be limited to State tribunals. But the rules which shall determine such rights and the method in which the rights shall be enforceable are wholly within the control of the State Legislature.

In *Security Trust Co.* v. *Black River Nat. Bank*, 187 U. S. 211, 227, this Court said:

"Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the State of the domicile, and are bound by the same rules that govern the local tribunals."

Hence if a time is fixed within which claims of creditors must be prosecuted, lapse of that time is a bar whether suit is brought in a Federal or in a State Court.

The State in like manner determines the nature of the proceedings which shall be had for the settlement of the estate and their effect.

In *Farrell* v. *O'Brien*, 199 U. S. 89, this Court regarded the nature of the proceedings prescribed by the law of Washington for probate of a will as decisive of the question whether a contest of the will could be removed to the Circuit Court. *Tilt* v. *Kelsey*, 207 U. S. 43, 56, recognized the power of each State to give such effect as it pleased to decrees of distribution and similar proceedings. The Court said:

"In respect to the settlement of the successions to property on death the States of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable."

In conformity with these principles a State may make such provision as to the disposition of property of deceased non-residents found within its jurisdiction as it thinks fit, and may impose a tax upon the transmission of the property, although the State of the decedent's domicile collects a like tax on the same property. This tax is justified on the ground of the supreme power of the State over the privilege of transmitting property upon death.

Blackstone v. *Miller*, 188 U. S. 189.

Since a State has this supreme power, whatever provisions it makes are controlling and must be complied with in whatever Court the questions may arise. The Circuit

Court of the United States is bound to administer the same law as a State Court in dealing with property in course of administration in Massachusetts.

Moreover, a State may confer upon a special tribunal exclusive power of administration. Probate of wills is very generally in the exclusive jurisdiction of State Probate Courts, and when such is the case a Federal Court has no jurisdiction of a proceeding for probate.

See *Farrell* v. *O'Brien*, 199 U. S. 89, 110.

So, too, while a Federal Court may, when the necessary diversity of citizenship exists, take jurisdiction of and determine a controversy between individuals as to the share to which one is entitled, it cannot assume jurisdiction to administer the estate when by the State law that administration is confided to the Probate Court.

Byers v. *McAuley*, 149 U. S. 608.

The Commonwealth of Massachusetts has prescribed the manner in which the property in Massachusetts of a deceased non-resident shall be administered. Revised Laws, ch. 143, sects. 1 and 2, re-enacting Public Statutes, ch. 138, sects. 1 and 2, which were in force when administration on the estate of Andrew J. Davis was granted, provide:

"Section 1. If administration is taken in this commonwealth on the estate of a person who was an inhabitant of any other state or country, his estate found here shall, after payment of his debts, be disposed of according to his last will, if he left any duly executed according to law; otherwise his real property shall descend according to the laws of this commonwealth, and his personal property shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant.

"Section 2. After the payment of all debts for which such estate is liable in this commonwealth, the residue of the personal property may be distributed and disposed of, as provided in the preceding section, by the probate court; or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or

country of which the deceased was an inhabitant, to be there disposed of according to the laws thereof."

These provisions constitute a rule of administration in Massachusetts for the estates of deceased non-residents. The Legislature might have provided that after payment of debts the personal estate should in any event be transmitted to the foreign State for final administration. Such a statute would have removed the property from the jurisdiction and have prevented any court from interfering with the property so to be transferred. The provision that the Probate Court shall exercise a discretion confers upon it merely a power of administration. It is not an attempt to confer upon the Probate Court exclusive jurisdiction to determine controversies between persons some of whom may be non-residents, and therefore entitled to litigate in the Federal Courts. The discretion is a power, like power to admit a will to probate, that cannot be exercised by any court except the Probate Court.

Until the discretion conferred upon the Probate Court itself to administer or to remit the property to a foreign jurisdiction for administration is exercised, there can be no determination of rights based upon the result of such administration. Unless by law the ancillary administrator appointed in Massachusetts is to represent the assets of the deceased for the purpose of settling the rights of persons claiming such assets as legatees or next of kin, there can be no determination of the rights of such persons in Massachusetts. If the Probate Court in its discretion remits to the foreign jurisdiction the administration of the property after payment of debts, then the ancillary administrator in Massachusetts does not represent the assets for the purpose of determining rights of legatees or next of kin, and a judgment of the Circuit Court purporting to establish such rights could have no effect. Such a judgment would not be binding upon the property, because the property would at once be removed from the jurisdiction of the court, so that the judgment could not be enforced against it. Such a judgment would

not be binding upon the domiciliary administrator, because a judgment to which an ancillary administrator is a party does not affect the principal administrator except so far as the ancillary administrator was authorized to represent the assets, and in the case supposed there was no such authority.

These considerations show that on no theory was the Circuit Court justified in assuming jurisdiction to adjudicate the rights of legatees or next of kin or persons claiming under them in the property in the custody of the Probate Court. That court had not exercised its jurisdiction in favor of administering the property in Massachusetts. A decree of the Circuit Court, purporting to establish a lien upon the property in favor of a creditor or assignee of a person claiming as next of kin or in any other capacity, could only be given effect by compelling the administrator to distribute the property instead of remitting it to Montana. An attempt so to compel the administrator would be a flagrant encroachment not only on the jurisdiction of the Probate Court but on the power of the State to regulate administration. If a decree was entered directing the property to be transmitted to Montana, the action of the court would be nugatory. The very fact of such transmission would show that the ancillary administrator did not in the suit represent the estate for the purpose of determining such rights, and therefore that the decree was of no binding validity upon the administrator in Montana.

SECOND

THE CIRCUIT COURT HAD NO JURISDICTION TO FORECLOSE A LIEN, IF ONE EXISTED, ON PROPERTY IN THE PROBATE COURT FOR ADMINISTRATION.

The Circuit Court could not entertain any proceeding the purpose of which was to affect directly the property in the hands of the Probate Court. A decree the enforcement of which involved process to be executed in any form against that property would be an encroachment on

the jurisdiction of the Probate Court which had first obtained the custody of the *res* and therefore had exclusive jurisdiction over it.

The Probate Court in the exercise of its exclusive jurisdiction had the power to transmit all the property to Montana to be dealt with by the Court there according to the laws of Montana. Consistently with the exercise of this jurisdiction neither the Circuit Court nor any other Court could make a decree operative upon the property directly. To transmit the property to Montana for administration cannot mean to determine in Massachusetts all rights as to the distribution of the property and then transmit it to Montana for distribution according to such determination. If one claiming as assignee of or under a lien created by one of the next of kin or legatees can maintain a suit in Massachusetts to determine his right in the property, then every one of the next of kin or legatees can do so. The Federal Court administers the same law as the State Court, and whatever reasoning will enable a non-resident to maintain this suit will enable a resident of Massachusetts or of any other State to maintain a suit in the State Court to establish his right. But if every legatee and next of kin can maintain a suit in Massachusetts to establish a right to a specific share of the property, the provision of the statute authorizing the Probate Court in its discretion to transmit the property to Montana for administration is absolutely set at naught. The property would be transmitted subject to an adjudication, *ex hypothesi* binding, prescribing the distribution to be made. The Montana Court would have only the ministerial duty of carrying out decrees made in Massachusetts, decrees not rendered by the Probate Court, but made although the Probate Court should have determined pursuant to the statute to send the property to Montana for administration.

The result described is necessarily involved in a decision supporting the right to maintain the present suit. The complainant here is not seeking to establish a title as against the title of the administrator. Unquestionably one

claiming the property by a title alleged to be superior to that of the administrator, and seeking to get the property otherwise than by distribution, could maintain a suit in Massachusetts. The contention here is that one whose claim is derived from one of the next of kin can maintain a suit and obtain a decree establishing his right to a part of the property in the hands of the Probate Court. What one of the next of kin can do, all can do, and should all undertake to create similar rights the whole of the property would be involved.

The Circuit Court cannot make a decree operating directly upon the property, because to do so is an interference with the power over the *res* of the Probate Court, and inconsistent with the statutory provision for the disposition of property of deceased non-residents; but if the decree cannot operate directly upon the property, there is no jurisdiction to enter any decree.

Root was not before the Circuit Court by a service of process giving personal jurisdiction. No effective decree could be made against him even if the complainant had been entitled to sue him personally in Massachusetts. The administrator under the laws of Montana was not before the Court and could not be before the Court. No decree made in a suit in Massachusetts could be binding upon the administrator in Montana as an order requiring him to distribute the property in a certain manner when it came to him for administration.

The utmost that the Circuit Court in Massachusetts could do in a suit to foreclose a lien on the property in the Probate Court as a means of enforcing payment of a debt due from one of the next kin would be a decree against the debtor requiring him not to receive, and to do whatever might be necessary to enable the creditor to receive, the property. Such a decree could only be entered in a suit in which the debtor was personally within the jurisdiction of the Court. Assuming the difficulty of personal jurisdiction to be disposed of, however, there is the fatal objection that in such a suit there would be no jurisdiction in equity.

The present case was brought to establish an alleged indebtedness and to obtain satisfaction out of specific property upon which the complainant claimed to have a lien. The only ground of equity jurisdiction was to obtain satisfaction from the property covered by the lien claimed. If that property is not within the jurisdiction of the Court, so that the Court can make a decree for satisfaction out of that property, the basis for jurisdiction in equity fails. To make an effective decree for satisfaction from the property the Court must either lay hold of the property itself, which it cannot do because the property is already in the custody of the Probate Court, or must personally bind the administrator by whom final distribution is to be made, which it cannot do because the Montana administrator is not before the Court and no decree binding upon him can be made. The only decree that the Court can make without interfering directly with the jurisdiction of the Probate Court is a decree against the alleged debtors personally to compel them to satisfy the debt from this fund if and when the fund is received by them. If the indebtedness is established the Court cannot satisfy it or make any decree to enable the complainant to obtain satisfaction. The suit would be merely a suit for a preventive remedy to assist the complainant at some future time to collect his debt. There is believed to be no precedent for such a suit.

THIRD

THE CIRCUIT COURT HAD NOT JURISDICTION TO DETERMINE THE SHARES OF ROOT AND CORAM IN THE PROPERTY IN THE POSSESSION OF THE PROBATE COURT.

This Court has held that a non-resident claiming a share in the property of a deceased person may in a suit brought against the executor or administrator charged with the duty of distribution establish the share to which he is entitled. This decision proceeds upon the ground that a non-resident has a right, of which a State cannot de-

prive him, to have his controversies decided in a Federal Court, but the only subject matter of the suit in the Federal Court must be the right of the non-resident to receive from the executor or administrator his share.

In *Payne* v. *Hook*, 7 Wall. 425, a non-resident next of kin sued the administrator, alleging fraudulent disposition of the assets and seeking to have the fraud set aside and to recover a distributive share. For the reason specified above the Court held that the controversy between the plaintiff and the administrator was cognizable in the Circuit Court and that the plaintiff could recover. But in *Hook* v. *Payne*, 14 Wall. 252, the Court held that it was erroneous to enter a decree for the payment of shares to other next of kin. The Circuit Court could not, by reason of its jurisdiction over a controversy between a non-resident next of kin and the administrator, administer the estate.

In *Byers* v. *McAuley*, 149 U. S. 608, a bill was brought by a non-resident to establish against the administrator a right to a share as one of the next of kin. This Court held that the bill might be maintained but that the Circuit Court could not go further and assume control of the administration of the estate.

The foregoing cases were suits brought by a next of kin against the principal administrator. The Circuit Court took jurisdiction because of the diversity of citizenship. The only question considered was whether the Circuit Court could, compatibly with leaving undisturbed the prior right to possession of the property by the Probate Court, determine the right of the plaintiff in a suit in which the necessary parties were before the Court and the requisite diversity of citizenship existed. If the plaintiff was entitled to the rights which he claimed, this remedy was by a proceeding against the administrator then before the Court; the only question was whether he should not have proceeded against the same administrator in the Probate Court.

The case at bar presents a very different situation. The

plaintiff at the highest was an assignee of one of the next of kin. The plaintiff's assignor was not personally within the jurisdiction of the Court. The suit was brought against an ancillary administrator who by the laws of Massachusetts was not and might never be under any duty to distribute the property.

Assuming that the plaintiff by virtue of a lien or equitable assignment had the same right that Root or Coram would have had to establish any rights they had in the property, the suit could not be maintained. The administrator appointed in Massachusetts was the only person against whom a proceeding could be or was brought to establish such rights. But even if a domiciliary administrator in Massachusetts could be so sued without further proceedings in the Probate Court, an ancillary administrator cannot be. Had Root sued Leyson to establish a right to a share of the fund in Massachusetts, the answer would have been short and conclusive that until the Probate Court had determined that the property should be administered in Massachusetts no such suit could be maintained.

The establishment of a right on the part of Root to a share as next of kin implies either a judgment *in rem* which shall attach to the property, or a judgment against some person who controls or represents the property. A judgment *in rem* could be rendered only if the property itself were within the jurisdiction and control of the Circuit Court; the property was, on the contrary, in the exclusive possession and control of the Probate Court and must remain so. The only possible personal judgment establishing Root's right was a judgment against Leyson as administrator appointed in Massachusetts. But Leyson as such administrator was not, when the suit was brought or when the decree was entered, charged with any duty to distribute, and could not be so charged by any judgment of the Circuit Court consistently with the Massachusetts statute. A judgment against Leyson as administrator in Massachusetts would be of no effect, therefore, as estab-

lishing any right. Whenever the property was sent to Montana for administration the administrator there, though Leyson himself was such administrator, would be free from any obligation imposed by the decree against the administrator in Massachusetts; otherwise the property would in fact be administered in Massachusetts, not pursuant to the statute of Massachusetts, but by the intervention of the Circuit Court in a matter not relating to rights *inter partes* but in a matter of pure probate.

A further and fatal objection to the jurisdiction of the Circuit Court, in a proceeding to establish at the suit of this plaintiff an alleged right of Root in the property, is the citizenship of the parties. Such a proceeding clearly proceeds upon the theory that a suit is being brought by the plaintiff in the right of Root and as his assignee. It is a decree in favor of Root as against the administrator that is wanted and required if Root's right is to be established, assuming that such establishment is otherwise possible. Root and Leyson were both citizens of Montana. The plaintiff as Root's assignee could not, therefore, bring a suit in the Circuit Court. Leaving out any question of assignment the result is the same. To determine the jurisdiction of the parties the Court must arrange the parties according to their actual interests. It is a claim of Root against Leyson that is to be enforced, and in the establishment of that claim, although the purpose of establishing it may be inimical to Root, his interest is identical with the plaintiff's, and therefore he must be classed for purposes of determining the jurisdiction, as a plaintiff.

Pacific R. R. v. *Ketchum*, 101 U. S. 289.
Ewers v. *Watson*, 156 U. S. 527, 532.

FOURTH

NEITHER ON THE PRESENT BILL NOR ANY AMENDMENT CAN AN ORDER BE ENTERED REQUIRING LEYSON, ROOT, OR CORAM TO RETAIN PROPERTY HEREAFTER COMING INTO THEIR HANDS TO SATISFY THE COMPLAINANT'S CLAIM.

The bill was filed as a proceeding to assert jurisdiction over a particular *res*, so as to enable absent parties to be

brought in by publication. A decree such as is suggested in the inquiry would necessarily be a decree solely *in personam*. The complainant could not have brought such a bill against either Root or Leyson, both because they resided out of the district and for want of personal service. They were served by publication, and such service was insufficient to support a decree *in personam*.

Assuming, however, that a decree *in personam* could be entered, no such decree is justifiable. The complainant's claim is based upon the theory that she has a lien on certain property securing an indebtedness. Upon the ground of satisfying the indebtedness from a foreclosure of the security she asserts jurisdiction in a court of equity to determine the purely legal question of the existence of the debt. If, instead of a bill to foreclose the supposed lien and apply the proceeds to the satisfaction of the debt, she brings a suit to compel the defendants hereafter, if certain property is received by them, to apply it to the satisfaction of the alleged indebtedness, there is no jurisdiction in equity. A judgment creditor might conceivably maintain such a bill, but there is believed to be no precedent for a bill for such a purpose by a simple contract creditor.

The necessity of establishing a claim at law before resorting to equity for its enforcement has always been strictly maintained by this Court. Unless there is an actual existing lien or express trust as to property, a creditor desiring the assistance of a court of equity must first reduce his claim to judgment.

Cates v. *Allen*, 149 U. S. 451.
Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

If in the case at bar the property on which a lien is asserted is not subject to the jurisdiction of the Circuit Court, there can be no suit to enforce the lien. The proceeding becomes one merely to establish the complainant's debt and direct its payment from property which may hereafter be received pursuant to the decree of another

court establishing the alleged debtor's title and interest. There is no foundation for a resort to equity by a simple contract creditor to maintain such a proceeding.

FIFTH,

THE CIRCUIT COURT IS EXCLUDED FROM ANY EXERCISE OF JURISDICTION WHICH DISTURBS THE POSSESSION OF THE PROPERTY BY THE PROBATE COURT OR THE FREE EXERCISE BY THE PROBATE COURT OF ITS JURISDICTION OVER THE PROPERTY, AND THIS LIMITATION EXCLUDES JURISDICTION OF THE CASE AT BAR.

I

Controversies in which a title is asserted adverse to the title of the deceased do not involve any question as to this limitation of jurisdiction.

Those cases in which the controversy is adverse to the title of the executor or administrator have no bearing upon the present discussion.

The jurisdiction of the Probate Court is limited. It extends only to the settlement of the estate of the deceased person, that is, to the distribution of the estate among creditors of the deceased and persons entitled as his legatees or next of kin. If any controversy arises involving the question whether the property belonged to the deceased, or otherwise founded upon a claim adverse to the title of the deceased and therefore to that of his legal representatives, such controversy will be determined by the ordinary courts of law or equity. A Probate Court has no machinery and has never had jurisdiction to determine questions of ownership between executors or administrators and strangers. One claiming property adversely to the legal representative has always been at liberty to pursue, and has been bound to pursue, his remedy in the civil and not in the ecclesiastical courts.

The difference in this respect between the position of an executor or administrator and that of a receiver appointed by a court of equity rests upon the difference in the functions of the officers. An executor or administra-

tor is appointed to take possession of the property belonging to the deceased and administer it. The Probate Court has not power to, and does not assume to, put in the possession of its officer any property not that of the deceased or to give him any better title or right of possession than the decedent himself had.

A court of equity, on the contrary, may appoint a receiver to take possession of certain property pending the decision of the court as to the ownership and disposition of the property. The purpose of the appointment may be to regulate or prevent the enforcement of claims adverse to the ostensible owner. The object of the appointment would often be defeated if a claim of adverse title could be prosecuted in another court notwithstanding the appointment.

The distinction is clearly shown in the decisions of this Court. In *Erwin* v. *Lowry*, 7 How. 172, it was held that a mortgage given by a testator during his lifetime might be foreclosed by proceedings in the Circuit Court after his death although an administrator of his estate had been appointed. On the other hand, in *Williams* v. *Benedict*, 8 How. 107, it was held that a creditor, who had not obtained a lien on his debtor's property before the latter's death, could not, after the appointment of an administrator and a declaration that the estate was insolvent, levy upon the property in the hands of the administrator. In such a case the creditor did not claim adversely to the title of the administrator. So, too, in *Wiswall* v. *Sampson*, 14 How. 52, it was held that an execution from the Circuit Court laid on land prior to the appointment of a receiver by a State Court and constituting a lien thereon could not after such appointment be enforced by sale. In *Peale* v. *Phipps*, 14 How. 368, 376, Chief Justice Taney pointed out that in the earlier case the proceedings "were merely to enforce a lien created by the testator in his lifetime, and consequently could not interfere with the duties of the curator, or the authority of the State Court, under which he was acting, and to which he was bound to account."

In subsequent cases, some of which have been cited by counsel for the petitioner as bearing upon the right to interfere with property in the possession of the Probate Court, the same rule has been laid down. In all of the following cases the only matter that could be supposed to involve a conflict of jurisdiction was the enforcement of a claim based upon an asserted right superior to or inconsistent with that of the personal representatives.

Wylie v. *Coxe*, 15 How. 415.
Walker v. *Walker*, 9 Wall. 743.
McComb v. *Frink*, 149 U. S. 629.
Walker v. *Brown*, 165 U. S. 654.
Snyder's Adms. v. *McComb's Ex'x*, 39 F. R. 292.
Simmes v. *Whitney*, 50 F. R. 666.

II

The limitation prevents any exercise of jurisdiction by other courts inconsistent with the possession of property by the Probate Court or with its exercise of exclusive jurisdiction in matters of probate administration.

This Court has considered in the following cases how far the Circuit Courts of the United States could exercise jurisdiction over matters relating to the administration of estates of deceased persons.

In *Suydam* v. *Broadnax*, 14 Pet. 67, the Court held that a State statute barring all suits to establish claims against an estate which had been declared insolvent did not prevent a non-resident creditor of the deceased from suing in the Probate Court to establish his claim.

In *Williams* v. *Benedict*, 8 How. 107, a judgment had been recovered in the Circuit Court against an administrator on a debt of the decedent prior to a declaration that the estate was insolvent. It was held that an execution to satisfy the judgment could not be levied on real estate after the declaration of insolvency. The Court disclaimed any intention to decide that non-resident creditors could be driven into State Courts to establish their claims.

In *Union Bank* v. *Jolly*, 18 How. 503, a non-resident creditor failed to bring in a claim against an estate declared insolvent. The Court held that, the estate having proved solvent, he could maintain a suit against the administrator for satisfaction from the surplus.

In *Green's Admx.* v. *Creighton*, 23 How. 90, the Court held that a non-resident creditor could sue in the Circuit Court to establish his claim against an estate declared insolvent, although the State statute provided that the claim should be proved before the commissioners. The Court did not deal with the satisfaction of the debt.

In *Payne* v. *Hook*, 7 Wall. 425, a bill was filed by one of the next of kin, alleging that the administrator had rendered fraudulent accounts, had used the estate for private gain, and had obtained a fraudulent release, and asking that the release be set aside and that the plaintiff recover property to which she was entitled as one of the next of kin. The Court held that under its general equity jurisdiction the Circuit Court could entertain such a suit for relief, because there was no adequate remedy at law, and although under the Missouri statutes relief could only be granted by the Probate Court. At a later stage of the same case, *Hook* v. *Payne*, 14 Wall. 252, it was held that the Circuit Court could not make a decree giving relief to other next of kin not joined as plaintiffs. The Court said the bill was good only on the theory that the plaintiff was seeking to set aside the release and to recover a specific sum due her.

In *Yonley* v. *Lavender*, 21 Wall. 276, a non-resident sued and recovered judgment against an administrator. It was held that the judgment could not be levied on the real estate of the deceased.

In the *Case of Broderick's Will*, 21 Wall. 503, an attempt was made by bill in equity to have a will annulled on the ground that it was a forgery. The Court held that there was no jurisdiction; the will had been proved in the Probate Court and a Court of equity had no jurisdiction to revoke or set aside the probate.

In *Gaines* v. *Fuentes*, 92 U. S. 10, the Court held that a proceeding, in all essential particulars a suit in equity, authorized by the law of Louisiana and brought in a court of that State, to annul a will as a muniment of title and to restrain enforcement of the decree allowing it, could be removed to the Circuit Court of the United States.

In *Kittredge* v. *Race*, 92 U. S. 116, it was held that a suit could be brought to establish a debt against the estate of a deceased person "even though it may be that the judgment can only be collected through the local court in due course of administration." (P. 121.)

Tate v. *Norton*, 94 U. S. 746, was a suit to enforce payment from real estate of a deceased debtor, all other debts having been paid and all other assets exhausted. As the real estate did not pass to the administrator, there could be no question of taking property from the jurisdiction of the Probate Court.

In *Kennedy* v. *Creswell*, 101 U. S. 641, the Court sustained a decree for payment in a suit for discovery of assets and payment, the administrator having admitted assets.

Ellis v. *Davis*, 109 U. S. 485, was a suit alleging the invalidity of a will, seeking to have it cancelled as a muniment of title and seeking to recover real estate from one claiming as devisee under the will. The Court held that the bill could not be maintained, because by the law of Louisiana where the suit was brought such a proceeding was not the proper method of obtaining the relief sought.

In *Hess* v. *Reynolds*, 113 U. S. 73, a creditor who, according to the Michigan statute, had brought a proceeding before commissioners to establish a debt against the estate of a decedent, after appeal to the State Circuit Court removed the case to the Federal Court. It was held that the Federal Court had jurisdiction to establish the claim.

In *Borer* v. *Chapman*, 119 U. S. 587, this Court sustained a suit brought in the Circuit Court in Minnesota to enforce payment of a debt from assets that had been

paid out to legatees or next of kin. The principal question involved was the effect of a previous ancillary administration fully settled in which the claim had not been presented.

Simmons v. *Saul*, 138 U. S. 439, was a suit to revoke the grant of administration. The Court said that it was precisely similar to the Broderick will case, and for the same reasons there given the Circuit Court had no jurisdiction to grant the relief sought.

Clark v. *Bever*, 139 U. S. 96, was, like *Hess* v. *Reynolds*, a suit to enforce an alleged liability of the deceased by a suit against the administrator. The right to maintain the suit was affirmed.

Lawrence v. *Nelson*, 143 U. S. 215, was also a suit to enforce a liability of the deceased. The administrator admitted that he had assets when the suit was brought which he had since distributed among the next of kin. The right to bring suit and recover satisfaction from the administrator was maintained as within the general jurisdiction of a court of equity.

In *Hayes* v. *Pratt*, 147 U. S. 557, the principal executor, appointed in Pennsylvania, brought suit in New Jersey against an ancillary administrator to recover proceeds of property wrongly paid over by the latter. The Court held that the suit was maintainable, that under the statutes of New Jersey such a suit was within the jurisdiction of a State Court of Chancery and therefore was within the jurisdiction of the Circuit Court.

In *Byers* v. *McAuley*, 149 U. S. 608, one of several next of kin, being a non-resident, sued the administrator to establish a right to a distributive share and recover such share. Nothing remained to be done in the course of administration except to make an order of distribution. This Court held that the suit could be maintained to establish the plaintiff's right, that as payment of the share could not disturb the administration payment could be ordered, but that the Circuit Court could not deal with the rights of persons other than the plaintiff and assume the distribution of the whole estate.

In *Security Trust Co.* v. *Black River National Bank*, 187 U. S. 211, this Court held that if the time limited by State statute for prosecuting claims against the estate of a deceased person has elapsed a suit to establish such a claim in the Circuit Court is barred by the lapse of time.

Farrell v. *O'Brien*, 199 U. S. 89, was a suit brought in the Circuit Court to obtain a decree declaring invalid a nuncupative will already admitted to probate, restraining distribution under a decree about to be entered in the Probate Court, and requiring the administrator to surrender the estate to the plaintiff as next of kin. This Court ordered the bill dismissed for want of jurisdiction over the subject matter, on the ground that as the State Courts had not by custom or by statute authority to administer such relief in a suit in equity the Federal Court had not such authority.

From the foregoing review of the principal cases in this Court the actual scope of the limitation of jurisdiction may be determined and defined.

(a) The determination of a claim in behalf of a creditor against the estate is not excluded by the jurisdiction of the Probate Court.

In Massachusetts and most if not all the other States the Probate Court does not profess to exercise a final or exclusive jurisdiction in the determination of claims. In Massachusetts, indeed, except in case an estate is declared insolvent, there is no provision for the establishment of claims before the Probate Court, and in the case of an insolvent estate the creditor has an absolute right to establish his claim at law if it is rejected upon presentation to the commissioners and by the Probate Court upon appeal to it.

The determination of the validity of a claim is obviously not a matter of probate law. There is no reason why the fact that the claim is to be satisfied from property in process of administration should draw to the Probate Court the exclusive right to determine the validity of the claim. If there is jurisdiction in the courts of law to determine such claims, then that jurisdiction may be ex-

ercised by the Federal Courts, and the right to resort to the Federal Courts cannot be denied by State legislation. For these reasons this Court has uniformly and frequently held that a non-resident creditor might bring suit in a Federal Court, if the requisite diversity of citizenship exists, to establish his claim against the estate of the deceased.

(b) The right of a non-resident to establish his claim in a Federal Court does not imply a right to satisfy his claim from the assets of the estate, except in the regular course of administration pursuant to the State law.

The determination of rights *inter partes* is in no sense an exclusive function of the Probate Court; the direction of the administration and of the disposition of the property is. A court of law may establish a claim against the estate, and the administrator and the Probate Court will be bound to give effect and full faith and credit to that judgment. Whether the court of law can go further and issue execution to be levied upon the property, or order the administrator to pay the claim, depends upon the local law. Originally the administrator was personally liable for all debts and execution issued against him individually. This rule was relaxed so that the execution should be only for satisfaction *de bonis intestatoris*. But the State may, if it sees fit, provide as in case the estate is declared insolvent that no execution shall issue, and such a provision is binding on the Federal Courts.

The decisions of this Court fully establish this rule. In *Williams* v. *Benedict*, 8 How. 107, and *Vonley* v. *Lavender*, 21 Wall. 276, attempts to levy upon the property of the decedent were restrained. In *Kittredge* v. *Race*, 92 U. S. 116, this Court upheld the right to establish a claim in the Federal Court, but, referring to *Vonley* v. *Lavender*, said:

> "That decision is, that a judgment may be rendered for the amount due in order to have it judicially ascertained, even though it may be that the judgment can only be collected through the local court in due course of administration." (P. 121.)

In *Hess* v. *Reynolds*, 113 U. S. 73, this Court denied the power of a State legislature to cut off the right to a judicial

determination in a Federal Court of the claims of non-residents, but said:

"It may be convenient that all debts to be paid out of the assets of a deceased man's estate, shall be established in the court to which the law of the domicil has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require." (P. 77.)

So in *Security Trust Co.* v. *Black River National Bank*, 187 U. S. 211, the Court applied the limitation of time for presenting claims imposed by the State law as governing the time within which suit might be brought in the Federal Court, and said:

"Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the State of the domicile, and are bound by the same rules that govern the local tribunals." (P. 227.)

If, as in *Borer* v. *Chapman*, 119 U. S. 587, and *Lawrence* v. *Nelson*, 143 U. S. 215, the property has been wrongly distributed to the next of kin, there may be a decree for payment enforceable by the ordinary process of the court; or if, as in *Tate* v. *Norton*, 94 U. S. 746, all debts have been paid and all personal assets exhausted, a decree for the sale of real estate may be made, — since in neither case can there be any disturbance of the jurisdiction of the Probate Court. And if, as in *Kennedy* v. *Creswell*, 101 U. S. 641, the administrator when sued has admitted assets applicable to the payment of the claim and thus established his personal liability to satisfy the claim, a decree for payment may be entered.

The action of courts of law or equity, whether State or Federal, is limited to determining judicially the existence of a debt and does not extend to ordering satisfaction from funds being administered in the Probate Court, except in accordance with the provisions of the law of the State.

(c) As to any matter of probate administration not de-

terminable under the law of the State by a proceeding *inter partes* the jurisdiction of the Probate Court is exclusive.

Indisputably the Circuit Court of the United States has no jurisdiction of original proceedings to admit a will to probate or of proceedings to revoke the probate of a will, except so far as the State law makes provision for a contest or for revocation of probate by proceedings *inter partes* in the form of an ordinary suit.

Case of Broderick's Will, 21 Wall. 503.
Ellis v. *Davis*, 109 U. S. 485.
Farrell v. *O'Brien*, 199 U. S. 89.

Such controversies are in the exclusive jurisdiction of the Probate Court, except so far as the State by legislation otherwise provides. This exclusive jurisdiction appears to be based on the ground that the State has a right absolutely to control the rules and proceedings for the devolution of property after death, at any rate except so far as the rights of creditors of the deceased are concerned. The original probate of wills has historically always been within the exclusive jurisdiction of the Ecclesiastical Courts, the revocation of probate or annulling of the will and other matters of probate administration are subjects of which the Legislature may or may not give exclusive jurisdiction to the Probate Courts as successors to the Ecclesiastical Courts.

Farrell v. *O'Brien*, 199 U. S. 89.

III

Whether the remedy in a given case is by a proceeding inter partes *or by a probate proceeding depends upon the law of the State.*

All remedies relating to the administration of property of a deceased person are dependent upon the law of the State regulating such administration. The power of the State to regulate successions to property over which

it has jurisdiction is unrestricted. If by statute a time is fixed within which proceedings must be brought by creditors, such limitation is universally binding.

The law of the State determines the form of procedure and the nature of the remedy. In *Ellis* v. *Davis*, 109 U. S. 485, the right to maintain in the Circuit Court a bill in equity to annul the probate of a will and recover property on the ground that the will was invalid was denied because the law of Louisiana did not recognize such a method of contesting the validity of the will.

In *Farrell* v. *O'Brien*, 199 U. S. 89, this Court considered very fully the principles governing this subject. The Court stated the result of the authorities to be that as authority to make wills is derived wholly from State legislation, and the requirement of probate is a regulation to make the will effective, matters of pure probate are not within the jurisdiction of the Federal Courts, except that "where a state law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies." (P. 110.)

In determining whether such a right to a proceeding *inter partes* is given in the case of probate of a will, the test is whether the proceeding is an independent controversy or is a proceeding merely ancillary to the original petition for probate. It is the nature of the procedure provided by the State law that is decisive.

This conclusion does not imply that a State can deprive the Federal Courts of a jurisdiction *inter partes* which is exercised by their own courts, whether these courts are Courts of Probate or of common law. But such proceedings, not *inter partes*, relating to the settlement of estates, as may by State law be required, may be withdrawn from the jurisdiction of any courts except the Courts of Probate.

If it were true that whenever the interests of a nonresident were in issue he could proceed immediately and

originally in the Circuit Court, a non-resident executor could demand to have the question of allowing the will determined at the outset by a proceeding in the Circuit Court. A non-resident next of kin could demand to have the validity of a will already admitted to probate determined by an original proceeding in the Circuit Court irrespective of the procedure provided by the law of the State. Neither of these claims, however, can be sustained. The executor cannot propound the will in the Circuit Court. The aggrieved next of kin can only seek revocation of probate and annulment of the will in a court of equity, if the law of the State so provides.

If the State by appropriate action can grant or withhold relief by a proceeding *inter partes* to one denying the validity of a will, it can equally grant or deny relief by like proceeding in other cases. If it creates a condition precedent to the right to bring such a proceeding, the condition is applicable to a suit in the Circuit Court as well as to one in the State Court. If it declares that the next of kin can recover a distributive share only after certain proceedings, not *inter partes*, have been had in the Probate Court, that requirement limits the right to recover in the Circuit Court as well as in the State Court.

A legatee cannot sue for his legacy until the will has been allowed by a proceeding of which the Probate Court has exclusive jurisdiction. One of the next of kin cannot sue to recover a distributive share until administration has been taken out by a proceeding within the exclusive jurisdiction of the Probate Court. Equally, the State may require that before either shall sue, any other proceeding in the Probate Court, not in its nature *inter partes*, must be had, and of that proceeding too the Probate Court may have exclusive jurisdiction.

The often repeated assertion that a State cannot compel non-residents to sue in its courts by conferring exclusive jurisdiction of a subject matter on one of its courts is true, but the principle there stated is applicable only so far as the State undertakes so to withdraw from the Fed-

eral jurisdiction a remedy to be obtained by proceeding *inter partes*. If in a matter wholly within its control the State imposes upon resident and non-resident alike the requirement that there shall have been certain proceedings in the Probate Court before a right in a succession can be asserted in the law courts, there is no attempt to curtail the jurisdiction of the Federal Courts in favor of the State Courts, — there is only a regulation as to the acquisition and enforcement of rights by succession, a subject matter over which the State has full power of regulation.

This conclusion is perfectly consistent with all the decisions in this Court. In *Payne* v. *Hook*, 7 Wall. 425, the suit was brought by one of the next of kin to recover a share of the estate wrongfully withheld by the administrator and to set aside a release fraudulently obtained. The relief sought could obviously be obtained only by a proceeding *inter partes*. It was an independent controversy and not a continuance of any probate proceeding. If the law of Missouri conferred exclusive jurisdiction of such a proceeding on the Probate Court, it was jurisdiction of a proceeding *inter partes*, which could not be thus withdrawn from the Federal Courts. Of any probate proceedings required by the state law before bringing such a suit there was no suggestion. The fact that the sureties on the administrator's bond were held to be proper parties and that the decree ran against them is inconsistent with such a suggestion. A law conferring exclusive jurisdiction of such a proceeding on any State Court could not be supported.

In *Byers* v. *McAuley*, 149 U. S. 608, one of the next of kin sued in the Federal Court to establish a right to a share. The estate was ready for distribution. So far as appears nothing was required by the law of Pennsylvania except a decree against the administrator to pay the share; it does not appear that a suit for that purpose might not have been maintained in the same form in the Court of Probate or in any State Court. It was strictly a proceeding *inter partes*, and therefore within the jurisdiction of the Federal Court if brought by a non-resident.

IV

Under the law of Massachusetts there can be no proceeding inter partes *to recover a distributive share until the Probate Court has ordered distribution.*

Originally at common law the next of kin had no title to any part of the personal estate. The administrator took title to the property and was charged only with the duty of paying the debts. Later by statute the administrator was charged with the duty of distributing the surplus remaining after payment of debts among the next of kin.

Just as the obligation of an executor to pay a legacy is not enforceable until the will has been admitted to probate, and until that time the legatee can assert no interest in the property, so the right of the next of kin to personal property cannot exist in enforceable form until an administrator has been appointed in the manner required by the statutes of the State. Until that time at least the next of kin have no title in the property. If the property requires protection recourse must be had to the appointment of a special administrator. If the next of kin attempt to transfer title the act is of no effect.

Haskins v. *Hawkes*, 108 Mass. 379
Pritchard v. *Norwood*, 155 Mass. 539

If the S. te sees fit to impose as a further condition of the duty on the part of the administrator to distribute that an order to that effect shall be made by the Court, its right to do so is as unquestionable as its right to require probate of a will or to require administration at all.

The law of Massachusetts imposes such a requirement. A next of kin cannot proceed in any form against the administrator for a distributive share until the Court of Probate has made an order of distribution.

Cathoway v. *Bowles*, 136 Mass. 54.
Fletcher v. *Fletcher*, 191 Mass. 211.

The order of distribution is not the result of a proceeding *inter partes*. It is in substance similar to the probate of a

will, with the added feature that it establishes the existence of assets not required for the payment of debts and therefore distributable. The order is made upon a petition to the court and notice to all persons interested, just as the grant of administration is made upon like petition and notice. The requirement of such an order is not an attempt to oust the jurisdiction of the Federal Courts. It is a requirement applicable alike to State and Federal Courts. Just as a legatee must show probate of the will to entitle him to sue for his legacy, so one of the next of kin must show the grant of administration and an order to distribute to entitle him to sue for his share. If the legatee is aggrieved by a refusal to allow the will, he may have a remedy in such form as the law provides, but it is not by an original proceeding before the will is disallowed. If a next of kin is aggrieved by probate of the will, he has his remedy; but it is not, unless the State law so provides, by an original proceeding at law or in equity to revoke the probate, and the form of remedy provided may determine the jurisdiction of the Federal Court. So if the next of kin is aggrieved by a failure or refusal to order distribution, he may have his remedy, but it is not by an original proceeding begun as a substitute for an application to the Probate Court. All of these cases may result in a proceeding *inter partes* of which a Federal Court may have jurisdiction; none of them can originate in such a proceeding, and of none of them, therefore, can the Federal Court have original jurisdiction.

In the case of ancillary administration the situation is still stronger. The statutes of Massachusetts, already quoted, give absolute discretion to the Probate Court to administer or not to administer. The Probate Court itself may decline all jurisdiction as to distribution and remit the property to the State of the domicile. A State might by appropriate legislation authorize the Probate Court to grant ancillary administration, or to refuse such administration wholly and permit the domiciliary administrator to take possession of and remove the property.

It is hardly conceivable that a court of law, State or Federal, would assume to overrule such a legislative grant of discretion or its exercise. In seeking to impose upon an ancillary administrator appointed by the Probate Court a duty as to distribution that by statute can arise only in case the Probate Court elects to assume the duty of distribution, the Circuit Court committed no less violent an usurpation.

The fact that the ancillary administrator is under bond with surety to the Probate Court is a further illustration of the anomaly created by such a proceeding. The bond is conditioned to dispose of the property according to the orders of the Probate Court. If the Probate Court orders the property transmitted to Montana for distribution there, as by statute it is authorized to do, the sureties are liable if the administrator fails to obey, and the administrator may be liable if he does obey.

V

In the case at bar the limitation on the jurisdiction of the Probate Court was absolute.

The present proceeding is to enforce a derivative right. The plaintiff claims under an alleged grant from Root and Coram, said to be in effect an assignment. Unless the assignors could themselves maintain a proceeding to determine their rights the assignee cannot do so.

Root's alleged right must be either as a legatee or as one entitled to be named as a distributee. As a legatee Root could in the court of primary probate jurisdiction maintain a suit for his legacy after the required lapse of time. He could not maintain such a suit in the court of ancillary jurisdiction until that court had decided to administer instead of transmitting the property to Montana.

But if under any circumstances Root could sue in Massachusetts as a legatee, he could not maintain the claim set up in the bill. No will supporting that claim has been allowed in Massachusetts. There was filed in the Pro-

bate Court a petition for ancillary administration, accompanied by a copy of the will and a copy of a decree entered March 25, 1895, in Montana, before the final compromise agreement alleged in the bill of complaint was made and inconsistent with the final decree in Montana alleged in the bill to have been entered in Montana. (Rec. pp. 889 *et seq.*) On this petition the Probate Court entered a decree admitting the will of Andrew J. Davis to probate. On appeal to the Supreme Court this record from the Probate Court was taken up. (Rec. pp. 730 *et seq.*) At the hearing in the Supreme Court a paper purporting to be a copy of the final decree in Montana was filed. (Rec. p. 736.) The appeal was dismissed and the decree of the Probate Court was affirmed. (Rec. p. 753.) Subsequently John E. Davis, as administrator of the estate of John A. Davis, filed a petition for a modification of the decree of the Probate Court by which effect should be given to the compromise agreement and the final decree of the Montana court. (Rec. pp. 689, 699.) The record shows no action on this petition by the Probate Court.

The position contended for by the complainant appears to be that if the decree of the Montana court is filed with the will in the Massachusetts Probate Court the decree of the latter admits to probate the will as modified by that decree. But the complainant cannot maintain her bill on this theory, because the decree of the Montana court which is set up in the bill was not before the Probate Court.

Certainly the decree of the Montana court on which the bill is founded can be enforceable only by the action of the Probate Court in Massachusetts. Unless adopted by the Probate Court the decree could not establish a rule of distribution in Massachusetts; it could only be evidence of agreements between the parties interested.

If the estate in Massachusetts is to be dealt with as a case of intestacy, then Root could maintain no proceedings because there has been no adjudication of intestacy and no order for a distribution.

A proceeding by Root to obtain a share of the property in Massachusetts would directly violate the statute giving discretion to the Probate Court to distribute or to remit the property to Montana. The Probate Court itself has already on Root's application refused to act on the ground that even if that Court could recognize the Montana decree it would not at this time decide to distribute in Massachusetts. (Rec. pp. 729, 730.) It is difficult to suppose that Root could by a proceeding in the Circuit Court have obtained what the Probate Court denied. But if Root could not thus compel a distribution in Massachusetts, the complainant claiming under Root cannot do so.

The complainant is met by all the difficulties that Root would have, and met by them in an aggravated form. The Probate Court has definitely announced its intention to exercise the statutory discretion to distribute or remit to Montana, but has not yet exercised that discretion; nevertheless the complainant seeks to have a decree which at least *pro tanto* annuls that discretion. Claiming only by assignment from Root a part of a share to which he is alleged to be entitled, she seeks in a forum to which Root could not resort a decree which in effect removes from the control of the Probate Court a part of the property confided to it for administration before the Probate Court has either allowed or rejected the only instrument that can establish the share of which she claims to recover a part.

Much has been said by the complainant of the supposed hardship inflicted if jurisdiction is not taken of this controversy. It is pertinent to observe that any hardship results wholly from unsuccessful litigation elsewhere. The complainant seeks to obtain here what one court of last resort has declared she was not entitled to.

In order to obtain relief she seeks to compel the Federal Court in Massachusetts to take jurisdiction of a controversy concerning property temporarily in Massachusetts, which by the laws of Massachusetts it is contemplated should be sent elsewhere for administration.

She seeks to oust the Probate Court of its privilege to have all questions of distribution determined elsewhere. Every consideration suggests the expediency that the property should be sent to Montana for administration by the courts in which the compromise agreement was made and its effect can be determined and enforced. The complainant alone objects, and objects only in order to secure a second trial of a claim already once adjudicated.

SIXTH

THE PROBATE COURT OF SUFFOLK COUNTY HAS NOT AS ANCILLARY TO ITS POSSESSION OF THE PROPERTY FINAL JURISDICTION TO ASCERTAIN, DECLARE, ENFORCE, AND FORECLOSE A LIEN ON A SHARE IN THE FUND.

The equity jurisdiction conferred by statute on the Probate Court is exercised independently of its jurisdiction in probate. As a Court of equity it can entertain such proceedings only as any general Court of equity could entertain. The powers of the same court as a Court of Probate do not enlarge, and are not enlarged by its powers as a Court of equity.

Bennett v. *Kimball*, 175 Mass. 199.
Green v. *Gaskill*, 175 Mass. 265.

A Probate Court as such cannot undertake to determine the rights between a legatee or next of kin and an alleged creditor claiming a lien for his debt. Such a creditor may by recourse to the Court of Probate in equity or to any other Court of equity assert any rights cognizable in equity and enforce them against the property after the court of Probate has completed the administration and made an order for distribution.

Lenz v. *Prescott*, 144 Mass. 505.

SUMMARY

The conclusive objections to the assumption of jurisdiction by the Circuit Court in the present case are:

FIRST: It cannot act upon the property as a *res* bringing in absent parties by publication, because the *res* is in the custody of another court of which the possession cannot rightfully be disturbed.

SECOND: It cannot act by any decree undertaking to determine the rights of persons claiming as legatees or next of kin, because by the Statutes of Massachusetts the Probate Court has discretion to remit the administration to Montana, and any decree determining rights in Massachusetts necessarily interferes with the exercise of this discretion.

THIRD: It cannot make any decree undertaking to establish the rights of Root and Coram, because such a decree presupposes the possibility of an establishment of such rights by Root and Coram, and upon the facts stated in the bill neither Root nor Coram could compel such a determination in Massachusetts.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Of counsel.

INGERSOLL *v.* CORAM.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 8. Argued March 11, 12, 1908.—Decided December 7, 1908.

In this case the Circuit Court had jurisdiction under the provision of the act of March 3, 1875, 18 Stat. 470, 472, to enforce a lien for professional services, on property within the district, although some of the defendants did not reside therein.

An objection to the jurisdiction of the Circuit Court based on the residence of defendant, although diverse citizenship exists, may be waived, and is waived if not seasonably made. *In re Moore*, 209 U. S. 490.

A decree in a suit in the Circuit Court between citizens of differer States is not violative of § 720, Rev. Stat., because it determin liens on distributive shares in an estate under administration in state probate court and enjoins transmission of that share to th original administrator until satisfaction of the lien.

Quære, whether it is within the power of a state court to orde: propert on which there is an asserted lien to be sent out of the district, thereb defeating the jurisdiction of the Circuit Court to enforce the lie under the act of March 3, 1875, 18 Stat. 470, 472.

The fact that proceedings for the administration of an estate are pend ing in the probate court does not deprive the Circuit Court of th United States of jurisdiction to determine whether a lien exists i favor of citizens of another State on some of the distributive shares the lien only to be enforced after the probate court shall have finishe its functions.

Section 629, Rev. Stat., does not deprive the Circuit Court of jurisdic tion of an action brought by a citizen of another State against a administrator to enforce a lien on the distributive share of an hei of defendant's intestate because that heir being of the same Stat as the defendant could not sue him in the Circuit Court.

An ancillary administrator in one jurisdiction is not in privity wit an ancillary administrator in another jurisdiction, and a judgmen against the one is not *res judicata* and a bar to a suit by the other *Brown* v. *Fletcher's Estate*, 210 U. S. 82.

Where the case in which counsel is employed on a contingent fee is s settled that the clients receive as much as though the contingen on which the fee depends were realized, and the settlement is achieve after a trial and by the services of the counsel, his contract is per formed and he is entitled to the agreed compensation.

An express executory agreement in writing whereby the contracting party sufficiently indicates an intent to make some identified prop erty security for a debt or other obligation, creates an equitable lie on such property; and in this case an agreement by contestants t pay counsel a contingent fee if the propounding of a will is prevented, created a lien on the distributive shares in the estate to which thos contestants became entitled on a settlement of the matter effected by the successful services of the counsel so employed.

148 Fed. Rep. 169, reversed; 136 Fed. Rep. 689, modified and affirmed.

THE petitioner, as administratrix of the estate of Robert G. Ingersoll, deceased, sued the respondents and certain other persons, in the Circuit Court of the United States for the Dis-

trict of Massachusetts, to subject certain interests in the estate of Andrew J. Davis to a lien which is alleged to have accrued to her intestate by the agreement which is set out in the opinion, and by the laws of Montana, in which State the services were rendered.

Andrew J. Davis, a man of great wealth, a citizen of Montana, died, leaving property in that State and in Massachusetts. By a will, which was offered for probate in Montana, all of his property was left to his brother, John A. Davis. Certain other of his next of kin, five in number (referred to in the bill as the "five heirs"), associated to contest the probate of the will. Henry A. Root, one of the respondents, and a nephew of Andrew J. Davis, agreed with the four other contestants to conduct the litigation and to procure evidence and counsel at his own expense, receiving therefor an assignment of a part of the prospective distributive shares of the others. Joseph A. Coram, another respondent, also acquired an interest in the prospective shares of some of the contestants. Robert G. Ingersoll, the petitioner's intestate, was engaged as counsel to conduct the litigation, and Root and Coram entered into the agreement with him, which will hereafter be set out.

Upon the trial of the contest the jury disagreed. Pending the preparation for the second trial an agreement of compromise was made, by which Ingersoll's clients received a larger portion of the estate than though Davis had died intestate. It is alleged that this was the result of Ingersoll's services as counsel. "By reason," it is alleged, "and in consideration of the prosecution of said contests, and the force, effect, and stress thereof, as against the proponent of such alleged will, in preventing the admission thereof to probate, and in consideration of the determination of said controversy and litigation, and for no other consideration or reason," was the compromise effected. It is hence further alleged that the "will was defeated in so far as it could affect the rights, shares, or interest in and to said estate of said five heirs mentioned in

said agreement and promise made and delivered by said Root and Coram to said Robert G. Ingersoll, for as much as they were entitled to only $\frac{350}{1100}$ of said estate as such heirs at law of Andrew J. Davis, deceased, and got absolute right and title to 515½ eleven-hundreths thereof, through the prosecution of said contests and decree determining the same." Two hundred and fifty eleven-hundredths, it is alleged, were allotted directly to said five heirs and 265½ eleven-hundredths, for their use and benefit, to Charles H. Palmer (a respondent here) and Andrew J. Davis, Jr., trustees. A copy of the decree was annexed to the bill and made part of it. And it is alleged that by reason of said agreement and the fulfillment thereof and the "provisions of the laws and statutes of Montana," which are set out, an attorney's lien accrued in favor of said Ingersoll and his legal representatives, "and is existing and is in force and effect upon the portions, parcels, and interests of, in and to the funds and other property of said Andrew J. Davis, deceased, so acquired for said five heirs." That Root and Coram have conveyed away the real estate vested in them by the decree determining the said will contests, and that the distributions under said decree "have practically exhausted the funds and property of said estate in the State of Montana, and that by reason of the employment of Ingersoll and the services rendered by him and by the promises of payment an equitable lien exists on the funds and effects acquired by said heirs, situate in Boston, Mass.," and that such funds and effects should not be distributed or carried away "in default of payment of said indebtedness owing by Root and Coram to the estate and legal representative of Robert G. Ingersoll, deceased, but that said funds and effects situate in Boston, Mass., should be and remain subject to said indebtedness, and to be resorted to for the payment thereof."

It is alleged that John H. Leyson is the duly appointed, qualified and acting administrator of the estate of Andrew J. Davis, deceased, situate in Massachusetts, and has custody of the funds and effects acquired by Root and his associates, and

upon which the said lien exists in favor of the estate and legal representatives of Ingersoll, and that if such funds and effects should be distributed the lien will be defeated.

The death of Ingersoll in the State of New York is alleged, and the appointment of Eva A. Ingersoll, administratrix, by the Surrogate's Court of the county of Westchester, of that State, and her qualification. And it is alleged that she was subsequently appointed administratrix of his estate by the Probate Court of the county of Suffolk, Commonwealth of Massachusetts, situate in that Commonwealth, and that she duly qualified as such. It is alleged that the estate of Andrew J. Davis, situate in Boston, and in the hands of said John H. Leyson as administrator, consists of money, convertible stocks and bonds of the value of $450,000, after paying expenses of administration, of which funds and effects Coram and other parties for whom Ingersoll prosecuted said will contest are entitled by virtue of the decree of the District Court of the State of Montana, directly and through Charles H. Palmer and Andrew J. Davis, Jr., to 515½ eleven-hundredths, "acquired as part of the fruits of the labors of said Robert G. Ingersoll in the prosecution of said will contests." That Root, Coram and their associates have petitioned the Probate Court of Suffolk County to order distribution of said shares of said funds and effects to them. That all of said 515½ eleven-hundredths, except the interest owned by Sarah Maria Cummings and the interest owned by Ellen S. Cornue, are subject to the lien of Ingersoll. It is alleged that the interests of Elizabeth S. Ladd and Mary L. Dunbar have been transferred to Root and Coram.

A conspiracy and purpose of Coram and Root to defeat the lien of Ingersoll are alleged, and that distribution of the estate in Massachusetts is sought as a means thereto; further, that if the funds and effects be removed from Massachusetts or distributed to Root and Coram before the representatives of said Ingersoll have an opportunity to enforce their lien, the same will be placed beyond their reach and the payment of

the indebtedness secured thereby defeated; that the funds and effects remaining in Montana will be required and used to pay indebtedness and expenses of administration there; and that Root and Coram have no tangible property other than their shares and interest in the estate of Davis.

It is further alleged that petitioner brought suit in the District Court of the State of Montana in her name, as administratrix of Robert G. Ingersoll, to enforce payment of said claim existing in favor of the estate and legal representatives of Ingersoll. That Root and the other defendants therein appeared and demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, but did not specify or raise the objection that she was not qualified to prosecute said suit, although she alleged her appointment as administratrix by the Surrogate's Court of New York. That upon her urging the pendency of said suit against the petition for distribution filed by Root and Coram and their associates, it was objected that said suit had not been brought by an administrator of Ingersoll appointed in Montana. The court sustained the objection. That thereupon John S. Harris was appointed administrator in Montana, and substituted in said suit for respondent. The cause coming on to be heard in the District Court of Montana, Root objected to the introduction of any evidence, on the ground that the complaint therein did not state facts sufficient to constitute a cause of action. The motion was sustained, and without further proceedings the court granted a nonsuit and dismissed the complaint on the alleged ground that it did not state facts sufficient to constitute a cause of action, in consequence no trial thereof has been had, nor has the claim and lien of Ingersoll ever been adjudicated, nor is it barred by any statute of limitation.

The bill prays an injunction against Leyson to restrain him from delivering, and against respondents to restrain them from receiving, said funds and effects and for the appointment of a receiver, discovery of Coram's interest, and judgment for

the same, and that it be declared a lien on such interest. Judgment is prayed against Root for $95,000, with interest, and that the sum be declared a lien on his shares and interests. What else is prayed need not be noticed.

There were demurrers to the bill that went to the parties, the jurisdiction of the court, to the merits, and that the judgment of the District Court of Montana constituted a bar. The grounds of demurrer to jurisdiction were expressed in the demurrer filed by Root and Coram and Herbert P. Cummings, executor of the last will and testament of Sarah Maria Cummings, one of the five heirs, as follows:

"2. These defendants also demur to the bill of complaint upon the further ground that this court has not jurisdiction of this action, because it appears from the said bill that this action is brought to secure from this court a writ of injunction staying proceedings now pending in the Probate Court, in and for the county of Suffolk and Commonwealth of Massachusetts, to distribute the funds and effects of the estate of Andrew J. Davis, deceased, situate in the State of Massachusetts, among the persons entitled thereto, or to otherwise dispose of said funds and effects, and this court is forbidden by section 720 of the United States Revised Statutes from granting a writ of injunction to stay proceedings in any court of a State."

The demurrer of Leyson was more general, stating that the court "had no jurisdiction to grant the relief prayed for in the bill of complaint or any part thereof." And Andrew J. Davis particularized this by the specification that to enjoin the disposition of property in the hands of Leyson as administrator "would be an interference with the proceedings of the Probate Court of Suffolk County having jurisdiction of the matter, and would be unauthorized and illegal."

The demurrers were overruled except as against certain parties, and except so far as the bill claimed a statutory lien. The court said: "No statutory lien can be maintained, and that portion of the bill must be regarded as ineffectual; and as it is specially demurred to, it must be stricken out." 127

Fed. Rep. 418. The bill was amended in compliance with the order of the court, making Charles H. Ladd, individually and as administrator of the estate of Elizabeth S. Ladd, a party. The bill, however, was subsequently ordered to be dismissed as to him, Mary Louise Dunbar (one of the five heirs), and Herbert P. Cummings, executor. 132 Fed. Rep. 168. They seem, however, to have been regarded as parties until the final disposition of the case, for they joined Coram, Root and Palmer in an answer. Leyson filed a separate answer. In the answers some of the allegations of the bill were denied and others admitted. The answers also pleaded in bar of the suit the proceedings and judgment in the action brought in the District Court of Silver Bow County, State of Montana. Proofs were taken, the allegations of the bill were found to be true and a decree entered for petitioner. 136 Fed. Rep. 689. Root, Coram and Palmer took an appeal to the Circuit Court of Appeals, the other respondents declining to join them, which court reversed the decision by a divided court. 148 Fed. Rep. 169. This certiorari was then granted.

Mr. E. N. Harwood and *Mr. Hannis Taylor*, with whom *Mr. Hollis R. Bailey* and *Mr. John H. Hazelton* were on the brief, for petitioner:

The commencement and non-suit or dismissal of an action in Montana, by such proceedings as were had in the *Harris case*, even if the plaintiff had title to and right of action upon, the claim which he attempted to prosecute, would not, under the rules of law governing the effect of such proceeding, create or constitute a bar to another action for the same cause. *Homer* v. *Brown*, 16 How. 354; *Manhattan Insurance Co.* v. *Broughton*, 109 U. S. 121; *Gardner* v. *Mich. Cent. R. Co.*, 150 U. S. 349; *McComb* v. *Frink*, 149 U. S. 629; *Hughes* v. *United States*, 4 Wall. 232; *Canal Co.* v. *Gordon*, 6 Wall. 561; *Keller* v. *Stolzenbach*, 20 Fed. Rep. 47; *Wilbur* v. *Gilmore*, 21 Pick. 252; *Bridge* v. *Sumner*, 1 Pick. 370; *Clapp* v. *Thomas*, 5 Allen (Mass.), 158; *Borden* v. *Thomas*, 99 Massachusetts, 200; *Hub-*

bard v. *Hooker*, 102 Massachusetts, 202; *Fleming* v. *Hawley*, 65 California, 492; *Gummer* v. *Trustees &c.*, 50 Wisconsin, 247; Note on Non-suit and cases, 49 Am. St. R. 831; Freeman on Judgments, § 261; Montana Code of Civil Procedure, §§ 1004, 1111, 1112, 1196, 3453; *Green* v. *Montana Brewing Co.*, 32 Montana, 110; *Gilman* v. *Rives*, 10 Pet. 301; *Kleindschmidt* v. *Binzel*, 14 Montana, 31; Montana Compiled Statutes of 1887, 118, 119.

A judgment that a declaration is bad in substance, which alone and not matter of form is the ground of a general demurrer, can never be pleaded as a bar to a good declaration for the same cause of action.

The judgment is in no sense a judgment on the merits. The rule of law is thus declared by this court and many others without the aid of statute and is so declared in Montana according to the general rule and pursuant to statutes. And see *Gilman* v. *Rives*, 10 Pet. 301; *Kleindschmidt* v. *Binzel*, 14 Montana, 31; *Glass* v. *Basin & Bay St. M. Co.*, 34 Montana, 88; *Kirsch* v. *Kirsch*, 113 California, 56; *Hardenburg* v. *Bacon*, 33 California, 356; *Los Angeles* v. *Mellus*, 59 California, 452; approved in *City &c.* v. *Clark*, 62 Fed. Rep. 697; approved in *Gilmer* v. *Morris*, 30 Fed. Rep. 481; *Lockett* v. *Lindsay*, 1 Idaho, 324; *Wilbur* v. *Gilmore*, 21 Pick. 253; *Garrish & Brewster* v. *Pratt & Bunker*, 6 Minnesota, 53; *Rodman* v. *Michigan Central R. Co.*, 59 Michigan, 395; *Carmony* v. *Hoober*, 5 Pa. St. 307; *Moore* v. *Dunn*, 41 Ohio St. 62; *Stevens* v. *Dunbar*, 1 Blackf. (Ind.) 56; *Estep* v. *Larsh*, 21 Indiana, 190; *Hassell* v. *Nutt*, 14 Texas, 265.

The administrator appointed in Montana had no title to the chose in action on which this suit is founded. That the law, by virtue of the facts shown, vested in Eva A. Ingersoll, as administratrix, title to said chose in action and that the debtors thereon, wheresoever residing, could safely pay said administratrix and her receipt would protect them everywhere, is settled, beyond dispute, by the authorities. *Wilkins* v. *Ellett*,

9 Wall. 740; *Harper* v. *Butler*, 2 Pet. 239; *Wyman* v. *United States*, 109 U. S. 654; *Thorn* v. *Watkins*, 2 Ves. Sen. 36; *Eells, Admr.*, v. *Holder*, 12 Fed. Rep. 668; *May* v. *County of &c.*, 30 Fed. Rep. 250; *Van Bokkelen* v. *Cook*, 5 Sawy. 591; *S. C.*, Fed. Cas. No. 16,831; *Rand, Admr.*, v. *Hubbard*, 4 Mete. 252; *Pinney, Admr.*, v. *McGregory*, 102 Massachusetts, 186; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *St. John* v. *Hodges*, 68 Tennessee (9 Baxt.), 334; *In re Cape May & D. B. N. Co.*, 51 N. J. L. 82; *Gove* v. *Gove*, 64 N. H. 503.

Administrators of an intestate appointed in different States have no privity with each other in law or in estate. See opinion below and *Aspden* v. *Nixon*, 4 How. 467, 497; *Stacy* v. *Thresher*, 6 How. 44, 59; *Johnson* v. *Powers*, 139 U. S. 156; *Carpenter* v. *Strange*, 141 U. S. 87.

The effect given to said judgment of non-suit, by the ruling of the Court of Appeals in the case at bar, deprives the legal representative of Ingersoll of property without due process of law. *Fayerweather* v. *Ritch*, 195 U. S. 276; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 234; *Martin* v. *Texas*, 200 U. S. 316.

There is a lien existing in favor of complainant, by virtue of the Montana statute, and also by virtue of principles of equity independent of statute, to secure payment for Ingersoll's services. *Coombe* v. *Knox*, 28 Montana, 202; *Justice* v. *Justice*, 115 Indiana, 201; *Fillmore* v. *Wells*, 10 Colorado, 228; *S. C.*, 3 Am. St. Rep. 567; *Newbert* v. *Cunningham*, 50 Maine, 231; *S. C.*, 79 Am. Dec. 621; *Wylie* v. *Coxe*, 15 How. 415.

Rights can and do have extraterritorial effect, and it makes no difference whether they were created by statute law, or common law, or by contract, will, decree or other effectual means. *Dennick* v. *Cent. R. R. Co.*, 103 U. S. 11; *Smith* v. *Condry*, 1 How. 29; *Nor. Pac. Ry. Co.* v. *Babcock*, 154 U. S. 190.

Both Federal and state courts constantly enforce rights founded upon the laws of other States, "whether the right

of action be *ex contractu*, or *ex delicto*." *Texas* v. *White*, 10 Wall. 483; *Nor. Pac. Ry. Co.* v. *Babcock*, 154 U. S. 190; *Dennick* v. *Cent. R. R. Co.*, 103 U. S. 11; *Smith* v. *Condry*, 1 How. 29; *Huntingdon* v. *Attrill*, 146 U. S. 657.

The courts of the United States take judicial notice of and administer the laws of the States of the Union in cases to which they respectively apply, and enforce rights created thereby. *Owings* v. *Hull*, 9 Pet. 607; *Merchants' Exchange Bank* v. *McGraw*, 59 Fed. Rep. 972; *Bank* v. *Franklyn*, 120 U. S. 747; *Lamar* v. *Micou*, 114 U. S. 218; *Gormley* v. *Bunyan*, 138 U. S. 623.

There are many cases which directly sustain the attorney's equitable lien foreclosed in the case at bar, such as: *Meddaugh* v. *Wilson*, 151 U. S. 333; *Central R. R. Co.* v. *Pettus*, 113 U. S. 116; *Louisville & St. L. Ry. Co.* v. *Wilson*, 138 U. S. 501; *Cowdry* v. *Galveston Ry. Co.*, 93 U. S. 352; *Semmes* v. *Whitney*, 50 Fed. Rep. 666; *Mahone* v. *Southern Tel. Co.*, 33 Fed. Rep. 702, approved in 138 U. S. 507; *Frink* v. *McComb*, 60 Fed. Rep. 486; *Tuttle* v. *Claflin*, 31 C. C. A. 419; *Needles* v. *Smith*, 32 C. C. A. 226; *Foster* v. *Danforth*, 59 Fed. Rep. 750; *Weeks* v. *Wayne Cir. Judge*, 73 Michigan, 256; *Carpenter* v. *Meyers*, 90 Michigan, 209; *Justice* v. *Justice*, 115 Indiana, 201; *Stratton* v. *Hussey*, 62 Maine, 286.

To the questions propounded by the court [1] counsel answer: 1. The Circuit Court has jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts.

The case at bar has in view the establishment of a lien on certain shares of funds and effects, which, although now in the hands of an administrator of an estate already settled, with the exception of possibly a few minor details, as shown without dispute, will be distributed to the parties holden for the debt secured by that lien.

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[1] See *post*, p. 354.

The administrator is a necessary party for the purpose of the suit and to protect the lien on the shares in his hands subject thereto, which he will have for distribution to the parties holden for the debt secured by the lien. The lien can only be established and protected by a court of equity jurisdiction. *Hauselt* v. *Harrison*, 105 U. S. 401; *Fletcher* v. *Morey*, 2 Story, 555; *S. C.*, Fed. Cas. No. 4,864, per Story, J.; *Pinch* v. *Anthony*, 8 Allen (Mass.), 336; *Hovey* v. *Elliot*, 118 N. Y. 124.

No Probate Court, as such, could adjudicate the question of debt and the existence of the lien involved in the case at bar. *Perris* v. *Higley*, 20 Wall. 375.

No abridgment of the equity jurisdiction of state courts by state law would restrict or impair the chancery jurisdiction of the Federal court sitting in that State. *Payne* v. *Hook*, 7 Wall. 425; *Kendall, Admr.*, v. *Creighton*, 23 How. 90; *Holland* v. *Challen*, 110 U. S. 15; *Gormley* v. *Clark*, 134 U. S. 338; *Bardon* v. *Land Imp. Co.*, 157 U. S. 327; *Rich* v. *Braxton*, 158 U. S. 405; *Smyth* v. *Ames*, 169 U. S. 466, 516.

A controversy as to the existence of a debt and lien on property to secure it, or other equitable right in property in the hands of an administrator or executor, may be adjudicated and determined by a court of equity without seizing or taking actual possession of the property on which the lien rests. *Wylie* v. *Coxe*, 15 How. 415; *McComb* v. *Frink*, 149 U. S. 629; *Canfield* v. *Canfield*, 56 C. C. A. 169; *S. C.*, 118 Fed. Rep. 1; *Richardson* v. *Green*, 9 C. C. A. 565; *S. C.*, 61 Fed. Rep. 423; *Van Bokkelen* v. *Cook*, 5 Saw. 587; *S. C.*, Fed. Cas. No. 16,831; *Snyder's Admr.* v. *McComb's Exr.*, 39 Fed. Rep. 292.

As a Massachusetts court of equity would apply the remedies which have been applied in the case at bar, to protect and enforce complainant's equitable right in the funds in the hands of the administrator, although they be in probate administration, so may the Federal Circuit Court, sitting in Massachusetts, apply the same equitable remedies to a case cognizable in chancery, even though it be an enlarged remedy given

by statute. *Clark* v. *Smith*, 13 Pet. 194, 203, 204; *Gaines* v. *Fuentes*, 92 U. S. 10; *Gormley* v. *Clark*, 143 U. S. 338; *Holland* v. *Challen*, 110 U. S. 15; *Bardon* v. *Land & R. Imp. Co.*, 157 U. S. 327; *Rich* v. *Braxton*, 158 U. S. 405; *Smyth* v. *Ames*, 169 U. S. 466, 516, *Richardson* v. *Green*, 9 C. C. A. 565; *S. C.*, 61 Fed. Rep. 423.

2. The Circuit Court has jurisdiction to enforce by foreclosure a lien upon property so situated. See 3 Pomeroy's Eq. Juris. § 1339; *Hauselt* v. *Harrison*, 105 U. S. 401; *Milner* v. *Metz*, 16 Pet. 221; *Dulaney* v. *Scudder*, 36 C. C. A. 52; *S. C.*, 94 Fed. Rep. 6; *Phelps* v. *McDonald*, 99 U. S. 298, 308; *McKinney* v. *Curtiss*, 60 Michigan, 611; *Sherman* v. *Am. Stove Co.*, 85 Michigan, 169; *Smith Co.* v. *Skinner*, 91 Hun, 641; *Lewis* v. *Doge*, 17 How. Pr. 229; *Keller* v. *Payne*, 1 N. Y. Supp. 148; *Hendrix* v. *Morrill*, 6 N. Y. Supp. 254.

3. The Circuit Court has jurisdiction to determine the shares of Root and Coram in the property so situated. See *Hauselt* v. *Harrison*, 105 U. S. 401; *Phelps* v. *McDonald*, 99 U. S. 298, 308; *Byers* v. *McAuley*, 149 U. S. 608; *Mayer* v. *Foulkrod*, Fed. Cas. No. 9,341; *Gaines* v. *Fuentes*, 92 U. S. 10; *Payne* v. *Hook*, 7 Wall. 425; *Dodd* v. *Ghiselin*, 27 Fed. Rep. 405; *Sullivan* v. *Andoe*, 6 Fed. Rep. 641; *Dennick* v. *Central Ry. Co.*, 103 U. S. 11; *Wylie* v. *Coxe*, 15 How. 415.

4. The Circuit Court has jurisdiction, upon the pending bill, either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them, should hold any property coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant. 3 Pomeroy's Equity Juris. § 1339; *Hauselt* v. *Harrison*, 105 U. S. 401; *Cole* v. *Cunningham*, 133 U. S. 107.

5. The Circuit Court will confine its action to the determination, protection and enforcement of the equitable rights of the citizen of a different State than that of the administrator. *Byers* v. *McAuley*, 149 U. S. 608; *Sherman* v. *American Cong. Assn.*, 51 C. C. A. 329; *S. C.*, 113 Fed. Rep. 609.

6. Whatever equity jurisdiction is vested in the Probate

Court of Massachusetts, must be exercised independently of their ordinary probate jurisdiction. *Sherman* v. *Am. Cong. Assn.*, 113 Fed. Rep. 609, and cases cited. The jurisdiction in equity given to the Probate Court of Massachusetts by Stat. 1891, c. 415, § 1, is a jurisdiction concurrent with that of other equity courts. *Bennett* v. *Kimball*, 175 Massachusetts, 199. The Probate Court's possession is for certain prescribed administrative purposes. It has no possession that excludes established chancery jurisdiction over equitable rights touching the property. The chancery jurisdiction is not different in Massachusetts. And if it were different there, by virtue of state law, the equity jurisdiction of the Federal court would not be thereby impaired.

Mr. Louis D. Brandeis, with whom *Mr. William H. Dunbar* was on the brief, for respondents:

The appellant (petitioner) has not established the existence of any lien on any interest of any of the defendants in the estate of Andrew J. Davis in Massachusetts.

No lien can be maintained unless an equitable lien was created by act of the parties. No statutory lien can be maintained. It is not now open to appellant to assert the existence of a statutory lien. *Landram* v. *Jordan*, 203 U. S. 56, and cases there cited. The Montana statute could not create a lien upon property in Massachusetts. The Montana statute does not create a lien in a will contest. Montana Code of Civil Procedure, § 430; *Smith* v. *Central Trust Co.*, 4 Dem. (N. Y. Surr.) 75; *In the Matter of Lexington Avenue*, 30 App. Div. (N. Y.) 602; *S. C.*, 157 N. Y. 678; Montana Code of Civil Procedure, §§ 3471, 3472; *Reed* v. *Reed*, 31 Fed. Rep. 49; *In re Cilley*, 58 Fed. Rep. 977; *Wahl* v. *Franz*, 100 Fed. Rep. 680.

There is no attorney's lien apart from the statute. *Welsh* v. *Hole*, 1 Douglas, 238; *Barker* v. *St. Quinton*, 12 Mees. & W. 451; *Mercer* v. *Graves*, L. R. 7 Q. B. 499, 503; *Fillmore* v. *Wells*, 10 Colorado, 228, 231; *McCullough* v. *Flournoy*, 69 Alabama,

189; *Cozzens* v. *Whitney*, 3 R. I. 79; *Smalley* v. *Clark*, 22 Vermont, 598; *Forsythe* v. *Beveridge*, 52 Illinois, 268; *Braden* v. *Ward*, 42 N. J. L. 518; *Goodrich* v. *McDonald*, 112 N. Y. 157; *McDonald* v. *Napier*, 14 Georgia, 89, 110; *Frissell* v. *Haile*, 18 Missouri, 18; *Ward* v. *Sherbondz*, 96 Iowa, 477; *Wells* v. *Hatch*, 43 N. H. 246; *Baker* v. *Cook*, 11 Massachusetts, 236; *Gregory* v. *Pike*, 67 Fed. Rep. 837.

There is no equitable lien created by contract. In the present case there was not even a promise to pay from a particular fund. An equitable lien is not created by a promise to pay from a specified fund unaccompanied by some sort of assignment. This rule has long been the settled law of this court. *Wright* v. *Ellison*, 1 Wall. 16; *Christmas* v. *Russell*, 14 Wall. 69; *Trist* v. *Child*, 21 Wall. 441; *Dillon* v. *Barnard*, 21 Wall. 430; *Removal Cases*, 100 U. S. 457. The rule laid down by this court in the foregoing cases has been followed as the established law of the Federal courts. *Ex parte Tremont Nail Co.*, 24 Fed. Cas. 183; *In re Butler's Estate*, 105 Fed. Rep. 549; *Strang* v. *Richmond P. & C. Ry. Co.*, 101 Fed. Rep. 511; *Columbus, S. & H. R. Co. Appeals*, 109 Fed. Rep. 177, 197; *Cushing* v. *Chapman*, 115 Fed. Rep. 237; *Boyle* v. *Boyle*, 116 Fed. Rep. 764. The law is the same in other jurisdictions. *Bradley's Case*, Ridgeway's Reports, 194; *Newell* v. *West*, 149 Massachusetts, 520; *Rogers* v. *Hosack's Executors*, 18 Wend. 319; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Cameron* v. *Boeger*, 200 Illinois, 84. None of the acts set out in the bill of complaint done after Ingersoll's death created a lien. *Christmas* v. *Russell*, 14 Wall. 69; *In re Butler's Estate*, 105 Fed. Rep. 549. The cases cited by the appellant (petitioner) do not support the contention that an equitable lien exists.

The appellant (petitioner) has failed to show that there is any property in Massachusetts that can be subjected to a lien for the alleged debt. There is no property of the defendants in Massachusetts.

Any property in Massachusetts not distributed under the will can be disposed of only by transmission to Montana, to

be distributed as the court there shall determine. In no case is there any property in Massachusetts that can be subjected to a lien in favor of the creditors of these defendants or upon which these defendants could create a lien. *Boston* v. *Boylston*, 2 Massachusetts, 384; *Clark* v. *Blackington*, 110 Massachusetts, 369; *Cowden* v. *Jacobson*, 165 Massachusetts, 240, 243; *Holcomb* v. *Phelps*, 16 Connecticut, 127; *Walton* v. *Hall*, 66 Vermont, 455; *Elder* v. *Adams*, 180 Massachusetts, 303, 306; *Lawrence* v. *Wright*, 23 Pick. 128, 129; *Clapp* v. *Inhabitants of Stoughton*, 10 Pick. 462; *Pritchard* v. *Norwood*, 155 Massachusetts, 539; *Flynn* v. *Flynn*, 183 Massachusetts, 365. See *Duchesse d'Auxy* v. *Soutter*, 35 Fed. Rep. 809; *Gardner* v. *Gantt*, 19 Alabama, 666; *Dugger* v. *Tayloe*, 60 Alabama, 504; *Costephens* v. *Dean*, 69 Alabama, 385; *Hickox* v. *Frank*, 102 Illinois, 660; *Alexander* v. *Stewart*, 8 Gill & J. 226; *Downing* v. *Porter*, 9 Massachusetts, 386; *Stills* v. *Harmon*, 7 Cush. 406; *Taylor* v. *Brooks*, 3 Dev. & Bat. 139; *Bradford* v. *Felder*, 2 McCord, Ch. 168; *Kaminer* v. *Hope*, 9 S. Car. 253; *Strickland* v. *Bridges*, 21 S. Car. 21. It is immaterial what contractual rights not amounting to a title the defendants may have in respect to the estate in Massachusetts. *Eyre* v. *Potter*, 15 How. 42; *Grosholz* v. *Newman*, 21 Wall. 481; *Andrews* v. *Farnham*, 2 Stockton, 91; *Stucky* v. *Stucky*, 30 N. J. Eq. 546, 554.

The judgment in the suit brought in Montana is a bar to the maintenance of this suit. Harris as ancillary administrator in Montana had power to bring the suit. The suit was brought by Harris as ancillary administrator, with full knowledge, consent and authority of the principal administratrix. The suit was maintainable by an ancillary administrator without any assignment from the domiciliary administratrix. The doctrine that personal property has a *situs* only at the domicil of the owner is a rule of convenience that never applied to the question of *situs* for purposes of administration, and that for all purposes is limited in its scope. Upon the death of the creditor the *situs* of the debt for purposes of dealing with it as property is recognized as the domicil of the debtor precisely

as if the debt were a chattel. *Blackstone* v. *Miller*, 188 U. S. 189; *Wyman* v. *Halstead*, 109 U. S. 654, 656; *Cunnius* v. *Reading School Dist.*, 198 U. S. 458; *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138. By virtue of his appointment an ancillary administrator acquires power to deal with the assets within his jurisdiction. *Wilkins* v. *Ellett*, 108 U. S. 256; *New Eng. Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138. An ancillary administrator may bring suit against persons within his jurisdiction to collect simple contract debts due the deceased without requiring or receiving any assignment or authority from the principal administrator. *New Eng. Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138; *Equitable Life Ass. Society* v. *Brown*, 187 U. S. 308; *Noonan* v. *Bradley*, 9 Wall. 394; *Pinney* v. *McGregory*, 102 Massachusetts, 186; *Sulz* v. *Mut. Res. Fund*, 145 N. Y. 563; *Fox* v. *Carr*, 16 Hun, 434; *Traflet* v. *Empire Life Ins. Co.*, 64 N. J. L. 387. So far as property in a foreign jurisdiction is concerned, the domiciliary administrator has no right nor title that can conflict with the title of the ancillary administrator. *Gove* v. *Gove*, 64 N. H. 503; *Bowdoin* v. *Holland*, 10 Cush. 18, 21. The presence in New York of the letter of August 17, 1891, is immaterial. *Blackstone* v. *Miller*, 188 U. S. 189, 206; *Buck* v. *Beach*, 206 U. S. 392, 403.

The suit in Montana was upon the same cause of action and upon the same facts set up in the present suit.

The judgment in Montana was valid.

The judgment in the Montana suit was a conclusive judgment on the merits. A judgment rendered on an issue of law is conclusive as to the questions involved. *Gould* v. *Evansville & C. R. R. Co.*, 91 U. S. 526; *Bissell* v. *Spring Valley Township*, 124 U. S. 225. It appears in compliance with the Montana law that the judgment against Harris was a final judgment upon the merits. The judgment was not (as appellant contends) a mere non-suit constituting no adjudication. *Herbert* v. *King*, 1 Montana, 475. A judgment on the merits against an ancillary administrator in a suit

brought by him is conclusive as to that cause of action against the domiciliary or any other ancillary administrator.

Appellant did not establish the existence of any debt due from the defendants or any of them. The will was not "defeated" either in form or in substance. The defendants did not "get their shares" within the meaning of the contract before the suit was brought. The conditions not having been fulfilled, the appellant cannot recover.

To the questions propounded by the court, counsel answer:

1. The court has no jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts; it cannot entertain such a suit unless there is a *res* of which it can take jurisdiction. *Robertson* v. *Carson*, 19 Wall. 94; *Goodman* v. *Niblack*, 102 U. S. 556; *Ins. Co.* v. *Bangs*, 103 U. S. 435; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; *Arndt* v. *Griggs*, 134 U. S. 316; *Greeley* v. *Lowe*, 155 U. S. 58; *Dick* v. *Foraker*, 155 U. S. 404; *Compton* v. *Jesup*, 167 U. S. 1; *Roller* v. *Holly*, 176 U. S. 398; *McDaniel* v. *Traylor*, 196 U. S. 415.

There was no *res* within the jurisdiction upon which the decree of the court could be enforced. *Byers* v. *McAuley*, 149 U. S. 608; *Hess* v. *Reynolds*, 113 U. S. 73, and other cases.

Even in a suit *inter partes* founded on personal jurisdiction the Circuit Court would not have jurisdiction to ascertain and declare a lien upon the property in possession of the ancillary administrator appointed in Massachusetts. *Blackstone* v. *Miller*, 188 U. S. 189; *Mager* v. *Grima*, 8 How. 490, 493; *Security Trust Co.* v. *Black River Nat. Bank*, 187 U. S. 211, 227; *Farrell* v. *O'Brien*, 199 U. S. 89; *Tilt* v. *Kelsey*, 207 U. S. 43, 56; *Byers* v. *McAuley*, 149 U. S. 608.

2. The Circuit Court had no jurisdiction to foreclose a lien, if one existed, on property in the Probate Court for administration.

3. The Circuit Court had not jurisdiction to determine the shares of Root and Coram in the property in the possession of

the Probate Court. *Payne* v. *Hook*, 7 Wall. 425; *Hook* v. *Payne*, 14 Wall. 252; *Byers* v. *McAuley*, 149 U. S. 608.

4. Neither on the present bill nor any amendment can an order be entered requiring Leyson, Root or Coram to retain property hereafter coming into their hands to satisfy the complainant's claim. *Cates* v. *Allen*, 149 U. S. 451; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

5. The Circuit Court is excluded from any exercise of jurisdiction which disturbs the possession of the property by the Probate Court or the free exercise by the Probate Court of its jurisdiction over the property, and this limitation excludes jurisdiction of the case at bar.

Controversies in which a title is asserted adverse to the title of the deceased do not involve any question as to this limitation of jurisdiction. *Erwin* v. *Lowry*, 7 How. 172; *Williams* v. *Benedict*, 8 How. 107; *Wiswall* v. *Sampson*, 14 How. 52; *Peale* v. *Phipps*, 14 How. 368, 376.

The limitation prevents any exercise of jurisdiction by other courts inconsistent with the possession of property by the Probate Court or with its exercise of exclusive jurisdiction in matters of probate administration. *Suydam* v. *Broadnax*, 14 Pet. 67; *Williams* v. *Benedict*, 8 How. 107; *Union Bank* v. *Jolly*, 18 How. 503; *Green's Admx.* v. *Creighton*, 23 How. 90; *Yonley* v. *Lavender*, 21 Wall. 276; *Case of Broderick's Will*, 21 Wall. 503; *Gaines* v. *Fuentes*, 92 U. S. 10; *Kittredge* v. *Race*, 92 U. S. 116; *Borer* v. *Chapman*, 119 U. S. 587; *Ellis* v. *Davis*, 109 U. S. 485.

Whether the remedy in a given case is by a proceeding *inter partes* or by a probate proceeding depends upon the law of the State. *Ellis* v. *Davis*, 109 U. S. 485; *Farrell* v. *O'Brien*, 199 U. S. 89; *Payne* v. *Hook*, 7 Wall. 425.

Under the law of Massachusetts there can be no proceeding *inter partes* to recover a distributive share until the Probate Court has ordered distribution. *Haskins* v. *Hawkes*, 108 Massachusetts, 379; *Pritchard* v. *Norwood*, 155 Massachusetts, 539; *Cathaway* v. *Bowles*, 136 Massachusetts, 51;

Fletcher v. *Fletcher*, 191 Massachusetts, 211. In the case at bar the limitation on the jurisdiction of the Probate Court was absolute.

6. The Probate Court of Suffolk County has not, as ancillary to its possession of the property, final jurisdiction to declare, enforce and foreclose a lien on a share in the fund. *Bennett* v. *Kimball*, 175 Massachusetts, 199; *Green* v. *Gaskill*, 175 Massachusetts, 265; *Lenz* v. *Prescott*, 144 Massachusetts, 505.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

A question of jurisdiction occurs. It was discussed somewhat in the original briefs of counsel, but questions were submitted to them as appropriate to elicit further discussion.[1] We find it, however, more convenient and more conducive to brevity, in passing on the question of jurisdiction, to be somewhat

[1] 1. Has the Circuit Court jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the county of Suffolk and State of Massachusetts?

2. Has the Circuit Court jurisdiction to enforce by foreclosure a lien upon property so situated?

3. Has the Circuit Court jurisdiction to determine the shares of Root and Coram in the property so situated?

4. Has the Circuit Court jurisdiction, upon the pending bill either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them, should hold any property, coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant?

5. To what extent, if any, is the jurisdiction of the Circuit Court limited or affected by the fact that the property from which payment is sought is in the hands of an administrator appointed by the Probate Court of Suffolk County?

6. Has the Probate Court of Suffolk County, as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, enforce, and foreclose a lien upon it?

general. The petitioner (and her intestate) were citizens of New York. The defendants in the suit below, nine in number, were citizens of Massachusetts. Coram was a citizen of Massachusetts. Root and Andrew J. Davis, trustee, were citizens of Montana. Leyson was also a citizen of Montana. It is hence contended that, while there was diversity of citizenship when the suit was brought, there was no jurisdiction against Root and Andrew J. Davis, they not being inhabitants of the district. The suit against them, it is further contended, was without jurisdiction also, because it was not brought either in the district of the residence of the plaintiff or the defendant. And this, it was said, was recognized by the bill, which prayed an order for the absent defendants to appear and plead in accordance with § 738, Rev. Stat., now act of March 3, 1875, 18 Stat. 470, 472. That act provides, § 8, for notice to absent defendants in any suit "to enforce any legal or equitable lien or cloud upon the title to real or personal property within the district." And it is urged that the Circuit Judge said that the proceeding could only be sustained under that act.

The objection that Massachusetts was not the district of the residence of either Root or Davis was not made to the bill. The objection to the jurisdiction made by the demurrers was to the jurisdiction of the Circuit Court to interfere with or stay proceedings in a Probate Court of the Commonwealth of Massachusetts. It makes no difference how the parties were served or brought in. Being in, all objections to the bill should have been made. The bill prayed a personal judgment against Root as well as a lien upon his share, and those represented by Coram, in the hands of Leyson as administrator of Davis, deceased, and that Leyson be restrained from paying them and Root and Coram from receiving or carrying them away. And general relief was also prayed. In other words, the whole case arising from Ingersoll's service and the remedies for that service was presented. And to this case the defendants were summoned to answer. They did answer as to the jurisdiction of the court as to subject-matter, as to the relation of the

courts of the United States to the courts of Massachusetts. They did not answer as to the jurisdiction of the court as to parties, as to the rights of the parties to be sued in the district of their residence. The latter objection may be waived, and is waived by not being made. *In re Moore*, 209 U. S. 490.

To decide what jurisdiction the Circuit Court exercised we must consider the decree. It found all of the allegations of the bill to be true, and that there was due and owing to the plaintiff (petitioner here), on the contract executed by Coram and Root the sum of $95,000, with interest, amounting in all to the sum of $138,810.83. It adjudged Root to be personally indebted and liable for that sum and awarded execution against him, and for any balance that should be due if the property upon which the lien was declared, as presently mentioned, should not satisfy such indebtedness; that Coram was personally obligated and liable for the payment of said indebtedness upon the full amount which he had received, or should receive, from the shares of the estate of Andrew J. Davis, deceased, acquired for the five heirs mentioned in said agreement, or either of them, under or pursuant to the decree of the District Court of the State of Montana. It was also found and decreed that there was in the State of Massachusetts, in the hands of John H. Leyson, as administrator of Andrew J. Davis, deceased, $337,862, and 137 bonds of the United States, and 170 bonds of the Butte and Boston Consolidated Mining Company, of which money and bonds and the increase thereof, the said five heirs of Andrew J. Davis, deceased, and their legal representatives and successors in interest, were entitled to receive 515½ eleven-hundredths under and pursuant to the decree of the District Court of the State of Montana; and of which money and bonds and the increase thereof Coram and Root were entitled to have and receive 415½ eleven-hundredths parts on distribution of such money and bonds by the proper court having jurisdiction thereof in the administration and distribution of the estate of Andrew J. Davis, deceased. Upon such 415½ eleven-hun-

dredths parts petitioner was decreed to have a lien "subject to all proper and lawful administration," as a part of the estate of Andrew J. Davis, deceased, "pursuant to the orders and decrees or judgments of the Probate Court of Suffolk County, Massachusetts, now having probate jurisdiction thereof, or any court which may hereafter have probate jurisdiction . . . to administer the same as part of the estate of said Andrew J. Davis, deceased, in the due and lawful course of administration thereof." A lien is decreed upon said money and bonds and foreclosed subject to the terms of the decree wheresoever said money and bonds may be taken or removed, whether within or without the State of Massachusetts, and in the custody of whomsoever the same may come, "subject only to the proper and lawful probate administration . . . pursuant to the orders, judgments or decrees of the Probate Court of Suffolk County, in the State of Massachusetts, now having probate jurisdiction thereof . . . to administer the same as a part of the estate of Andrew J. Davis, deceased, in the due and lawful course of administration thereof." And it was decreed that as soon as the probate administration is finished and distribution is ordered by the Probate Court having jurisdiction, that Leyson, as administrator, or his successor in custody thereof, should set apart and bring into court the said 415½ eleven-hundredths of said money and bonds, to be applied to the satisfaction of the lien of complainant. It was decreed that each and all of the injunctive and restraining terms and commands of the interlocutory injunction order be made perpetual, and Leyson was enjoined and restrained, as administrator, from removing out of Massachusetts 415½ eleven-hundredths parts of the money and bonds in his possession, "unless and until the proper court within the State of Massachusetts, having probate jurisdiction of said money and bonds, by its final order, judgment or decree, directs said John H. Leyson, as such administrator, to remove said 415½ eleven-hundredths of said money and bonds out of the State of Massachusetts."

We have made this epitome of the main provisions of the decree to show how careful the court was to require the observance of its direction expressed in its opinion that the decree should declare that nothing in it was intended to contravene, or should contravene, "any action of any probate tribunal in Massachusetts with reference to distribution, or to any order or judgment remitting to the courts of the domicil."

The decree therefore deals exclusively with the parties. It adjudges what contract they made, the extent of their obligation and how that contract was secured. The remedies awarded are executed through the parties, and through Leyson only as he holds property to be delivered to the parties. No action of the Probate Court of Suffolk County is attempted to be restrained or limited or trenched upon, nor the property in its possession disturbed. And yet it is urged that the suit that sought this purpose and a decree that executes this purpose transcend the jurisdiction of a Circuit Court of the United States.

The proposition has been discussed at length by counsel, many cases cited and arguments advanced based upon the respective functions of courts of equity and probate.

The respondents especially rely upon the pendency of proceedings in the Probate Court of Suffolk County, and as a corollary that the property was in the possession of the Probate Court and under its jurisdiction, and, therefore, not within the jurisdiction of the Circuit Court. Respondents express and illustrate the latter conclusion in various ways. Their fundamental postulate, however, is that the Circuit Court has not power to disturb the possession of the property by the Probate Court or do any act which may interfere with the free exercise of jurisdiction by the Probate Court. This postulate is argued at length and many cases are cited. Besides, a statute of Massachusetts is relied upon which provides that upon the settlement of an estate, and after the payment of all debts for which the same is liable in that Commonwealth, the residue of the personal estate may be distributed and dis-

posed of in the manner provided by the will of a deceased, if he left any, or according to the laws of the State or country of which he was an inhabitant, "*or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the State or country where the deceased had his domicil, to be there disposed of according to the laws thereof.*" (Italics ours.)

We think, however, a lengthy discussion is not necessary. The controversy presented by the bill was one between citizens of different States, and there was that ground of jurisdiction in the Circuit Court, being a court of the United States. One object of the bill, among others, was to declare and foreclose a lien upon property within the district, and there was that ground of jurisdiction, and we do not think that jurisdiction thus established and supported was taken away by the mere fact that the settlement of the estate of Davis was pending in the Probate Court of Suffolk County. No interference with that court was sought or decreed, as we have seen. Rights between the parties arising from their transactions and contracts were only adjudged and only decreed to be redressed when the Probate Court should have finished its functions. Indeed it may even be that the Circuit Court was too restrictive in the exercise of its power, for it may be disputed whether it is within the power of a state court to order property upon which there is a lien, sent out of a district and thereby defeat the jurisdiction of a court of the United States to enforce such lien in cases where they have jurisdiction under the act of March 3, 1875. This question, however, does not arise, nor any question depending upon it, and the line of cases of which *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, is an example does not apply, nor do the cases cited by respondent, but the case falls within the principles announced in *Payne* v. *Hook*, 7 Wall. 425, and *Byers* v. *McAuley*, 149 U. S. 608, and cases there cited.

The power of the court of equity to subject the share of a person under a lien, "and yet in the hands of an executor,"

to the payment of his debts has been decided in Massachusetts. *Ricketson* v. *Merrill*, 148 Massachusetts, 76. The same in principle is *Davis et al.* v. *Newton*, 6 Met. 537, where it was held that the distributive share of an insolvent debtor in the hands of an administrator passed to his assignee, and that the administrator could not withhold it from the assignee.

In *Lenz* v. *Prescott*, 144 Massachusetts, 505, it was decided that the Probate Court does not take cognizance of assignments of their interests, made by legatees or distributees, but deals only with those primarily entitled to the legacies or distributive shares; and many cases were cited. The court therefore sustained a bill in equity to ascertain the validity and construction of an assignment of an interest in an estate. See also *Green* v. *Gaskill*, 175 Massachusetts, 265, where the probate jurisdiction of the Probate Court and its equity jurisdiction in relation to other courts is explained, and it is decided that administrators and executors have a right to have their accounts adjusted and the amounts due to or from them determined in the Probate Court, on its probate side, and in the usual probate proceedings, but when the amount for which they are liable is so determined, may, by a bill in equity, be compelled to pay to those entitled their share of the property of the deceased. And this being the power of the courts of equity of the State, a like power certainly may be exercised by the Federal courts.

It is further objected that there is no property of the respondents in Massachusetts. The argument which is urged to support the objection is difficult to state. It seems to draw a distinction, under the laws of Massachusetts, between the will of Andrew J. Davis and the decree of the Montana court admitting the will to probate. "The Probate Court," respondents say, "might and did accept the decree of the Montana court as proof that the will ought to be allowed. It could not and did not accept the decree as establishing that the property in Massachusetts should be disposed of otherwise than as the will provided." And from a consideration of the laws

of Massachusetts, respondents conclude that (we quote the language of counsel), "No part of the property in Massachusetts can therefore in any sense be said to belong to the defendants in the suit. All of it must by law either be paid over according to the will, or be transmitted to Montana, to be distributed as the court may direct." We cannot refrain from saying that it is hard to believe that respondents would like to be taken at the full sense of their words, and we are quite sure that the Probate Court of Suffolk County will regard not the will as propounded for probate, but the will as qualified by the decree, as determining the rights of the parties. At any rate, it is only upon the shares which that court will distribute that the decree of the Circuit Court will operate.

Again, it is charged that the right of the petitioner's intestate was derived from Root, and as he, it is further contended, could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the petitioner was equally disqualified to establish and recover Root's share of the property. The argument is that she is seeking to enforce a right of Root against the administrator arising on an equitable assignment by Root to her intestate, and she is therefore, it is said, suing to recover as assignee of a chose in action upon which the assignor could not sue, because his citizenship is the same as that of the administrator in Massachusetts. Sec. 629, Rev. Stat. There are several answers to the contention. It is certainly very disputable if an interest in a distributive share of an estate is within the statute. Again, she is suing primarily on the obligation of Root to her intestate to secure which a lien was given on Root's distributive share; and besides, again, she sues as administratrix, and she is a citizen of a different State from Leyson. *Sere* v. *Pitot*, 6 Cranch, 333; *Chappedelaine* v. *Dechenaux*, 4 Cranch, 308; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Coal Company* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66.

Respondents assert the identity of the action in Montana

with the present suit, and upon that identity they urge tha such action constitutes *res judicata*. Petitioner denies th identity of the actions, and urges besides that there is no suc privity between the parties as to make the Montana actio *res judicata* of the pending case. In support of the latter con tention petitioner urges that an ancillary administrator in on jurisdiction is not in privity with an ancillary administrato in another jurisdiction, and that therefore a judgment agains one is not a bar to a suit by the other. And this was the rulin of the Circuit Court. The Circuit Court of Appeals took th contrary view, and rested its judgment upon the conclusiv effect of the Montana action.

We shall assume that there is identity of subject-matte between the Montana action and that at bar, but the questio remains, Was there identity of parties? An extended dis cussion of the question is made unnecessary by the case o *Brown* v. *Fletcher's Estate*, 210 U. S. 82. In that case a sui in equity against Fletcher, brought in his lifetime, was re vived after his death, and a decree obtained. Fletcher reside in Michigan, where he died leaving a will, which was dul probated in the Probate Court of Wayne County in that State in which the decree of the Massachusetts courts was filed a evidence of a claim against the estate. Its effect as such wa denied, and the case was brought here by writ of error. Re plying to the contention of plaintiff in error, that the Michigan executor and the administrator with the will annexed o Fletcher's estate in Massachusetts were in such privity tha the decree was conclusive evidence of it in the proceedings i Michigan, this court held that the decree was not binding upon the Michigan executor or the estate in his possession, citing *Vaughan* v. *Northrup*, 15 Pet. 1; *Aspden* v. *Nixon*, 4 How 467; *Stacy, Admr.*, v. *Thrasher*, 6 How. 44. The latter case was quoted from as follows: " 'Where administrations are granted to different persons in different States, they are so far deemed independent of each other that a judgment ob tained against one will furnish no right of action against the

other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law, there is no privity between him and the other administrator. See Story, Confl. of Laws, § 522; *Brodie* v. *Bickley*, 2 Rawle, 431.' " *McLean* v. *Meek*, 18 How. 16; *Johnson* v. *Powers*, 139 U. S. 156, were also cited, and it was said that the "doctrine was enforced in Massachusetts. *Low* v. *Bartlett*, 8 Allen, 259."

Respondents insist that this doctrine has no application to the Montana judgment, and urge that the latter was a bar of the pending suit (1) because it was a judgment on the merits, and (2) because such a judgment "against an ancillary administrator in the suit brought by him is conclusive as to that cause of action against the domiciliary or any other ancillary administrator." And this is said to follow from the proposition which appellant advances, that "the authorized act of an ancillary administrator as to property of the intestate within his jurisdiction is binding everywhere," and it is hence concluded that a suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property. That the argument by which this conclusion is supported has strength is established by the fact that the Circuit Court of Appeals yielded to it, and it is said to be sanctioned by *Biddle* v. *Wilkins*, 1 Pet. 686; *Wilkens* v. *Ellett*, 108 U. S. 256; *Talmage* v. *Chapel*, 16 Massachusetts, 71. But as these cases preceded *Brown* v. *Fletcher's Estate*, they must be regarded as consistent with it. Besides, in that case, *Johnson* v. *Powers*, 139 U. S. 156, was cited as establishing, on the authority of *Aspden* v. *Nixon*, *Stacy* v. *Thrasher*, *Low* v. *Bartlett*, 8 Allen, 259, the doctrine that a judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. That there is a certain amount of artificiality in the doctrine was pointed out in *Stacy* v. *Thrasher*, and that it leads to the inconvenience

and burdensome result of retrying controversies and repeating litigations. The doctrine, however, was vindicated as a necessary consequence of the different sources from which the different administrators received their powers, and the absence of privity between them, and that the imputations against it were not greater than could be made against other "logical conclusions upon admitted legal principles." It is not necessary, therefore, to review in detail the argument of respondents. Its fundamental concept is that the authorized act of an administrator as to property of the intestate within his jurisdiction is binding everywhere, and it is said that a suit brought by an administrator is subject to the same principle. The generality of the conclusion, however, counsel immediately limit by the concession that it does not include a suit brought against an administrator, whether he successfully or unsuccessfully defends it. In other words, the principle is true only of an action brought by an ancillary administrator to enforce a claim in behalf of the estate and judgment goes against him. But counsel even limit this again, and says it would not be binding "in the sense of creating a personal liability for costs, if costs be awarded, or otherwise, but it is binding in the sense that the cause of action has been effectively disposed of." That is, as counsel explains, merged in the judgment. We do not think that the doctrine announced in *Brown* v. *Fletcher's Estate*, *supra*, admits of these distinctions, and surely the estoppel of a judgment must be mutual. The argument of appellees contends for the contrary; it makes a judgment against an ancillary administrator binding against other administrators, but not binding for them. We think, therefore, that the Montana judgment is not a bar to the pending suit.

On the merits there are two propositions: (1) Did the complainant establish the existence of a debt due from Coram and Root to Ingersoll? (2) Did she establish the existence of a lien? On neither of these propositions did the Court of Appeals pass; the Circuit Court decided them in favor of complainant.

We need not recite the evidence. The Circuit Court found, and, we think, rightly found, that the agreement sued on was performed. In other words, that the will of Davis was defeated, and that the contestants got their shares through the services of Ingersoll. The form in which the defeat was expressed is unimportant. The will as propounded was defeated. As propounded it cut them off from inheritance. As qualified in probate, by compromise more property was received than would have come to them by inheritance. And the evidence leaves no doubt that it was brought about, to quote the bill, "by the force, effect and stress" of the contest and by the services, which it is admitted Ingersoll rendered, and from the belief that the will as propounded would not receive probate and would only receive probate when so qualified as to recognize the rights of the contestants as heirs of the estate. That it did not do so was its defect and to make it do so was the purpose for which they employed Ingersoll and which his services achieved. There was performance, therefore, of his contract.

The next question is, Does the evidence establish the existence of the lien? An affirmative answer must be given. It is manifest that payment to Ingersoll was dependent upon success, but it is equally manifest that he relied upon more than the personal responsibility of the parties. The so-called five heirs, Elizabeth S. Ladd, Sarah M. Cumming, M. Louise Dunbar, Ellen Cornue, and Henry A. Root entered into an agreement in which it was recited that controversies had arisen in regard to the will, and that Root had rendered services and expended money in behalf thereof, and had undertaken "to procure evidence, counsel and such other needs" as were necessary for opposing the will and obtaining for the others their "respective rights and shares" of the estate, and in consideration thereof there was assigned to Root and one Gideon Wells one-third part of each of their interests to reimburse Root for the moneys he had expended or should expend or the liabilities which he might incur on account thereof. And it was agreed

that the assignment was to be in full for past or future lia
bilities. Root, on his part, agreed to employ counsel and t
do all things necessary to secure the interests of the othe
parties.

It is alleged in the complaint and admitted by the answe
that Coram acquired the remaining interests of Elizabeth Lad
and Mary L. Dunbar and that the interests so acquired we
dependent upon the prosecution of the objections to and co
tests of the validity of the will until the shares of the fiv
heirs should be secured to them by a grant from the proponer
of the will or by the decree of the District Court of Montan
This being the situation, Ingersoll wrote to Root as follows:

"May 1st, 1891.

"My dear Root. Do not know whether I can get th
money, but feel sure I can raise $25,000—have already s
cured $13,000—

"Now, there is another thing: I suppose it is best for you an
I to have a specific and definite understanding in regard t
my fee. Of course, if you should lose the case you could n
pay. We can raise money enough to pay expenses and of cour
I shall want expenses—but the real question is as to what
am to have in case of success and how that is to be secured-
i. e. what papers are necessary, etc.

"Let me hear from you.

"Yours,

"R. G. INGERSOLL."

To which Coram and Root replied as follows:

"Butte City, Mont., August 17, 1891.

"R. G. Ingersoll, Esq., Butte City, Montana.

"Sir: We agree that for your services in the contest of Mar
Cummings and Henry A. Root against the probate of the a
leged will of A. J. Davis, deceased, rendered and to be rendere
that your fee, in case the will is defeated and our clients g
their shares, shall be one hundred (100,000) thousand dolla
and that your expenses and disbursements shall be paid
any event.

"There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

"HENRY A. ROOT,
"J. A. CORAM."

It is evident, therefore, that Ingersoll asked for security in a definite and written form. We do not think it can be said that he sought only a promise to pay. That followed from his employment, and besides Coram stipulated against personal liability, but did obligate himself to pay "out of the funds secured from the estate." And this is the test of the agreement. It is the exception that establishes that as to Root there was a personal and property obligation; as to Coram, a property obligation. It is confirmed by excerpts from the letters of Root set out in the complaint and introduced in evidence. In those letters he expresses a desire "That Mrs. Ingersoll should realize out of the Davis estate as much as possible," and would "bend every effort" to that end. And, explaining the agreement, he said that Ingersoll "was to receive $100,000 from moneys collected from the Davis estate for his services," and assured Mrs. Ingersoll that he would do everything in his power to see that she received "as much from that fund," (referring to the estate in Boston).

The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the Circuit Court upon the argument of the demurrer. However the court said that "Upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll." On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying, "Whether or not the particular

agreement creates a lien is a matter of construction. In th
case the fact that there was no primary personal responsibili
on J. A. Coram specially serves to stamp the agreement
issue as declaring a purpose to create a lien. Therefore,
the whole, we hold that, on this final hearing on bill, answ
and proofs, the bill must be sustained." The conclusion
the court is sustained by authority. In *Wylie* v. *Coxe*,
How. 415, a contract was made with an attorney for the pros
cution of a claim against Mexico to pay him a contingent f
of five per cent out of the fund awarded. It was held that t
agreement constituted a lien upon the fund. In *In re Pasch*
10 Wall. 483, in the letter retaining Paschal it was said that h
compensation would depend upon the action of a future legi
lature, "unless a recovery is had in the suit, in which eve
I shall feel authorized to let you retain it out of the amou
received." It was held that in accordance with the prevaili
rule in this country Paschal had a lien on the fund in his han
for disbursement and professional fees. The case was cited
McPherson v. *Cox*, 96 U. S. 404, 417, and the doctrine repeate
See also *Central Railroad* v. *Pettus*, 113 U. S. 116; *Louisville &*
Railroad Company v. *Wilson*, 138 U. S. 501, 507. In *Walk*
v. *Brown*, 165 U. S. 654, it was held that every express e
ecutory agreement in writing, whereby the contracting par
sufficiently indicates an intention to make some particul
property, real or personal, or fund, therein described or ide
tified, a security for a debt or other obligations, creates
equitable lien on the property so indicated. This was an a
plication of the doctrine of *Fourth Street Bank* v. *Yardley*, 1
U. S. 634, and *Ketchum* v. *St. Louis*, 101 U. S. 306. The
cases are not opposed by *Trist* v. *Child*, 21 Wall. 441, a
Wright v. *Ellison*, 1 Wall. 16. In the latter case it is said th
it is indispensable to the lien thus created that there shou
be a distinct appropriation of the fund by the debtor, and
agreement that the debtor should be paid out of it. The
conditions are satisfied in the case at bar.

The other contentions of respondents assert a defect of pa

ties and error in the decree as to the amount of interest adjudged to Root and Coram in the property. In the first contention we do not concur.

The second contention is justified. We do not think, however, that it is necessary to enter into all of its details, with some of which, we may say, we do not agree. We think that the Circuit Court rightly, as we have already pointed out, adjudged that the five heirs were entitled, by virtue of the final decree in Montana, to 515½ eleven-hundredths of the estate in Massachusetts, and in adopting, as we think it did, in making division among them according to intestacy, that is, in proportion to the shares they would have taken in case Davis had died intestate. Those shares the bill alleged and the answers admitted would have been as follows: Sarah M. Cummings and Elizabeth S. Ladd, one-eleventh each; Henry A. Root, Ellen S. Cornue and Mary Louise Dunbar, one twenty-second each—in all, 350 eleven-hundredths of the estate. But there was error in adjudging that the interest remaining in Sarah Maria Cummings and Ellen S. Cornue, after the assignment of one-third of their interest to Root, to be respectively sixty-two and two-thirds eleven-hundredths and thirty-three and one-third eleven-hundredths. The bill shows that they were entitled respectively to one hundred eleven-hundredths and fifty eleven-hundredths of the amount they as two of the five heirs would have been entitled to if Davis had died intestate, that is, those shares of three hundred and fifty eleven-hundredths. But the amount was increased by the decree in Montana to 515½ eleven-hundredths and their shares thereof necessarily increased. In other words, as they were entitled respectively to $\frac{2}{7}$ and $\frac{1}{7}$ of the first amount, they are entitled respectively to $\frac{2}{7}$ and $\frac{1}{7}$ of the second amount, to wit, $147\frac{4}{7}$ eleven-hundredths and $73\frac{3}{7}$ eleven-hundredths, one-third of which amounts was assigned to Root. There were left in them respectively, therefore, $98\frac{4}{7}$ eleven-hundredths and $49\frac{2}{7}$ eleven-hundredths. To Root, as we have seen, they assigned $\frac{1}{3}$ of their shares, and there was also assigned to him $\frac{1}{3}$ of the shares

of Elizabeth S. Ladd and Mary Louise Dunbar, making with the $\frac{1}{7}$ to which he is entitled in his own right $220\frac{13}{14}$ eleven-hundreths. Coram is entitled as assignee to the other two-thirds of the shares of Ladd and Dunbar, to wit, $147\frac{4}{14}$ eleven-hundredths, making the total in him and Root of $368\frac{3}{14}$ eleven-hundredths instead of $415\frac{1}{2}$ eleven-hundredths, as stated in the decree. The decree must be modified accordingly.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court is modified as above indicated, and, as modified,

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE MOODY dissent.